

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated December 10, 2018, 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:

- the appellant's PWD Application comprised of the appellant's self report ("SR") dated June 28, 2018, a medical report ("MR") and an assessor report (AR) both dated July 3, 2018 and both completed by the appellant's family physician ("the GP"), who has known the appellant for 18 years and who has seen the appellant 2 to 10 times in the past 12 months;
- Chronic Disease Management Report dated November 2, 2016 authored by a neurologist, indicating previous TIA (minor stroke) and carotid artery stenosis, for which he was prescribed antiplatelet medication for 6 weeks followed by daily aspirin. The neurologists also noted that "no cardiac investigation is indicated."
- ophthalmologist's report dated April 25, 2017 indicating mild cataracts and a mild foveal irregularity that should be of no consequence;
- medical imaging report dated June 19, 2018 authored by a physician, indicating moderate degenerative disc disease with considerable progression of degenerative changes to at C 6-7 discs since 2009;
- August 1, 2017 letter from the appellant's optometrist to the GP;
- the appellant's request for reconsideration submitted November 15, 2018 and December 7, 2018, including:
  - appellant's note requesting an extension of time in order to see a psychiatrist on November 26, 2018 and to submit the psychiatrist's report;
  - December 5, 2018 letter from the appellant completed by a community support person, summarized as follows:
    - his vision is poor;
    - he struggles to complete even the simplest task;
    - he entered into counselling in 2018 and told his counsellor ("K") of his struggles with sleep, concentration and focus;
    - he is meeting with a surgeon to discuss knee surgery;
    - there have been several days when he was unable to eat due to depression or lack of motivation, and he lacked the motivation to shop, plan/prepare meals, cook or attend to personal hygiene;
    - his anxiety has been overwhelming, at times making him unable to remain in a crowded store, use public transportation or socialize. He feels withdrawn and isolated;
    - his mind races, and he is awake all night worrying about things, which causes him to be tired the next day and forgetful of important appointments and dates;
    - His mobility is limited. Due to back and leg pain he has to stop every 10 minutes to rest. He is unable to get things done and needs to depend on others to assist with physical tasks. He doesn't have friends because of his social isolation.
  - November 15, 2018 letter from K ("K's assessment"), summarized below, with the following attachments:
    - depression inventory, indicating extreme depression;
    - amended copy of the pages 15-17 of AR, with K's assessments marked with an "X" to distinguish the original assessments made by the GP in the form of a check mark ("✓").

### Diagnosis

In the PR the GP notes that the appellant suffers from peripheral vascular disease (onset 2013), left inferior visual

field defect, C-spine degenerative disc disease (onsets 2017) and "depression mild major depression" (onset 2011).

### **Physical Impairment**

In his PR the appellant described his disability as "vascular problems".

In the PR the GP reported that the appellant:

- experiences chronic worsening left lower leg pain, non-palpable peripheral pulses, intermittent claudication (limping) requiring him to rest every 5-10 minutes, for which she has referred him to a vascular surgeon;
- has a left visual field defect;
- has experienced neck pain for 1 year, X-rays showing moderate degenerative disc disease;
- requires the use of a cane;
- can walk 2-4 blocks and climb 5+ steps unaided, lift 15-35 lbs and has no limitation in remaining seated.

In the AR the GP reported that the appellant:

- is independent in all of his physical ability and mobility but uses a cane to walk outdoors and takes significantly longer than typical.

In K's assessment K notes that the appellant's visual impairment prevents him from filling out forms related to housing, appointments and other DLA.

### **Mental Impairment**

In his SR the appellant described his disability as "mental health depression".

In the MR the GP noted that the appellant suffers from chronic depression with low motivation (PHQ-9 =14) and will likely need to remain on antidepressants long term. She indicates that his mental impairment causes significant deficits with cognitive and emotional function in the areas of emotional disturbance (depression, anxiety) and motivation.

In the AR the GP indicates that the appellant suffers no major impacts to cognitive and emotional functioning. There are moderate impacts in the areas of emotion and motivation and minimal impact upon bodily functions. There are no impacts indicated in the functional areas of consciousness, impulse control, insight/judgment, attention/concentration, executive, motor activity, language, psychotic symptoms or other neuropsychological, emotional or mental problems. At Section 3-C of the AR the GP indicates that the appellant is independent in all areas of social functioning, has good functioning with his immediate social network and marginal functioning with extended social networks, commenting: "*adequate functioning but he does not develop a social network*".

In K's assessment K notes that:

- the appellant's ability to maintain cognition and communicate is declining;
- Beck's depression inventory indicates extreme depression;
- his concentration is poor and his executive planning skills have been majorly impacted;
- he requires assistance to complete DLA.

In the amended copy of Section 4 of the AR K indicates that the appellant experiences:

- major impacts in emotion, attention/concentration and executive ability;
- moderate impacts in consciousness, memory, motivation, motor activity and language.

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

In the AR the GP noted that the appellant is independent in all DLA but takes longer to go to and from stores and carry purchases home. His social functioning was noted to be independent in all areas except that the appellant experiences marginal functioning with extended social networks due to his failure to develop a social network.

### **Assistance Required**

In the AR the GP noted that the appellant uses a cane.

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

The appellant did not attend or send a representative. No additional documentation was submitted.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision of December 10, 2018 which determined that the appellant did not meet three of the five statutory requirements of Section 2 of the EAPWDA for designation as a 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 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 he suffers from three medical conditions: peripheral vascular disease, degenerative disc disease and left visual field defect that severely impair his functional skills, mobility and ability to perform daily tasks.

The ministry's position is that the appellant's functional skills are not indicative of 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, which in this case includes the evidence of the appellant and his counsellor K. 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, the appellant's GP, neurologist and ophthalmologist. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

#### **1. Degenerative Disc Disease**

In the MR the GP noted that the appellant must rest every 5-10 minutes due to lower leg pain, and uses a cane when walking outdoors. A referral to a vascular surgeon is noted but no additional evidence has been submitted in this regard.

The GP also noted that the appellant experiences neck pain due to moderate degenerative disc disease. Her comments are confirmed by a diagnostic imaging report of another physician dated June 19, 2018 which indicated moderate degenerative disc disease. This information does not address any functional impairment experienced by the appellant, and must be contrasted with the GP's assessment that the appellant can walk 2-4 blocks and climb 5+ steps unaided, can lift between 7-16 kg and has no limitation to remaining seated.

### 2. Peripheral Vascular Disease:

The GP does not refer to functional impairments caused by the appellant's peripheral vascular disease, and the panel notes that the neurologist did not suggest further investigation or treatment in his November 2, 2016 report.

### 3. Left Visual Field Defect

The appellant and K indicated that the appellant's visual impairment prevents him from filling out forms, but did not suggest that the appellant is unable to navigate or complete tasks due to his visual impairment. Neither the GP nor the ophthalmologist indicated that the visual defect severely impairs the appellant's functional ability, mobility or capacity to carry out DLA.

For the reasons set out in Numbers 1-3 above, the panel finds that the ministry reasonably determined that the functional impairments arising from the medical conditions noted above neither individually nor aggregately reflect a severe degree of physical impairment.

### **Severe Mental Impairment**

The appellant argues that he suffers from depression and anxiety which severely impair his cognitive and emotional functioning.

The ministry's position is that there is insufficient information provided to establish a severe mental impairment.

### *Panel Decision*

In the MR the GP notes that the appellant suffers from chronic depression which was rated at a "moderate" level in a May 2018 assessment. In Section B-4 of the AR she indicated that the appellant's daily cognitive and emotional functioning is not impacted to a major degree in any of the 14 specified areas. Emotional functioning and motivation are categorized as moderately impacted, and there is minimal impact on bodily functions. No impact was noted in the remaining 11 areas of cognitive and emotional functioning.

The GP's assessment conflicts with the appellant's self-report and K's assessment. The appellant reports that due to his depression he struggles to complete even the simplest tasks, including shopping, cooking, food preparation and personal hygiene. His anxiety causes him sleep disturbance and fatigue, and he is unable to remain in public places, or use transit. He isolates himself socially. K classified the appellant as suffering from extreme depression, and submitted an amended copy of Section B-4 of the AR that differs markedly from the assessment made by the GP in the AR.

K indicated that the appellant suffers major impacts to emotion, attention/concentration and executive areas and moderate impacts to consciousness, memory, motivation, motor activity and language. Although the panel recognizes her qualifications as a registered clinical counsellor, she is not a prescribed professional as defined by the legislation. In her letter of November 15, 2018 K noted that she has known the appellant for 5 months. The GP has treated the patient for the past 18 years. It is therefore difficult to resolve the inconsistencies between

the information provided by the GP and that provided by K. In the absence of additional information greater weight must be given to the evidence of the GP. The panel also notes that the appellant asked for an extension of time for reconsideration of the ministry decision in order to attend an appointment with a psychiatrist on November 26, 2018. No psychiatric evidence was submitted prior to reconsideration or the appeal hearing.

The panel therefore finds that because the GP did not indicate a major impairment to cognitive and emotional functioning and no additional evidence from a psychiatrist was tendered prior to February 13, 2019 the ministry reasonably determined that the information provided does not establish a severe impairment in mental functioning.

#### **Restrictions in Ability to Perform DLA**

The appellant argues that his ability to perform DLA is significantly restricted as a result of his severe physical and mental impairments.

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 professional is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

#### *Panel Decision*

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is 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 AR the GP indicated that the appellant is independent in all DLA, but takes longer to travel between stores and to carry home purchases. The GP does not describe how much longer it takes the appellant to accomplish these tasks, or how often the appellant experiences the restriction. Because the frequency and duration of the restriction is not described it is difficult to conclude that the restriction is significant or occurs over extended periods. The GP also indicated that the appellant is independent in all areas of social functioning.

A severe impairment was not established in the appellant's circumstances. Because this precondition was not met and because the GP indicated that the appellant is independent in all but one of the areas of DLA listed in the AR, and did not describe the degree, frequency and duration of the DLA in which the appellant takes significantly longer, the panel finds that the ministry reasonably determined that the information fails to establish that the appellant suffers from a severe impairment that in the opinion of a prescribed professional directly and significantly restricts DLA continuously or periodically for extended periods.

#### **Help in Performing DLA**

The appellant argues that he requires an assistive device (cane) to perform DLA.

The ministry's position is that because the information did not establish that the appellant's DLA are significantly restricted it cannot be determined that an assistive device or significant help is required.



*Panel Decision*

The panel acknowledges that the appellant requires a cane to assist him with walking outdoors and notes that he needs help with performing DLA but cannot ask because of his sense of social isolation.

However, the establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. 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**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and confirms the decision. The appellant is not successful on appeal.

**PART G – ORDER**

THE PANEL DECISION IS: (Check one)       UNANIMOUS       BY MAJORITY

THE PANEL       CONFIRMS THE MINISTRY DECISION       RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister  
for a decision as to amount?       Yes       No

**LEGISLATIVE AUTHORITY FOR THE DECISION:**

*Employment and Assistance Act*

Section 24(1)(a)  or Section 24(1)(b)

and

Section 24(2)(a)  or Section 24(2)(b)

**PART H – SIGNATURES**

PRINT NAME

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/Feb/13

PRINT NAME

Patrick Cooper

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/Feb/13

PRINT NAME

Marilyn Mellis

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/Feb/13