



PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated February 12, 2019, 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* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and the requirement that his impairment is likely to continue for at least two years, it 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

EAPWDA, Section 2

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

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the Reconsideration Decision included the PWD Application comprised of the applicant information and a Medical Report (MR) dated November 7, 2018 and completed by a Specialist in Orthopedics and Hand Surgery (OS) who has known the Appellant since 2016 and who has seen the Appellant once in the past year, and an Assessor Report (AR), dated November 7, 2018, completed by the OS. The Appellant's Self Report (SR), though signed and dated November 13, 2018, was not completed.

The evidence also included the following documents:

1. Request for Reconsideration (RFR), signed on February 1, 2019, in which the Appellant states that:
 - The OS who completed the MR and the AR is not his "*regular doctor*" and that his regular doctor (GP), who has been his doctor since 2002, is semi-retired and "*is very difficult to get in touch with*";
 - The Appellant never discussed his PWD application with the OS. On November 1, 2018 the Appellant went to the OS's office and spoke with his administrative assistant and "*asked her to show the application to (the OS) and to call (the Appellant) with an answer if (the OS) was interested. Unfortunately (the Appellant) never read (the OS's) application (information)*";
 - He is unable to sit or walk for very long with chronic pain in his back and legs, his balance and mobility are impaired "*24/7*", and when he aggravates his back he can be incapacitated for "*a day or up to a month*". The Appellant states that he should be a candidate for surgery because he is "*past pills or shots*", and that when his GP returns the Appellant hopes to be able to make an appointment with him because the Appellant will then be able to "*get some proper help for this condition*"; and
 - Annotated copy of the AR (Annotated AR) with the Appellant's comments on the information provided by the OS, including, in the section of the AR in which the OS has indicated that the information sources he used to complete the form included an office interview with the applicant, the comment "*this was never discussed in the office*";
2. Letter from the OS to a medical practitioner at a medical clinic in the Appellant's community dated October 31, 2018 (Letter #1) providing details of a physical examination conducted by the OS on the Appellant, including his medical history and analysis of an August 2, 2017 magnetic resonance imaging (MRI) scan, which concludes, in part, that the Appellant "*is not a surgical candidate*" and that the OS has arranged for lumbar injections at a pain clinic in a hospital in an adjacent community;
3. Letter from the OS to a medical practitioner at a medical clinic in the Appellant's community dated April 11, 2018 (Letter #2) providing details of a physical examination which recommends that the Appellant lose a specified amount of weight and receive lumbar caudal injections at a pain clinic in a hospital in an adjacent community and that the Appellant is not, in the OS's view, a candidate for surgery;
4. Letter from the OS to a medical practitioner at a medical clinic in the Appellant's community dated September 8, 2016 (Letter #3) providing an analysis of radiograms of the Appellant's left hand, a

computerized tomography (CT) scan of the his index and long finger, and details a physical examination, and offering the opinion that the Appellant is not a surgical candidate but could possibly have a cortisone injection from time-to-time;

5. X-Ray Imaging Report (XIR #1) prepared by a medical imaging facility in a community adjacent to the Appellant's home community dated March 23, 2018;
6. Medical Imaging Report (MIR) prepared by a medical imaging facility in a community adjacent to the Appellant's home community dated February 8, 2017;
7. CT Report prepared by a diagnostic facility in a community within the same region of the Province as the Appellant's home community dated January 13, 2016; and
8. XIR (XIR #2) prepared by a medical imaging facility in a community adjacent to the Appellant's home community dated November 19, 2015.

Diagnoses

In the MR, the OS diagnosed the Appellant with arthritis of the lumbar spine, a degenerative disc disease (DDD) of the lumbar spine, both with an onset of 1990, and a congenital anomaly of the thoracic spine which caused the Appellant pain between 2002 and 2008 and was cured by surgery.

The OS also states that the Appellant's lumbar spine pain began 28 years ago following a Workers Compensation Board (WCB) claim for an injury at work, that the Appellant has had a total of 5 WCB claims, the last of which was in 2002, and that the Appellant stopped working in 2015 as a result of those injuries. The OS indicates that the Appellant's progressive incapacitating disability results in lower back pain (LBP) which has been so incapacitating that the Appellant is unable to return to most manual tasks.

Physical Impairment

In terms of health history that might have an impact on physical impairment, The OS reports in the MR that:

- The Appellant is unable to return to any manual labour tasks due to progressively disabling LBP and right sciatica. After leaving work in 2015 he declined a controversial surgical procedure;
- His hand has improved since the OS examined him in September 2016;
- After 5 WCB claims for LBP between 1990 and 2002 his LBP and right sciatica spontaneously recurred and progressed to the point where it is severe and incapacitating preventing his return to employment in a manual capacity and impairing the quality of his home and recreational life;
- He has had no physiotherapy, massage or chiropractic treatments and in any event the OS does not think that they are likely to be useful;
- He underwent extensive thoracic back surgery in 2008 to remove a painful congenital - developmental thoracic abnormality which was very successful in eliminating his thoracic pain and which allowed him to the discontinue hydromorphone medications that he had been taking between 2002 and 2008;

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- The Appellant's GP ordered a CT scan which demonstrated severe degenerative changes in L3 without significant nerve root compression;
 - In September 2016, the OS examined the Appellant's hand, which had been injured in 2015, and determined that surgery was unnecessary;
 - At the Appellant's request, the OS examined the Appellant again in April 2018 regarding his LBP and right sciatica, following which the OS arranged for caudal lumbar spinal cortisone injections at a pain clinic which the Appellant did not proceed with because he was unable to arrange for transportation to the clinic; and
 - In October 2018 the Appellant visited the OS again for reassessment and redirection to the pain clinic. As the pain relief from the injections was likely to be temporary, the Appellant decided to apply for a PWD designation.

In terms of functional skills, the OS reports in the MR that the Appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and that the Appellant's limitations in the length of time that he can remain seated is unknown.

In the AR, the OS assessed the Appellant as independent with all aspects of mobility and physical ability including walking indoors and walking outdoors, climbing stairs, standing and lifting and carrying, with the qualification that the Appellant is limited to lifting and carrying about 15 lbs. on a repeat basis and that heavy manual work is too much for him.

In the Annotated AR, the Appellant stated that he can walk less than one block, can climb stairs only if a handrail is available, and can remain seated for less than 15 minutes.

Mental Impairment

With regard to any significant deficits in cognitive and emotional function, the OS states in the MR that the Appellant "*seems to*" have a deficit with respect to motivation and has a "*relatively minor*" deficit in memory, adding "*failed to complete property management course provided by WCB in 2016, having barely failed*". The OS also indicates that the Appellant has no difficulties with communication.

In the AR, the OS indicates that the Appellant's level of ability with respect to all listed components of communication (speaking, reading, writing and hearing) as good (the other choices being satisfactory, poor and unable). No additional comments are provided in this section of the AR.

In the section of the AR dealing with social functioning, where the instructions say that the section is only to be completed if the applicant has an identified mental impairment, the OS has written "*N/A. No such problem*".

Where asked in the AR to complete the section identifying the degree to which the Appellant's mental impairment restricts or impacts his daily functioning only if the applicant has an identified mental impairment or brain injury, the OS has not completed that section, noting "*N/A*".

Where asked in the AR to identify whether the Appellant requires any assistive devices or an assistance animal, the OS has written "*Nil*".

In the Annotated AR the Appellant states that his memory and motivation are fine and that *"if anything (he has) depression and anxiety from time-to-time."*

Restrictions in the Ability to Perform DLA

Where asked in the MR whether the Appellant's impairment impacts his ability to manage DLA, the OS has ticked "Yes" and indicated that the Appellant is periodically restricted with respect to basic housework, mobility inside the home and social functioning (adding the comment *"Little if any impact"*), and that his mobility is actively restricted outside the home without indicating whether those restrictions are continuous or periodic, adding the comment *"His LBP and sciatica has (progressed) and now (illegible) daily re: heavy manual physical work"*. Where asked to provide additional comments regarding the degree of restriction generally, the OS has written *"Little if any impact"*. Where asked what assistance the Appellant needs with DLA, the OS has written *"He is able to accomplish (DLA) and able to look after himself but does so in a somewhat reduced capacity and at (a) reduced rate"*. The OS further indicates that the Appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA.

In the MR, the OS indicates that the Appellant is fully independent and has no impairment that directly restricts any of the listed DLA (all listed aspects of personal care and basic housekeeping, management of medications, basic housekeeping, shopping, meal planning and preparation, paying rent and bills, medication and transportation), indicating that getting in and out of a vehicle is *"a little slow and awkward"*, and where asked to provide additional comments including a description of the type and amount of assistance required and identification of any safety issues has written *"Nil"*. With respect to social functioning, the OS did not complete that section of the AR other than to write *"N/A no such problem"*.

In the Annotated AR the Appellant indicates that his back *"slips out or gets aggravated (he) could be bed ridden for one day or one month"*, and that all sections of the AR that seek information on his ability to complete DLA should indicate that periodic assistance is required.

Need for Help

In the AR, where asked the OS indicates that the Appellant does not have an assistance animal, does not require any assistive devices, and in the section where the assessor is asked for information about assistance provided by other people he has written *"Nil N/A"*.

In the Annotated AR the Appellant indicates that he requires assistive devices for dressing (*"sock slider/extendable claw"*), bathing (*"walls and support handle"*), transferring in and out of bed (*"walls and dresser"*), transfers on and off a chair (*"hands"*), laundry (*"extendible claw"*), basic housekeeping (*"friend"*), going to and from stores (*"shopping cart"*), and reading process and labels (*"glasses"*). He also states that he *"uses a cane, the walls, whatever is available and sometimes both (balance issues)"*.

Additional Information submitted after reconsideration

In his Notice of Appeal (NOA) dated February 15, 2019, the Appellant stated that he has mobility issues that prevent him from returning to work.

At the hearing, the Appellant explained that he had visited the OS in the hope of receiving a referral to a back surgeon. He stated that he had provided the OS with a copy of his PWD application form and that he should have read what the OS had written in those reports before submitting them to the Ministry. He said that he received a call from the OS's administrative assistant a week after dropping off the forms indicating that the application forms were ready to be picked up, and that he provided them to the Ministry without reading what the OS had said. He explained that the OS had required payment for completing the forms and that he (the Appellant) was surprised that the forms had been completed by the OS without him having been interviewed.

The Appellant stated that the OS did not know his detailed medical history, having only examined him a total of 3 times, including a visit a few years ago when he had issues with his hand, and again within the last year when he was examined for his back problem. He said that his GP, who had a better knowledge of his medical condition, had not been available to complete the PWD application forms as he was wintering in a foreign country and not returning until April 2019. He also explained that he had been trying to get in to see a different doctor for the past 2 weeks.

The Ministry relied on its Reconsideration Decision and stated that, for the reasons provided in its Reconsideration Decision it had no reason not to rely on the information provided by the OS. With respect to the Appellant's contention that he was not interviewed by the OS when the OS completed the application forms, the Ministry stated that it assumes that an applicant has reviewed the MR and the AR to confirm that the information is accurate before submitting the forms to the Ministry for evaluation.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and "*oral and written testimony in support of the information and records*" before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. These limitations reflect the jurisdiction of a panel established under section 24 of the EAA: to determine whether the Ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the Ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The Panel considered the information in the Notice of Appeal to be argument and the evidence provided at the hearing to be oral and written testimony in support of the information and records that were before the Ministry at reconsideration pursuant to EAA Section 22(4).

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 designation as a PWD, 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, while the evidence establishes that the Appellant has a severe mental or physical impairment that, in the opinion of a prescribed professional, is likely to continue for at least 2 years, his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, the Ministry found that 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 ...

Severity of Impairment

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a "severe" impairment. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD the Ministry must be satisfied that the individual has a severe physical or mental impairment. An "impairment" is a medical condition which results in restrictions to a person's ability to function independently or effectively. With respect to assessing the severity of an impairment,

Section 2(2)(b)(i) of the EAPWDR requires that a mental or physical impairment *directly and significantly* restrict the person's ability to perform DLA either *continuously, or periodically for extended periods*.

Therefore, to assess the severity of an impairment, the Ministry must consider both the nature of the impairment and the extent to which it impacts daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant's OS.

With respect to the assessments provided by the OS as a prescribed professional, the Panel notes the Appellant argues that the OS is not his regular doctor, does not know his medical history well enough to provide an informed opinion as to the Appellant's impairments, and did not interview the Appellant in completing the MR and the AR.

Physical Functioning

The Appellant's position is that the OS did not accurately assess the severity of his impairment and its impact on his physical functioning and that, despite the OS's assessment, he can walk less than one block, can climb stairs only if a handrail is available, and can remain seated for less than 15 minutes.

In its Reconsideration Decision, after summarizing the OS's diagnosis of the Appellant's mental functioning from the MR, the Ministry states "*The Ministry notes that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment*". The Ministry argues that a severe impairment of the Appellant's functioning has not been established because the OS has not provided evidence to indicate that the Appellant's impairment significantly and severely limits or restricts his mobility, physical ability or basic functional skills.

Panel Decision

The OS has provided evidence indicating that Appellant's right sciatica spontaneously recurred and progressed to the point where it is severe and incapacitating, preventing his return to employment in a manual capacity and impairing the quality of his home and recreational life, and that he is unable to return to any manual labour tasks. In its Reconsideration Decision, the Ministry states that "*for the purpose of determining eligibility for the PWD designation an applicant's employability or ability to work is not taken into consideration.*" As neither the EAPWDA nor the EAPWDR refer to the impact of an impairment on an applicant's ability to work, the Panel finds that the Ministry reasonably determined that the Appellant's inability to return to any manual labour tasks is not a consideration in assessing his eligibility for the PWD designation.

In terms of functional skills, the OS has reported that the Appellant is independent in all aspects of mobility and physical ability, including walking indoors and walking outdoors, climbing stairs, standing and lifting and carrying, with the qualification that the Appellant is limited to lifting and carrying about 15 lbs. In the Annotated AR, the Appellant stated that he can walk less than one block, can climb stairs only if a handrail is available, and can remain seated for less than 15 minutes.

Despite the conflicting evidence with respect to how far the Appellant can walk or his ability to climb stairs unaided, the Panel notes that the EAPWDA Section 2(2) requires that the severity of an

impairment be expressed as “*the opinion of a prescribed professional*”. Therefore the Panel finds that the Ministry reasonably relied primarily upon the evidence of a prescribed professional in assessing the severity of the Appellant’s impairment and its impact on DLA and whether or not the Appellant needs help to perform those activities.

The Panel has reviewed all the evidence and finds that, as there has been no evidence of a *severe* physical impairment presented by the prescribed professional, the Ministry reasonably determined that the Appellant did not have a severe physical impairment.

Mental Functioning

Neither party has argued that the Appellant has a severe mental impairment.

Panel Decision

The Panel finds that the Ministry reasonably held that the Appellant did not have a severe mental impairment.

Restrictions in the ability to perform DLA

The Appellant’s position is that he requires periodic assistance with all aspects of his DLA. The Ministry’s position is that it is not satisfied that the Appellant has a severe impairment that restricts his ability to perform DLA because the OS has indicated that the Appellant is independent with respect to virtually all aspects of DLA.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant’s severe impairment *directly* and *significantly* restricts his or her DLA, continuously or periodically for extended periods. In this case, the OS is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Therefore, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant’s impairments either continuously or periodically for extended periods, and to further elaborate so that the nature and extent of the restrictions to DLA are clear. Prescribed professionals are further encouraged to elaborate on the nature and extent of the limitations or restrictions in the instructions provided in those sections of the forms. For example, in Part C of the AR the assessor is instructed to identify whether assistance is required in each case with respect to the full range of DLA, and if the applicant is not independent, to describe the type and amount of assistance required.

The Panel has reviewed all the evidence and notes that the OS has indicated that the Appellant is independent with respect to all aspects of DLA in the AR, and that where impacts are identified in the MR (restrictions to basic housework and mobility inside and outside the home) the OS has written “*little or no impact*” and does not describe the degree of reduced capacity, as determined by the Ministry in its Reconsideration Decision. Accordingly, the Panel notes that there is no evidence other than the Appellant’s statement that he requires periodic assistance with all aspects of his DLA, and therefore finds

that the Ministry has reasonably determined that the Appellant does not have a severe impairment that restricts his ability to perform the DLA set out in the legislation.

Help with DLA

The Appellant's position is that when his back slips out and gets aggravated he can be bed ridden "*for 1 day or 1 month*" and when this occurs he has to rely on friends to help him. He also states that he relies on devices such as sock sliders, an extendible claw, handrails, the walls and dressers, a shopping cart and eye glasses as aids for various aspects of his DLA. The Ministry's position, as set out in its Reconsideration Decision, is that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted.

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. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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 respect to assistive devices, the Panel notes that the EAPWDA defines "assistive device" to mean "*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*". The Panel notes that most of the devices identified by the Appellant, including walls, dressers, hand rails, shopping carts and eye glasses are not devices "*designed to enable a person to perform*" DLA and therefore finds that they are not considered assistive devices for the purpose of the EAPWDA.

The Panel has reviewed all the evidence and 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

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 under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.

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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 Simon Clews	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2019/03/09

PRINT NAME Tina Ahnert	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY)

PRINT NAME Vivienne Chin	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/03/09