



## **PART C – DECISION UNDER APPEAL**

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated December 23, 2009 which held that the appellant did not meet 3 of the 5 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 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or 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. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help to perform DLA.

## **PART D – RELEVANT LEGISLATION**

(State the relevant Legislation considered)

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

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

The evidence before the ministry at the time of reconsideration was comprised of a PWD application (Self-report (SR), Physician Report (PR), and Assessor Report (AR)), a September 1999 operative report respecting surgery for a fracture of the left ankle, what appear to be physician's notes for dates from October 26, 1999 to March 5, 2004, letters from the appellant dated June 26, 2009 and December 20, 2009, a December 19, 2006 orthotic clinic outpatient report (on which the appellant has made notes), and the Request for Reconsideration.

In the SR, the appellant describes multiple fractures and reports that he cannot stand, walk, or climb stairs after an hour, approximately, and that he is also limited with bending, kneeling and lifting. He writes that there is no further corrective surgery available and that he is unable to work in his former field of employment due to his limitations.

In the PR, completed by a general practitioner, the appellant is diagnosed with post traumatic osteoarthritis and asthma with the comment "multiple fractures, pain now especially feet and ankles". Aids used are a left knee brace, left and right ankle braces, and orthotics. Regarding Functional Skills, the appellant is able to walk 1 to 2 blocks unaided on a flat surface, climb 5+ steps unaided, has no limitations with lifting, and can remain seated for 1 to 2 hours; no difficulties with communication or deficits with cognitive and emotional function are indicated. Regarding DLA, a continuous restriction is indicated with basic housework and mobility outside the home; no restrictions are indicated for the remaining DLA (personal self care, meal preparation, management of medications, daily shopping, mobility inside the home, use of transportation, management of finances, and social functioning). Additional information provided regarding the degree of restriction is "pain with any prolonged posture or physical activity". The physician wrote "no" where asked what assistance is required with DLA.

In the AR, completed by an occupational therapist, the impairment impacting the appellant's ability to manage DLA is listed as chronic lower extremity pain that limits standing, walking and general body dexterity tolerances. The appellant's Ability to Communicate is either good or satisfactory in all listed areas. The appellant is reported as independent with all aspects of Mobility and Physical Ability (walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying/holding); a maximum lifting and carrying weight of 50 lbs and a maximum of 10 to 15 minutes of continuous walking are indicated. Regarding DLA, the appellant is reported to be independent with all aspects of all DLA (personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, transportation, and mobility indoors/outdoors). The appellant requires the use of crutches and/or cane to assist in mobility when ankles and/or feet flare up; the use of orthotics is also indicated. The assessor writes that the appellant is "independent in daily living activities but must pace himself and take occasional rest breaks when engaged in ambulatory activities (e.g. housekeeping)".

In his letter dated June 26, 2009, the appellant writes that he cannot sit longer than one hour without searing pain and cannot stand longer than half to one hour without experiencing great pain in his left ankle and leg which has resulted in a crab-like gait and twisting of his back. He writes that his daily living is severely restricted and that he must rest to relieve pain in his ankle, leg, and back. He reports that he requires help every day to get him on his feet in the morning as well as a lot of massage and prescription pain medication. He hopes to be retrained to obtain employment.

In his letter dated December 20, 2009, the appellant writes of his financial difficulties and that he has been refused, due to his young age, as a candidate for ankle replacement. The appellant also reports arthritis in his

hands, the need for prescription pain medication, and that he cannot walk properly or stand for more than 1 or 2 hours.

The December 19, 2006 orthotic outpatient clinic report indicates that the appellant has trialed a special boot and orthotics and that the appellant had a brace which he discarded. The appellant has added comments that his condition is worse since this report was completed 4 years earlier, that he has tried walking aids, none of which worked, and that he has 2 slipped discs in his lower back.

In the Request for Reconsideration, the appellant writes that he has severe back pain everyday and cannot sleep a whole night, that he cannot sit for more than one hour, and that the only surgical option available would leave him with no mobility in his left ankle. He reports the use of a cane in the morning or crutches every day.

In his Notice of Appeal, the appellant questions if he is applying for the right level of disability. He writes that his arthritis is so bad he can barely get out of bed in the morning, that his back is "wedged in 2 spots", and that his ankles are so weak in the morning that he has to hold on to the walls to get to the bathroom. The panel admitted the new evidence under section 22(4) of the Employment and Assistance Act as it is in support of the information and records before the ministry at reconsideration.

The ministry did not provide additional information on appeal.

## PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue under appeal is whether the ministry reasonably concluded that the appellant does not have a severe physical or mental impairment and that his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The appellant's position is that he is eligible for designation as a PWD because his impairment is severe and severely restricts his daily living necessitating daily assistance.

The ministry's position is that the evidence does not establish the existence of a severe physical or mental impairment that, in the opinion of a prescribed professional, significantly restricts DLA or necessitates help with DLA.

Regarding the existence of a severe mental impairment, the panel finds that as a physician has not diagnosed a mental impairment and the evidence of both prescribed professionals and the appellant does not establish any deficits with cognitive and emotional functioning or impact on social functioning, the ministry reasonably concluded that a severe mental impairment has not been established under section 2(2) of the EAPWDA.

Regarding the existence of a severe physical impairment, the panel finds that the evidence of the appellant is that he can stand and walk for between ½ and 2 hours, with his most recent evidence in the December 20, 2009 letter and Notice of Appeal indicating a limit of 1 to 2 hours with increased difficulty upon waking in the morning, when he holds onto the walls to get to the bathroom. The appellant also reports difficulty with bending and lifting as well as an ability to remain seated for no more than 1 hour. The panel finds that this evidence is not inconsistent with the evidence of both the physician, who reports limitations with walking (1 to 2 blocks unaided on a flat surface) and remaining seated (1 to 2 hours), and the assessor, who reports that lower extremity pain limits standing, walking (10-15 minutes of continuous walking), lifting (maximum of 50 lbs), and

general body dexterity tolerances though the appellant remains independent with all aspects of mobility and physical ability. The panel finds that the additional evidence submitted is not indicative of a severe restriction in terms of physical functioning. The panel finds that while the evidence establishes that the appellant has some restrictions respecting functional skills and mobility and physical ability, primarily with walking and remaining seated, as the evidence of the appellant and the prescribed professionals establishes that the appellant can, at a minimum, stand and walk 1-2 blocks or half an hour, and, at a maximum, for up to 2 hours and that the appellant can remain seated for 1 hour, the limitations to physical functioning can reasonably be viewed as moderate. Additionally, the panel finds that the appellant's degree of independent physical functioning is further supported by the evidence of both prescribed professionals that the appellant is able to manage all DLA without any assistance. Therefore, the panel finds that the ministry reasonably determined that a severe physical impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree to which the appellant's DLA are restricted, the panel finds that the evidence of the physician is that the appellant is continuously restricted with basic housekeeping and mobility outside the home, has no restrictions with all remaining DLA, and does not require assistance with any DLA, including those in which he is continuously restricted. The evidence of the assessor also indicates that the appellant is independently able to manage all DLA. As the evidence of the prescribed professionals establishes that the appellant is independently able to manage all DLA, the panel finds that the ministry reasonably determined that, although there is a continuous restriction with 2 DLA, the restriction can reasonably be viewed as not meeting the legislative test of being a significant restriction. Therefore, the panel finds that the ministry reasonably concluded that the appellant is not directly and significantly restricted either continuously or periodically for extended periods in his ability to perform DLA as required under section 2(2)(b)(i) of the EAPWDA. In reaching this decision, the panel notes that the legislation expressly requires that the requisite restriction with DLA be in the opinion of a prescribed professional. Additionally, the panel notes that the legislation respecting designation as a PWD addresses the ability of an applicant to manage DLA rather than an ability to secure or maintain employment.

The panel also finds that, as a direct and significant restriction with DLA has not been established, as the evidence of the prescribed professionals is that the appellant is able to independently manage DLA without assistance, the ministry reasonably determined that the evidence does not establish that, in the opinion of a prescribed professional, the significant help or supervision of another person, use of an assistive device or assistance animal is required to perform DLA as required under section 2(2)(b)(ii) of the EAPWDA. The panel acknowledges that both prescribed professionals indicate that the appellant uses aids (crutches and/or a cane when ankles and/or feet flare up (no information is provided as to how often flare ups occur), as well as knee and ankle braces, and orthotics), neither prescribed professional has indicated that any assistance is required with DLA.

The panel finds that the ministry's reconsideration decision is reasonably supported by the evidence and confirms the decision.