

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated October 12, 2010 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

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 evidence before the ministry at reconsideration was comprised of:

- a PWD application (Self-Report dated February 1, 2010 (SR), Physician Report dated January 14, 2010 (PR), and Assessor Report dated February 19, 2010 (AR);
- an undated physician's note;
- a June 10, 2010 letter from the appellant;
- letters dated June 15, 2010 and August 13, 2010 from the appellant's physician;
- an October 6, 2010 physician's letter provided by the same physician who completed the PR in response to the ministry's request for clarification of information the physician provided in the PR.

In the SR, the appellant writes that, due to pain in his lower back and front left thigh down to his foot, he can walk less than a block and that, in part due to low blood pressure, gets dizzy if standing too long. He is barely able to clean his home because of pain and is dependent on others for basic chores like housecleaning and shopping. He writes that he lost his teeth due to gum disease and is only able to eat very soft food as he does not yet have dentures and has lost weight. Additionally, he is depressed, lonely and very emotional, has difficulty thinking coherently, and has noticed memory and hearing loss. In his letter dated June 10, 2010, the appellant writes that for several weeks following his back surgery in early March the surgery seemed successful and the pain was minimal; however, around May 1, 2010 his back started hurting again and his physician now states that the appellant is disabled and may require more surgery.

The evidence of the appellant's physician is as follows.

In the PR, completed by the appellant's general practitioner of 10 months on January 14, 2010, the appellant is diagnosed with lumbar spine disc herniation and degenerative disc disease. The physician reports a history of mild low back discomfort with severe left leg discomfort developing in 2009 due to disc herniation impinging on the nerve root for which surgery is indicated and which should correct the problem. The appellant takes narcotics which cause nausea and drowsiness. A significant deficit is reported for 1 of 11 specified aspects of cognitive and emotional function, emotional disturbance, with narrative "History of anxiety. Was on meds." Continuous restrictions are indicated for 6 of 10 DLA, with narrative identifying pain as the cause of the restrictions including the restriction identified with social functioning. The physician adds that the appellant's condition "should only be temporary until surgery is done and he has gone through rehabilitation. Emotionally he has difficulty coping and has a history of anxiety issues that complicate matters".

In the undated note, the physician writes that the appellant "should be able to function fine on the recent medications prescribed for his ongoing back condition".

In the June 15, 2010 letter, the physician writes that the appellant has had ongoing back issues since surgery and that a CT scan demonstrates quite significant disc disease in addition to disc herniation at a few different levels which may be a contributing factor to ongoing back pain. The physician writes that he will know more in July.

In his August 13, 2010 letter, the physician writes that an MRI indicates multi-level disc disease with a number of disc herniations, that the appellant's back is "overall not in great shape" and would most likely prevent him from doing any labour type jobs and that he should refrain from lifting or straining too strenuously and that it is not out of the question that he has chronic low back pain with fairly significant disease. The appellant continues to complain of lower back pain and limitations with regard to movement for which he is on analgesics.

In a letter dated October 6, 2010, the physician indicated that the appellant does not require aids and "can

walk 2-4 blocks possibly more", climb 5+ steps, lift 2 to 7 kg, and likely sit for 1-2 hours at a time. The appellant's condition is "likely to be permanent and fluctuating in its course due to the extent of herniated discs and other degenerative [changes] in his lumbar spine". The physician adds that the appellant "can perform all activities of daily living at this time to the best of my knowledge" and that he is "not as restricted as he was last winter/spring but has some residual deficits in the left leg in addition to intermittent sciatica and back pain that affects his ability to find work and perform a variety of jobs. He does have fairly significant pathology on investigations done to date. He may require occasional support depending on how his back/discs do in the future."

In the February 19, 2010 AR, completed by a social worker, information respecting the appellant's physical impairment and its impact on cognitive and emotional functioning and DLA is provided respecting the appellant's pre-operative condition. Respecting the major impact on daily cognitive and emotional functioning, comments include: "medication effects appetite"; "can lose hours in drug induced fog"; "No memory – meds"; "Major depression related to life events"; "Impulsive – needs to hide medication"; "can walk 3-4 steps, constant pain"; "Language effected by meds"; "Has problems with time management"; "Hostile – anger management problems, frustration"; "Meds effect thought process". Narrative respecting restrictions to DLA identifies pain related mobility problems, paranoia, isolation, social anxiety, and the use of large amounts of opiates. Additionally, the assessor writes that the appellant's physical impairment has affected his mental state and that walking aids and a scooter would allow him to get out and socialize. Marginal functioning is reported with both immediate and extended social networks.

On appeal, the appellant submitted a December 7, 2010 letter from his general practitioner who writes that the appellant "is unable to do labour jobs in any capacity due to underlying medical condition. He is on regular meds for this condition and is followed regularly by myself". The panel admitted this new evidence under section 22(4) of the Employment and Assistance Act as being in support of the information and records before the ministry at the time of reconsideration.

The ministry's submission on appeal was its reconsideration summary.

PART F – Reasons for 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 remains disabled following back surgery and that his impairment is chronic and likely to continue for the rest of his life. The appellant further argues that he is depressed and has difficulties thinking coherently and with his memory.

The ministry's position is that the evidence does not establish the existence of a severe physical or mental impairment which directly and significantly restricts the appellant's ability to perform DLA or necessitates help. In determining that these criteria had not been met, the ministry relied on the evidence provided by the appellant's physician subsequent to the appellant's back surgery and noted that employability is not a consideration in the determination of PWD eligibility.

Regarding the existence of a severe physical impairment, the panel has relied on the evidence of the appellant's physician respecting the appellant's post operative condition and its impact on physical function which reflects the appellant's current medical condition rather than the evidence in the PR and AR which reflects the appellant's pre-operative condition. The post-operative evidence of the physician is that the appellant has multi-level disc disease with a number of disc herniations which is "likely to be permanent and fluctuating" in its course. In terms of functional skills, the appellant does not require aids and "can walk 2-4 blocks possibly more", climb 5+ steps, lift 2 to 7 kg (5 to 15 lbs), and likely sit for 1-2 hours at a time. Additionally, the physician reports that the appellant "can perform all activities of daily living at this time to the best of my knowledge" and that he is not as restricted as he was last winter/spring but has some residual deficits in the left leg in addition to intermittent sciatica and back pain that affects his ability to work and perform a variety of jobs and is unable to do labour jobs in any capacity. The physician also states that the appellant should refrain from lifting or straining too strenuously and may require occasional support depending on how his back/discs do in the future. The evidence of the appellant is that he has chronic pain following back surgery and is disabled. The panel finds that the evidence establishes that, as a result of disc disease and

herniations, the appellant suffers from residual deficits in his left leg and intermittent sciatica and back pain which result in some limitations to the appellant's physical functioning. However, the panel finds that the ministry reasonably determined that the appellant's current level of independent physical functioning and mobility as well as his ability to perform DLA independently, excepting lifting outside of the 5 to 15 lb range, does not reflect a severe physical impairment. Therefore, the panel finds that the ministry reasonably determined that a severe physical impairment was not established under section 2(2) of the EAPWDA.

Regarding the existence of a severe mental impairment, in the PR the appellant's physician does not diagnose the appellant with a mental impairment but notes the appellant's history of anxiety for which he had been medicated and problems coping. Restrictions with DLA, including social functioning, are described as relating to the appellant's pre-operative pain level. Subsequent information from the physician is silent as to the existence of a mental impairment and any impact on functioning. The evidence of the assessor, who is not a medical practitioner, indicates a significant impact on the appellant's daily cognitive and emotional functioning and identifies problems with major depression, paranoia, and anger. The evidence of the appellant is that he is depressed, lonely, emotional, and has difficulties with memory and coherent thinking. In the absence of confirmation from a medical practitioner of a mental impairment that is likely to continue for at least 2 years, and as much of the assessor's narrative reflects problems with mental functioning consequent upon the appellant's pre-operative pain and the pre-operative use of mind altering narcotics, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree of restriction with DLA, the panel has relied on the prescribed professional's evidence that relates to the appellant's current post-operative condition. The evidence of the appellant's physician, a prescribed professional, respecting the appellant's current functioning is that the appellant independently manages DLA, with the exception of lifting beyond the 5 to 15 lb limit, and does not require any aids; occasional support in the future may be indicated depending on how the appellant's back and discs do in the future. In light of this evidence, the panel finds that the ministry reasonably determined that a direct and significant restriction in the appellant's ability to perform DLA, in the opinion of a prescribed professional, was not established under 2(2)(b)(i) of the EAPWDA.

Regarding the need for help with DLA, the panel finds that the ministry reasonably determined that as it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required under section 2(2)(b)(ii) of the EAPWDA.

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