

# ONTARIO DISABILITY SUPPORT PROGRAM

## **Disability Determination and Appeals to the Social Benefits Tribunal**

Paper for the Task Force on  
Modernizing Income Security for Working Age Adults

**April 2005**  
(updated January 2006)

Submitted by:

Melodie Mayson / Neighbourhood Legal Services  
Nancy Vander Plaats / Scarborough Community Legal Services  
Dianne Wintermute / ARCH

# ONTARIO DISABILITY SUPPORT PROGRAM

## **Disability Determination and Appeals to the Social Benefits Tribunal**

(updated January 2006)\*

### **INTRODUCTION**

Since the introduction of the Ontario Disability Support Program (ODSP) in 1998, one of the most criticized aspects of the program has been the process by which disability applications are assessed. While some administrative efforts to improve the application process have occurred over the last few years, significant problems remain. This paper will examine various factors that contribute to the significant failure rate of ODSP applications at the initial stage and to the correspondingly large numbers of successful appeals to the Social Benefits Tribunal (SBT).

Remaining problems include:

- the considerable public resources expended by the provincial government on the ODSP eligibility determination process, as well as on internal reviews and appeals;
- the time and resources that are required by the health care system to aid applicants;
- the resources required by the Social Benefits Tribunal to conduct the appeals, and by Legal Aid Ontario to provide representation for the appellants;
- the lengthy delays in resolving cases; and, above all,
- the hardship created for people with disabilities who are initially denied income support.

Why do so many people have to appeal the decisions of the ODSP Disability Adjudication Unit (DAU), and why does the SBT overturn so many of those decisions? To answer these questions our study analyzes the structural dimensions of the ODSP application process and the related issue of the lack of support and resources available for those navigating a complex system; the problems associated with the actual disability adjudication process, including the system's need for and reliance on detailed written medical information; and the issue of ongoing medical eligibility reviews (reassessments). In our conclusions

---

\* See page 16 regarding the lengthy backlog in processing applications that has become much more serious since this paper was submitted in April 2005; also see additional recommendation under section 4, regarding the DAU.

we advance what we hope are key recommendations to ameliorate the situation for those who are most vulnerable and at risk in our society.

## **A. WHO QUALIFIES FOR ODSP BENEFITS AND WHO SHOULD QUALIFY**

With the introduction of the *Ontario Disability Support Program Act* in 1998, a new legal definition of a “person with a disability” came into effect. This definition is quite different from the one contained in the *Family Benefits Act*, the predecessor legislation.

Section 4.(1) of the ODSP Act states:

- 4.(1) A person is a person with a disability for purposes of this Part if,
- (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
  - (b) the direct and cumulative effect of the impairment on the person’s ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
  - (c) the impairment and its likely duration and the restriction in the person’s activities of daily living have been verified by a person with the prescribed qualifications.

The FB category of “Permanently Unemployable” was eliminated in the *ODSPA*. This classification had been considered very contentious by many advocates, recipients, and government officials, as it appeared to abandon any prospect of employability for this group of recipients. The government also eliminated the categorical eligibility for those age 60-64. Without summarizing the entire debate surrounding the merits and drawbacks of these changes, it can be said that many Ontarians with chronic health problems and numerous social/ educational barriers to employment have experienced considerably more difficulties in applying for ODSP under the *ODSPA* than they did under the *FBA*.

In December 2004, Deb Matthews, Parliamentary Secretary to the Minister of Community and Social Services, released her *Review of Employment Assistance Programs in Ontario Works and Ontario Disability Support Program*. This Report comments perceptively on the issue of eligibility under the *ODSPA*:

“A significant number of OW clients should, in fact, be ODSP clients and indeed would have been prior to 1998. I argue that these people, while they have much to contribute to society in general, are highly unlikely to ever maintain permanent, full-time employment due to multiple barriers. However, MCSS spends considerable amounts of money ‘training’ these people, diverting resources from those who would really benefit from

enhanced employment supports. We need to provide increased financial support, social supports and opportunities for clients to contribute in ways other than through the competitive employment market.”

Matthews claims that “although there is no data to support it, those responsible for service delivery estimate that this group represents 10-20% of the OW caseload.” (10) Their long-term reliance on Ontario Works results from the ODSP program having “no appropriate categorization for ‘very hard to employ’ clients – their inability to work is not temporary, yet they do not qualify for ODSP; secondly, the ODSP application process is so cumbersome that some people who do qualify never access the program.” If the DDP forms were designed to present a picture of the “whole person” as part of the mandatory documentation, including very relevant information about education and employment history, the “very hard to employ” group of people would be better served by the program.

The *ODSPA* also introduced a categorical ineligibility for those whose only impairment is that they are dependent on or addicted to alcohol, a drug, or some other substance (e.g. alcoholism is no longer considered a disability). This exclusion of persons with addictions from receipt of ODSP benefits is a particularly troubling concern. Persons with alcohol or other substance addictions are the only persons with disabilities who are singled out for differential treatment under the *ODSPA*. This is arguably contrary to both the *Ontario Human Rights Code* and section 15(1) of the *Canadian Charter of Rights and Freedoms*. Moreover, no adequate reason for excluding persons with addictions from ODSP benefits has been offered.

If this discriminatory restriction were removed, not every person with an addiction would qualify for ODSP benefits; only those persons whose impairment is substantial and whose restrictions are substantial would be eligible for benefits. Furthermore, any suggestion that treatment will redress this disability is extremely problematic; the legislation does not require that persons with other disabilities seek treatment or avail themselves of any possible treatments. We therefore suggest that the discriminatory handling of this group of persons with disabilities cannot be demonstrably justified in a free and democratic society, and therefore cannot be protected under section 1 of the *Charter*. Persons with addictions should not be viewed any differently than other persons with disabilities.

According to the Ministry of Community and Social Services, there were 206,884 ODSP cases files and 286,465 beneficiaries as of December 2004 (*Statistics & Analysis Unit*). This represented an increase of 9.2% since the program was introduced in 1998, when there were 189,442 files. The current caseload consists of 60% grandparented Family Benefits recipients. Approximately 4% are people aged 65 and older who are not eligible for Old Age Security.

According to the Ontario Provincial Auditor's report (*OPAR, 2004:79-111*), the Disability Adjudication Unit received 29,000 applications in 2003. While anticipating about 400 applications a week, the DAU in fact received an average of 600 applications per week over the course of that year. In 2003, the DAU approved 50% of the initial applications for benefits. This means that approximately 14-15,000 applicants were found ineligible for ODSP during the course of that year. Again, according to the OPAR, 8,475 applicants who were denied eligibility at the time of the DAU's first assessment in 2003 requested an internal review of the decision. An internal review is the first step in the appeal procedure. As a result of the internal reviews, 641 applications were granted and the original decision overturned. This represented a success rate on internal review of 7.6%.

In 2004 the DAU initiated procedural changes. Now a panel of five adjudicators conducts the internal review instead of a single adjudicator. Under the new procedure, internal reviews overturned the original decision in 21% or 245 of the cases reviewed in the first three months of 2004.

Many unsuccessful ODSP applicants dispute the DAU's negative decision by filing an appeal with the Social Benefits Tribunal (SBT). The OPAR indicates that in 2003 the Tribunal heard 2,708 appeals in total and 90% (2,437) of the hearings were on the issue of ODSP disability determination. In 1,954 of those cases the Tribunal overturned the DAU's decision and found the individual eligible for ODSP benefits. That is an 80% success rate. It is also important to note that as of December 31, 2004, there were 4,234 ODSP appeals waiting to be heard by the SBT. Of those, 2,661 were on the issue of disability determination. According to the OPAR, ODSP applicants who pursue an appeal wait, on average, a year for their hearing and a decision.

How has a provincial income security program, targeted at the most vulnerable in our society, come to be so backlogged and weighted down with procedures that erect barriers to admissibility and accessibility?

## **B. THE ODSP APPLICATION PROCESS**

***Multiple-step application process:*** Applying for ODSP involves an assessment both of one's financial status and of one's health status. Verifying the requirements in these areas involves dealing with at least two or three different government offices as well as a number of different doctors or health professionals, community agencies and a legal clinic or lawyer (see *ODSP Application Process* flow charts, attached).

***OW applications:*** People with no income first have to apply for welfare assistance under Ontario Works (OW) in order to have some income during the long ODSP application process. OW applications also have at least two steps: a telephone interview that takes at least an hour and a half, and an in-person

verification interview at the OW office. In addition, a workshop about the workfare requirements is also part of the OW application process. This is mandatory even for people with severe disabilities who clearly can't work.

***ODSP direct applications:*** People who might have slightly too much income or too many assets to qualify for OW must apply directly to a local ODSP office. They still have to have their financial application assessed before they can get the medical forms.

***Electronic referrals to the central Disability Adjudication Unit:*** Once a person successfully completes the financial application, their local OW or ODSP office makes a computer referral to the central Disability Adjudication Unit in Toronto, and gives the applicant a Disability Determination Package (application forms). The applicant has ninety days, from the date the computer referral is made, to mail in the forms or their application automatically expires.

The central form in the Disability Determination Package is divided into two parts: a Health Status Report, which must be completed by a medical doctor, psychologist, optometrist or nurse in the extended class; and an Activities of Daily Living Index, which can be done by occupational therapists, physiotherapists, audiologists, chiropractors and regulated social workers in addition to the above group of health professionals. There is also a Self-Report, which is optional, that allows the applicant to provide details of their education and work experience, as well as the impact of their medical conditions on them.

### ***Assessing medical eligibility:***

The Disability Adjudication Unit has a staff of health professionals called adjudicators, whose qualifications are the same as those of the persons qualified to complete Activities of Daily Living forms, such as occupational therapists, nurses in the extended class, or doctors. The adjudicator reviews the DDP to decide whether the applicant meets the definition of disability in the *ODSPA*. The main task of the adjudicator is to decide whether the health condition diagnosed by the health care professional amounts to a "substantial" impairment that "substantially" restricts the applicant's ability to attend to personal care, function in the community or function in a workplace.

If the DAU decides the applicant is disabled, the applicant, the local ODSP office, and the local OW office (if applicable) are notified. The OW office then sends the file to the ODSP office, and a second financial assessment is done to re-verify financial eligibility. This process can take from 2 to 6 months before a person starts to receive ODSP benefits.

However, if the person is denied disability status, they must make a written request for an Internal Review within 10 days of that decision. If the DAU still

denies disability status after doing the IR, the person may appeal to the Social Benefits Tribunal.

The application process is entirely paper-driven, relies on many detailed forms and letters written in legal and bureaucratic language, has a ninety-day deadline for submitting the DDP, a ten-day deadline for requesting an Internal Review in writing, a 30-day deadline to submit an appeal to the SBT, and a deadline 30-days prior to the hearing date for submitting additional medical reports. Many of these deadlines can be extended in extenuating circumstances, but applicants are not told that. As well, the Ministry frequently does not meet many of its own deadlines to respond at various stages in the application process.

### **C. COMMUNITY CONCERNS**

#### ***Need for support for applicants:***

Very soon after the ODSP was implemented, complaints started to arise about the complex application process and the high rate of denials of disability status. Based on their numerous years of trying to assist applicants, legal clinics, mental health service providers and other community agencies organized a series of community forums across the province in 2002 to document the problems and search for solutions. The Report on those forums summarized the concerns with the application process:

Forum participants described problems at all stages in the application process. Many observed that these problems are compounded, and can become insurmountable when an applicant with disabilities is facing other barriers as well. Many people called the application process too slow and too complicated, and pointed out that just obtaining the necessary application forms was difficult. Some of the words used to describe the process were "discouraging", "demoralizing" and "de-humanizing". A recurring theme was that the intent seemed to be to keep people off ODSP, rather than serve persons with disabilities in need of assistance. (*Summary of Forum Reports: 6*).

One of the biggest problems identified in the community forums was the lack of help given to vulnerable clients who cannot navigate the application process and assemble the necessary information to establish eligibility because of homelessness, mental illness, cognitive impairments, illiteracy or language difficulties. There are no resources provided by the Ministry for such applicants; some OW staff and some community agencies struggle to assist applicants but do not have the resources to meet the need. As a result, many people are falling through the cracks or simply giving up. (*Summary of Forum Reports: 7*).

Municipal social service administrators have also expressed concerns about the complexity of the process and the number of applicants who are denied disability status. The report prepared for Toronto City Council in 2003 noted:

It is generally acknowledged that the ODSP Application process is involved and complex. . . . in most cases, substantial support is required to complete the forms. (Commissioner of Community and Neighborhood Services: 3)

Although Toronto and other municipalities recognized that ODSP applicants need support to get their forms fully and accurately completed and submitted on time, there has never been clear acknowledgement of this from the Ministry of Community and Social Services and no commitment to provide the support applicants need. Indeed, the Ministry's policies and procedures focus on self-reliance, requiring persons who are disabled, vulnerable and/or marginalized to navigate through this complex process on their own.

In 2002, the Income Security Advocacy Centre provided a detailed review of the problems encountered in the new ODSP system. As their report, *Denial by Design*, puts it,

The ODSP delivery system does not include assistance or support to applicants in getting these forms completed adequately. Formerly, municipal social assistance caseworkers could make direct referrals of clients to ODSP and could directly observe and document limitations, but that is no longer permitted. OW workers are expected to do no more than hand out a DDP and, perhaps, make a referral to a community agency.

Ironically, the complexity of the package, the lack of any resources to provide support to applicants or even to reasonably accommodate the very disabilities that underlie the program, make the program least accessible to those who are most vulnerable. (*Denial by Design*: 11).

In 2003 the Ministry acknowledged the barriers that applicants face in this complex process by convening an Applications Working group consisting of community and clinic advocates, some individual municipal social service administrators, as well as representatives from the Ontario Municipal Social Services Association, and Ministry staff. This group drafted a paper suggesting "Best Practices" for assisting applicants, with input gathered from many communities by the Ontario Municipal Social Services Association (OMSSA), and from community organizations by the ODSP Action Coalition. While the "Best Practices" has not been implemented, the Ministry has recently acknowledged the continuing barriers and has reconvened an "Applications / DAU Working Group" in consultation with the ODSP Action Coalition. It is too early in that process for any recommendations to, or commitments by, the Ministry to have been made.

Another group of service providers, the Toronto ODSP Roundtable, was convened in 2004 expressly to address the problems people with mental disabilities have with the application process. It concluded that:

Based on our collective observations, it is exceedingly difficult for applicants with mental health disabilities to navigate the present application process on their own. If the application process cannot be simplified, then there must be support workers or resources allocated to assist those who are applying for ODSP benefits. This could be done in different ways: attaching new staff to local welfare offices, community health centres, public health centres, drop-in centres, etc. However, there must be an outreach dimension if this option is to be successful, since many applicants will not go to 'official' offices. (Toronto Roundtable, *Proposals to Enhance Services to Applicants with Mental Health Disabilities*: 4).

In Ottawa, agencies who had been struggling to assist ODP applicants and who despaired as they kept seeing people fall through the cracks, developed a grant proposal for an ODSP Application Support Worker:

Years of problem identification and advocacy to the provincial and local governments have had negligible impact on improving access to ODSP for disabled individuals. It is time, now, for the community to intervene and to provide this crucial service. . . .

Anglican Social Services - Centre 454 and CMHA (and many other community agencies) assist people with income support issues. However, the existing focus and resources of these agencies does not permit the kind of specific, complicated, on-going, consistent, time-sensitive support function that is required to assist an individual from the first stages of confirming income eligibility and receiving an ODSP application package to ensuring that the application is received by the Disability Adjudication Unit, and then through the internal appeal process and Social Benefits Tribunal, if necessary. There are many critical deadlines that must be met by the applicant and the doctors at the initial stages of the application process that require a strict monitoring of the person's file. With an advocate and support worker who can be at the applicant's side throughout the process, the challenges of accessing the ODSP for disabled people with complicated barriers will be reduced. . . .  
(*Community Project Grant Proposal 2004*: 3)

Experienced and well-educated doctors and advocates have difficulty understanding the complex application process, yet the system assumes that applicants with disabilities will deal with all of the various offices involved, get their forms filled out fully and correctly, and meet all the time deadlines, completely on their own.

### ***Disability Determination Package:***

*Denial by Design* and the numerous other reports referred to above expressed concerns about the original forms included in the Disability Determination Package. These issues included the length of the forms, the difficult language used, the incomprehensible rating scales, the lack of reference to the ODSP definition of disability, and the fact that most of the questions posed relate to physical disabilities and provide very little opportunity to adequately document mental impairments. Doctors found the forms confusing and felt they took far too much time to complete.

The Ministry therefore revised the forms. In doing so, they consulted most extensively with the Ontario Medical Association, but did not take into account the significant concerns of community groups and legal clinics. Many of the specific complaints about the forms that were documented in *Denial by Design* still apply to the new forms.

The forms are still lengthy, complex and time consuming for doctors to complete. Most people just get their family physician to fill them out because either they don't have access to specialists or other medical professionals or it seems easiest to get one person to do the complete HSR/ADL. Doctors often do not take the time to fully understand and document all of the restrictions experienced by the patient in daily living. The ADL Index does not ask appropriate questions relevant to many types of conditions, particularly those related to mental illness or intellectual disabilities. Nor does the ADL encourage the health professional to provide any additional information, allowing only for a check mark for each question and a blank page if the doctor is motivated to add more detail.

The most recent change made by the Ministry is to allow regulated social workers to complete the ADL Index. This could be helpful in some cases, but many applicants do not have such a qualified person available to them. Even if they do, this is only a secondary part of the application, and can not be used to verify that the applicant has a substantial impairment. Getting doctors and specialists to provide sufficient detail about the health conditions so that the extent of the impairment can be assessed as "substantial" is still very difficult with the current forms. Most appeals to the SBT are either settled by the DAU, or are granted by the SBT, because of additional medical information gathered by the legal representative. Most of this information should have been available as part of the original application, but for a variety of reasons, which include: the length and complexity of the forms and/or the lack of training for health care practitioners on the relevance of the forms and the importance of ODSP benefits to their patients, this information wasn't provided on the initial application.

One type of report frequently requested by legal advocates in preparing appeals is a psychological assessment. Many people with cognitive or learning disabilities

may not have had them assessed, as these assessments are not covered by OHIP. It would be of benefit both to the OW and ODSP programs, and to applicants, to have a procedure in place for referrals and payment for such assessments.

In her recent report, Deb Matthews made several recommendations (Matthews: 6-11) concerning the ODSP application and appeal process:

- Streamline the ODSP application process.
- Provide additional supports to those for whom multiple barriers to employment result in long-term dependence on social assistance.
- Assign advocates to help collect documentation and support client applications.
- Reform the appeals process; currently a very high percentage of applications for ODSP are denied on internal review, appealed, and subsequently approved.

In addition she noted:

In some cases, a more intensive psychosocial evaluation would be required to identify barriers to employment not captured by skills assessment. (Matthews: 22)

OW could use such an assessment in order to provide the best possible employment or training supports to people with multiple barriers; however, if the assessment identified a more serious impairment which substantially restricted the person's ability to function in the workplace, the report would be valuable in adjudicating ODSP eligibility.

#### **D. INADEQUATE OR INSUFFICIENT MEDICAL INFORMATION**

As noted above, the present definition of disability ignores social factors which may also constitute barriers to community participation, work or activities of daily living. The "medical model" of disability, upon which ODSP is based, treats persons with disabilities as having a defect, dysfunction, abnormality or impairment that is located within the individual. Implicit in this model is that disability is a physiological or psychological defect that needs to be cured or treated. This is because the exclusive focus of medicine is diagnosis and/or prognosis. This narrow view ignores the fact that a person with a disability may be disadvantaged because of a complex set of interrelated social, environmental, physical and political factors. A social model of disability would take into account exclusionary effects, rather than a strict medical diagnosis. A comprehensive and holistic approach to disability that considers the whole person and all the barriers they face would be a more effective and fair way of ensuring income security for those who need it.

The Ontario Provincial Auditor's Report states that the most common problem in the disability adjudication process is the poor quality of completed Disability Determination Packages. Approximately 40% of all applications failed to provide critical information about the duration of the applicant's medical condition. An additional 16% failed to provide other important pieces of information. Doctors do not answer all of the questions, do not include specialists or other reports, or do not spend adequate time with their patients to know that impact of the medical condition(s) on activities of daily living.

Health care practitioners often do not have adequate supports or resources to help them understand and complete the complex disability determination packages. As noted above, the package is difficult and confusing, despite fact that it was recently revised in an attempt to make it more accessible and understandable. Many doctors are surprised when they learn that their patient is not eligible for disability benefits – they don't know what else they could have done to improve the quality of the information provided on the DDP.

One of the ways to ensure that health care practitioners understand the DDP and its impact on the eligibility determination process is to make the disability determination process more public and transparent. If people completing the package had a better understanding of the eligibility determination process, they would provide the necessary information to ensure that the requirements of the process were met.

Another way to address the problem of insufficient medical information is to ensure that members of the prescribed groups who can complete the DDP receive training on how to fill out the forms **and** on the importance of disability benefits (as opposed to welfare benefits) for applicants. ODSP's Chief Medical Officer, Dr. G. Di Marchi, provides training to doctors through the OMA. We would suggest that community legal clinic staff accompany Dr. Di Marchi to these training sessions. Clinic staff can provide a unique and valuable perspective on the importance and value of ODSP benefits. Clinic staff can speak to the common issues that applicants face and how they might be addressed. Clinic staff can also provide useful information about community resources and where applicants might be able to go for assistance in the ODSP application and appeals process. However, doctors are not the only group of people who can complete the DDP. Training opportunities must be expanded to include every group of persons with the prescribed qualifications who may be responsible for completing these forms.

Additional topics for training health care practitioners could include disability-sensitivity training; hidden disabilities; episodic disabilities; benefits available under the ODSP program; and information about employment supports. These could be delivered as part of a medical school curriculum; continuing education program; community information forum; or by means of pamphlets, brochures or other creative vehicles that will ensure that as large a segment of the health care

profession as possible is reached. ODSP benefits are critical for many low-income persons, and their health care providers must have a wide and broad knowledge base in order to better meet the needs of their patients.

Another issue is that in some communities, such as rural, remote or inner-city communities, the same person is relied upon to complete the DDP for a large number of persons. This constitutes a drain on the practitioner's resources. Additionally, filling out application forms is not what doctors are trained, or want, to do. Finally, if the same doctor is completing forms on behalf of large numbers of applicants, there may be a tendency to do a cursory job, or to pick and choose, whether consciously or not, among applicants. All of these issues have an impact on the quality of the information provided on the DDP and, consequently, on the applicants themselves. On-going training can address attitudinal barriers. Expanding the list of persons who can complete the DDP will address some of the resource issues. The unavailability of health care practitioners, and the lack of opportunity for applicants to choose a physician with whom they are comfortable are issues beyond the scope of this paper but nonetheless are very real problems for many applicants.

The quality of the information provided on the DDPs might also be affected by the meager compensation provided for completing these forms. Indeed, either because the health care provider is "the only game in town" or because of the numbers of forms they are being asked to complete, some practitioners extra-bill for providing this service. It is useless for applicants to complain if the practitioner is the only person with knowledge of their medical condition or is the only person they can rely on for medical assistance. Applicants also can't complain if they don't know that practitioners cannot extra-bill.

Community legal clinics have a remarkable success rate in having ODSP eligibility denials overturned. This is due, in part, to their ability to provide the DAU with additional medical documentation. If clinics request additional medical information from a doctor, they are able to pay for a new report. If specialists' reports are absent, clinics may be able to connect an applicant with a specialist and pay for an assessment. However, clinics are finding their ability to provide additional and often costly medical information curtailed because of budgetary restrictions. Moreover, poor, unrepresented applicants may have a very difficult time establishing their eligibility since they are not in a position to pay for additional reports. In order for ODSP applicants to be able to provide all of the relevant information and documentation to establish their eligibility, at least some, if not all, of the costs of additional information should be recouped from the Ministry of Community and Social Services, particularly in those cases where the decision is overturned.

The poor quality of medical information might also be explained by the lack of access to specialists. Community clinic workers and agency staff frequently comment that the DAU appears to require that an applicant have a specialist for

each and every medical condition. Indeed, DAU Adjudication summaries frequently refer to the fact that someone did not have a specialist as a justification for finding that a condition is not substantial. But the reality is grim. Many people with disabilities, particularly those outside of urban centres, do not have access to specialists. Some people with disabilities do not even have a family physician. Where specialists are available, there may be lengthy waiting lists.

A different problem confronts people who may not have insight into their medical conditions, and therefore, may not see a doctor for that very reason. Others may fear the stigma attached to seeing a doctor or may fear being medicated for their condition. The most vulnerable and marginalized people who are desperately in need of ODSP benefits may not be able to access them for these reasons.

One of the ways of to address these problems is to permit the use of lay medicals. These were used under the former FB regime, but are no longer permitted unless the person has “prescribed qualifications”. Often, there is someone in the community who has the most consistent contact with the person with a disability, but who does not have the necessary qualifications to provide medical information to the DAU. For example, this “community” person might be an OW worker. The worker will already have information about education, work history, length of time on the social assistance system, and deferrals from OW participation requirements. The OW worker has met the applicant and may be able to provide information about someone’s restrictions or medical condition that might not otherwise be available. However, there are many other agency staff, including those from shelters, community centres, drop-ins, mental health agencies or community health clinics, who will be able to provide useful and valuable information about the applicant.

While we applaud the expansion of the list of those with prescribed qualifications to include social workers, we do want to mention that many social workers do not belong to the relevant association and are therefore not regulated. This means that they will not be able to complete the Activities of Daily Living form. A DDP that is completed by someone with knowledge of the applicant and their restrictions will present a fuller, richer and more detailed picture of the applicant; this will, in turn, assist in the quality of the decision-making at the DAU. Having DDPs filled out by a member of a regulated profession is not the only, or necessarily the best, way of ensuring the DDP contains sufficient documentation.

As mentioned elsewhere in this paper, adequate resources to support the program and its administration are critical for its success. If there is going to be a single-handed reliance on medical information, then it is critical that all applicants have access to informed health care practitioners without delay. In cases where specialists are either not available, or where the applicant does not want to avail him or herself of their services, other credible reports or information must be given significant weight. The list of those with “prescribed qualifications” needs

to be expanded to include other people with whom the person with a disability has contact and who may be able to provide information that would improve the decision-making process. Finally, there needs to be a range of resources and supports that ensures that applicants are linked to health care and community resources.

## **E. QUALITY AND TIMELINESS OF DAU ADJUDICATION**

The Ontario Provincial Auditor's Report documents that in 2003, 80% of all negative disability determination decisions that were appealed to the Social Benefits Tribunal were overturned. The overwhelming success of these types of appeals directly calls into question the quality of decision making at the DAU.

The Ontario Court of Appeal has provided significant guidance on the definition of disability in the ODSPA. In *Gray v. The Director of the Ontario Disability Support Program*, the Court specifically held that the definition of disability in the new legislation is broader than the former definition under the *Family Benefits Act*:

Compared with its predecessor and similar federal legislation, it would appear that the current definition of "person with a disability" in the ODSPA was intended to encompass a broader segment of society and to provide assistance to persons with *significant* but not *severe* long-term functional barriers.

While we acknowledge that the DAU's decision making can only be as good as the information it gets, this can only account for part of the problem. There is a public perception that the DAU looks for ways to deny eligibility rather than to grant it. An attitudinal or culture shift may be necessary in order to address the problems with the disability determination process.

There is also an issue around whether the DAU should be more pro-active in soliciting missing information from health care practitioners. Since the DAU decides whether or not a condition meets the "substantial" threshold, it may raise an apprehension of bias or conflict if they solicited additional information from health care practitioners. In order to allay this concern, a script to be delivered by DAU adjudicators when speaking with health care practitioners that is crafted with input from community legal clinic staff and other agency staff would be useful.

We have been told that in some cases, the DAU does follow up with physicians. However, in such cases the applicant does not receive notice that this has happened. If the doctor does not respond to the DAU's inquiries, the applicant has no way of knowing what happened, why, and whether there might have been something they could have done to assist in this process. The applicant should always be advised of steps that the DAU takes with respect to an application – the applicant is the person whose livelihood is affected by any decisions made on

their application, and should have the option of being more involved in the process should they so choose. Furthermore, if the applicant has an advocate involved in their case, the advocate could play a significant role if they knew what was happening on the file.

The Provincial Auditor's Report also documents the uneven quality of the adjudicators' decision making, stating that "for the period July 2003 to December 2003, the rates at which individual adjudicators denied benefits ranged from 47% to 91% of the applications they initially considered". A Quality Assurance system has been implemented to consider, among other things, reasons for such significant variances. However, these figures are disturbing, and provide hard evidence of the need for an attitudinal and culture shift at the DAU. Given these figures, it is not surprising that appeals of disability determination denials are so successful at the Social Benefits Tribunal level.

Despite the introduction of a Quality Assurance system, community legal clinics are still experiencing a high volume of disability appeals. In 2004, ODSP appeals constituted 38% of clinic casework. This figure is higher than that in any other area of law practiced by community clinics. This also demonstrates that the quality of decision making at the DAU needs to be improved.

The very recent experience of advocates confirms that the concerns expressed in *Denial by Design* are still relevant today. For example, an ODSP appeal hearing in January 2005 dealt with a woman suffering from Post Traumatic Stress Disorder resulting from a 20-year abusive marriage. The DAU was given medical reports from both her family physician and psychiatrist, extensively documenting anxiety, depression, agoraphobia, panic attacks, insomnia, inability to interact with people, and inability to concentrate. The DAU adjudicator dismissed all this evidence, saying that since she is separated from her husband her Post Traumatic Stress Disorder should be subject to improvement (she had been separated for over 11 years). The Tribunal found:

Not only is there significant medical evidence that this Appellant's mental impairments stem from a lifetime of abuse, . . . there is ample medical evidence of continuing substantial impairment which substantially restricts the Appellant's ability to function in any workplace.

SBT# 0312-09776

### TIMELINESS OF DAU ADJUDICATION

The Provincial Auditor's Report speaks to considerable delays in processing and adjudicating applications. While a process that would expedite decision making would be beneficial to applicants, a speedier process that does not address the poor quality of decisions made would not be in an applicant's best interests.

As of January 2006, we have learned that the average length of time for the DAU to make their initial decision on eligibility is 9 months from the date of receiving the completed application package. Even when their decision is that the client is disabled, it will take at least two or three months before the processing is done by the local ODSP office to actually get the client on ODSP benefits. So now people with disabilities who are accepted without appeal are waiting at least a year for income support; people who have to appeal will wait another year for a final determination of their case.

When clients have to wait this long, they suffer more than the stress of not knowing whether they will be found to be disabled or not. They also lose money when they are actually found disabled, since the legislation only allows retroactive benefits to be paid for four months prior to the date of the Director's first decision. So people who have been suffering severe financial stress, depleting all of their resources and usually going into debt while waiting for a decision, are denied income they would have been entitled to had their application been dealt with within four months.

If the present application system is to be maintained, the DAU clearly needs additional resources to handle the volume of cases. We wish to reiterate that addressing the backlog of cases without also addressing the quality of DAU decision-making, would not be an adequate response to the needs of people with disabilities.

### RECOMMENDATIONS RELATED TO THE DAU

One way of addressing the above-noted concerns is to ensure that negative decisions are carefully and fully documented, with specific reference to the DAU's Adjudication Manual and detailed references to the DDP and supporting documentation.

Another solution is to require that the applicant's Self Report is carefully considered in all cases and given adequate weight. Since DAU adjudicators don't meet the applicants, this is the only opportunity they have to hear from the applicant themselves about how their medical condition impacts on them on a daily basis. Rarely do adjudication summaries refer to the Self Report unless it is used to reduce the applicant's credibility where the applicant's description of their limitations contradicts the Activities of Daily Living Form. The concern is that many applicants' day to day experience in living with a disability may be ignored if the Self Report diverges from what the medical practitioner relays.

Under the current regime that emphasizes "self-reliance", the Self Report often goes uncompleted because the nature of the applicant's disability has an impact on their ability to complete it, or because people feel that it is not seriously considered. However, when the information on that form is presented to the SBT,

it often assists the SBT in making a more informed decision, and results in a negative decision being overturned. If the Self Report was used in a more meaningful way by the DAU, it would also be necessary to direct resources to community agencies to enable them to assist applicants with the completion of that document.

DAU adjudicators generally have a background or training in medical or health related fields. However, they are being asked to make a decision based on law. A background in law or some additional legal training is essential if adjudicators are to make effective and efficient decisions. Adjudicators must also receive training in how to “measure” the cumulative impact and effect of more than one impairment or condition on a person, and how to appropriately assess episodic or cyclical disabilities and their impact on a person.

## **F. MEDICAL ELIGIBILITY REVIEWS / REASSESSMENTS**

The ODSP legislation states that “when a determination is made ... that a person is a person with a disability, the person making the determination shall set a review date for that determination unless he or she is satisfied that the person’s impairment is not likely to improve.” (*ODSPR 5*) ODSP recipients who were grandparented and transferred from the old Family Benefits system do not have review dates. However most recipients who applied and qualified for ODSP have a review date that may be 2 to 5 years from the time they were found eligible. Often, review dates were routinely assigned regardless of whether or not the person’s condition had any chance of improvement.

Many people who are granted ODSP benefits experience significant anxiety and worry over review dates. Arguably it may be undermining the program’s aim of encouraging employment activities, as recipients are unsure of the criteria against which they will be assessed during a medical review and fear a possible loss of benefits. For those who are chronically ill or disabled, this looming date adds considerable, but avoidable, stress to their lives. As the system is backlogged as a result of new applications, the medical eligibility review process adds considerable strain on Ministry and community resources. Only those people whose condition may improve should be assigned review dates.

From 2000 to 2002, medical reviews were completed for about 2,700 recipients and in 204 cases the individuals were found to be no longer eligible. Since March 2002, reassessments have been put in abeyance by the Ministry due to a lack of sufficient resources to implement them and at the same time continue processing new applicants. According to the Provincial Auditor’s report (2004), Ministry staff estimated that as of December 2003, 14,000 medical reassessments were overdue. That number would be significantly higher by April 2005.

The current ODSP review procedure requires an application *de novo*, necessitating the completion of a Disability Determination Package and the

submission of all relevant medical reports. A reassessment procedure that demands a full ODSP re-application by a current recipient of ODSP is exceedingly time consuming and resource intensive. In addition to the demand placed on the health care system to again provide completed applications and all relevant medical reports, the current procedure results in more appeal work. An adjudicator at the DAU, for example, sometimes reaches a different conclusion on review than the one on the original application even when there is little change in the medical evidence. Because of this insistence on a complete re-application procedure, when reassessments re-commence there is potential for an alarming increase in SBT appeals from the already elevated rate.

The Toronto ODSP Roundtable group in a submission to the Minister of Community and Social Services (December 3, 2004) stated: "To use a full-reapplication process to conduct reviews (employing the DDP) will in all likelihood mean incredible costs for the health care system, community service providers, COMSOC, Legal Aid Ontario, and the Social Benefits Tribunal. Such a process is exceedingly hard on recipients and also arguably a tremendous waste of time and resources; an expense our health care system and community services can ill afford."

The Roundtable's recommendations were for ODSP reviews to rely on a short update report from a recipient's health care provider that limited itself to three areas of inquiry: no change in the person's health status; further deterioration leading to the end of the assignment of review dates; or sufficient improvement in the person's conditions to warrant leaving the disability program.

As noted above, the DAU is currently (as of January 2006) taking nine months to process initial applications. Adding reassessments of current recipients to the DAU workload without added resources will clearly exacerbate this problem.

With so many problems created by the current complex application system, it is not tenable for the same process to be used for the reassessment of recipients who have already qualified for the program.

## **CONCLUSIONS**

The objective of ODSP is to ensure that all people who meet the definition of "disabled" as defined in the legislation, and who otherwise qualify, receive income support. It is essential therefore to target reforms at the initial stage of the eligibility determination process. To state the obvious, with a higher rate of success at the application stage, the number of requests for internal reviews will decrease and similarly the number of appeals to the Social Benefits Tribunal will also be reduced. It would be anticipated that the cases going to the Tribunal would then involve applicants whose medical conditions are more contestable and fewer DAU decisions would likely be overturned.

This submission makes the following key recommendations to improve the ODSP application and adjudication processes.

### **1. Ensure that people who qualify have access to ODSP benefits.**

Recommendation: Remove the discriminatory provision excluding persons with addictions, who otherwise meet the statutory definition of disability, from receipt of benefits.

Recommendation: Ensure that the DAU takes a broad and holistic approach to the determination of eligibility for ODSP benefits, using a social model of disability, looking at the “whole person” and applying the Court of Appeal’s decision in *Gray v. The Director of the Ontario Disability Support Program*.

### **2. Commit resources to assist people who require ongoing support with the ODSP application process.**

Recommendation: The Ministry must recognize its “duty to accommodate” people with disabilities who apply to ODSP. Accordingly, resources should be provided to assist people with the application process. Assistance should include liaison with appropriate health professionals to ensure the package is not only completed on time, but that it fully and adequately documents all health conditions and restrictions in activities of daily living. Applicants should also be assisted in completing the Self-Report, meeting all deadlines, and dealing with the Internal Review and appeal process if necessary. Because people access help in a variety of places, support to applicants also needs to be available from a variety of sources, including OW and ODSP offices, and especially in the community through street outreach to homeless and mentally ill applicants.

Recommendation: The Ministry should develop processes and cost-sharing to allow for psycho-educational assessments to be done upon referral by appropriate OW and ODSP staff.

### **3. Ensure that the Information Provided in the Disability Determination Packages is Complete**

Recommendation: The DDP needs to be revised again, to simplify the forms and write them in clearer language, to get closer to the goal of collecting all necessary information at the application stage rather than the appeal stage. The Ministry needs to consult with front line community workers who assist applicants as well as with the medical community in revising the package.

Recommendation: Make the disability determination process more public and transparent.

Recommendation: Provide training on a variety of topics to all persons who have the qualifications to complete the DDP.

Recommendation: Applicants and/or their advocates who provide additional medical information should be reimbursed for the costs of that information, particularly in cases where a negative decision is overturned.

Recommendation: Expand the list of persons who are eligible to complete the DDP. Accept “lay medicals” especially in those cases where the applicant may not have access to someone with the prescribed qualifications, or where the lay medical adds to the application significant value and information that might not otherwise be available.

#### **4. Improve the Quality and Timeliness of DAU Decision Making**

Recommendation: Commit additional resources to the DAU to ensure that initial decisions on applications are made within three months of receiving the completed applications, and that Internal Reviews are done within one month.\*

Recommendation: An analysis of the cases that are initially denied by the DAU but then granted during the IR and Appeal process should be done to see what kinds of disabilities tend to be involved in such cases. An examination of the type of information used to verify the disability in those cases may lead to a method of gathering such information at the initial application stage.

Recommendation: Continue Quality Assurance Initiatives at the DAU.

Recommendation: Bring about an attitudinal or culture shift at the DAU, so that the focus is on granting instead of denying ODSP benefits to eligible applicants.

Recommendation: Involve the applicants in the DAU’s processes wherever possible.

Recommendation: DAU Adjudicators must carefully and fully document the reasons for denying eligibility for ODSP benefits.

Recommendation: Ensure that the Self Report is seriously considered by the DAU and provide resources to the community to ensure that the Self Report is completed.

Recommendation: Provide adequate and effective training to DAU Adjudicators on a wide variety of topics, including how to apply the law.

#### **5. Medical Eligibility Reassessments**

---

\* This recommendation added January, 2006.

Recommendation: Review the process of assigning medical reassessment dates to ensure that only those recipients whose condition may improve are subject to a review.

Recommendation: Revise the medical reassessment process and rely on an update from the applicant's health care practitioner that speaks to whether there has been an improvement or deterioration in the condition, and whether there should be another medical review in the future.

## REFERENCES

Auditor General of Ontario, *2004 Annual Report*, Office of the Auditor General, November, 2004, <http://www.auditor.on.ca/english/reports/en04/en04fm.htm>

Canadian Mental Health Association, Ottawa Branch, *Community Project Grant Proposal, 2004: ODSP Application Support Worker*, Anglican Social Services - Centre 454 and CMHA-Ottawa, 2004.

*Gray v. Ontario (Disability Support Program, Director)* (2002), 212 D.L.R. (4th) 353 (C.A.).

Income Security Advocacy Centre, *Denial by Design ... the Ontario Disability Support Program*, Income Security Advocacy Centre, 2003.

Matthews, Deb, *Report to the Honourable Sandra Pupatello, Minister of Community and Social Services: Review of Employment Assistance Programs under Ontario Works and ODSP*, December, 2004.

Mushinski, Marilyn, SBT file #0312-09776, January, 2005.

ODSP Action Coalition Applications Working Group, *Best Practices for Assisting ODSP Applicants*, November, 2003.

ODSP Action Coalition, *Access to ODSP Campaign: Summary of Forum Reports*, Clinic Resource Office, January, 2003.

ODSP Toronto Roundtable, *Addressing the Issue of Disability Determination Reviews on Medical Grounds*, ODSP Toronto Roundtable Report, December, 2004.

ODSP Toronto Roundtable, *Proposals to Enhance Service & Accessibility for ODSP Applicants with Mental Health Disabilities*, ODSP Toronto Roundtable Report, October, 2004.

*Ontario (Director, Disability Support Program) v. Gallier*, [2000] O.J. No. 4541 (30 November 2000), Court File No. 531/99 (Div. Ct.), leave to appeal refused (7 June 2001), Court File No. M26675 (C.A.).