

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 30 Aug 2012 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, the person requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 consisted of the following:

1. The appellant's Application for PWD Designation dated 14 May 2012. The application included the appellant's Self Report (SR), a Physician Report (PR) dated 24 May 2012 and an Assessor Report (AR) dated 25 May 2012. The PR and AR were both completed by the appellant's general practitioner (GP) who has been the appellant's physician for 9 months and saw him over 11 times during that period.
2. The appellant's Request for Reconsideration dated 09 August 2012, to which was attached a summary by the appellant's advocate of the *Hudson* decision entitled "PWD eligibility criteria: Judicial Review sets standards" and a letter from the GP dated 22 August 2012 in which the GP indicates agree/disagree to statements attributed to the appellant by his advocate concerning his impairments (see below).

In the SR, the appellant writes that his disability has major effects on day-to-day living, from mental stress to physical pain. First of all, he has severe psoriasis which covers 90% of his body. This lowers his self-esteem and it is very hard to have job interviews when he has no self-esteem. Also, according to his doctor, this causes joint problems, which he finds are getting worse all the time. He also sees a therapist for PTSD. This is really a problem when he is trying to find work that he might be able to do. He also has a lot of joint pain that is getting worse all the time from an injury to his back that he received about 20 years ago. It is getting worse and with his back pain and other pain in his joints he gets pain just walking a few blocks now.

He writes that he also has diabetes, liver problems and [high] blood pressure which are very hard to manage with diet and trying to exercise, finding it hard to balance this while working now that he has found out that he is anemic. Needless to say there are more days that he doesn't feel well enough to work. He writes that he works part-time as a security officer on weekends in nightclubs but this work often comes with violence and arrests and his body just can't take it anymore. The arrests are most of the time violent and suspects are taken to the ground cuffed. This is very hard on him.

In closing he writes that at this time he can take care of himself but he just can't work in any job he has tried in the past 10 years because of his disabilities.

In the PR, the GP diagnoses the appellant with chronic liver disease (onset 16 years ago), T2DM [Type 2 diabetes] (onset 16 years ago), chronic depression (onset ~ 5 years ago), PTSD [Post-traumatic stress disorder] (onset 3 years ago) and psoriasis (onset ~ 10 years ago). Under health history, the GP writes: "DDD [degenerative disc disease] L spine - has ongoing pain. Taking narcotic for that. Does physical work that aggravates his back pain. Anxiety from chronic pain that aggravates his ongoing depression." The GP indicates that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA. In answer to the question as to whether the appellant requires any prostheses or aids for his impairment, the GP answers "No."

Under degree and course of impairment, the GP indicates that the appellant's impairment is likely to continue for two years or more, noting DDD L spine ongoing, depression/anxiety ongoing, and psoriasis.

In terms of functional skills, the GP reports that the appellant can walk 1 to 2 blocks unaided, climb 2 to 5 steps unaided, lift 15 to 35 pounds and remain seated less than an hour. The GP reports there are no difficulties with communication and no significant deficits with cognitive and emotional function. With respect to DLA the GP reports that the appellant is actively restricted on a continuous basis with

respect to daily shopping, mobility inside the home and mobility outside the home. The GP reports no restrictions with respect to personal self care, meal preparation, management of medications, basic housework, use of transportation, management of finances and social functioning.

In the AR, the GP reports that the appellant lives alone. The GP lists the appellant's mental or physical impairments that impact his ability to manage DLA as (1) chronic depression/anxiety and (2) ongoing back pain. As to ability to communicate, the GP assesses the appellant's ability in speaking, reading, writing and hearing as good. With respect to mobility and physical ability, the GP assesses the appellant independent for walking indoors. For walking outdoors, climbing stairs, standing, lifting and carrying and holding, the GP assesses the appellant independent but taking significantly longer than typical with a comment: "Due to back pain it is difficult for him to climb, lift, carry and walk for more than 10 min."

In terms of cognitive and emotional functioning, the GP assesses a major impact for emotion, motivation, and other emotional or mental problems. No impact is reported for bodily functions, consciousness, impulse control, attention concentration, executive, memory, language, psychotic symptoms, and other neuropsychological problems. Under comments, the GP lists PTSD, anxiety and chronic ongoing depression.

With respect to DLA, the GP assesses the appellant independent in all aspects of personal care, and requiring periodic assistance for laundry and basic housekeeping, noting problems with back pain. The GP makes no assessment with respect to meals, pay rent and bills, medications and transportation, crossing off these sections of the report.

As to social functioning, the GP assesses the appellant independent with respect to making appropriate social decisions, interacting appropriately with others, and securing assistance from others. Periodic support/supervision is required for ability to develop and maintain relationships and ability to deal appropriately with unexpected demands. The GP describes the impact of the appellant's mental impairment on his relationship with his immediate social network and extended social networks as marginal functioning. The GP does not indicate any support/supervision is required.

In terms of assistance provided for the appellant, the GP does not indicate that any assistance is provided by other people. The GP reports that the appellant routinely uses a cane and that he does not have an assistance animal.

In the letter attached to the appellant's Request for Reconsideration, the GP indicates agreement that, in addition to the diagnoses listed in the PR, the appellant has also been diagnosed with disc degenerative disease [sic], anxiety and joint pain. The GP indicates agreement with the appellant's statements that: he is only able to walk up to ½ block before he has to stop and take a rest; he is unable to climb any stairs at all without the use of a handrail; he is only able to lift up to 10 pounds at one time (with the comment that on good days he can do more); and he is only able to sit for a maximum of 15 – 20 minutes at one time. In connection with the appellant's statements that the following cognitive and emotional functioning has a major impact on his daily functioning, the GP indicates agreement with bodily functions (sleep disturbance), emotion, impulse control, attention/concentration, motivation, and motor activity; the GP indicates disagreement with respect to executive, learning disabilities (dyslexic) and hostility. With respect to the appellant's statement that

he is in need of continuous assistance or is unable to do the following DLA due to the combination of his conditions (he has to rely on his ex-wife and son to complete these tasks for him), the GP indicates agreement for most tasks listed, namely regulate diet, laundry, basic housekeeping, going to and from stores, making appropriate choices, and carrying purchases home, while disagreeing with a need for assistance with budgeting and social functioning.

In his Notice of Appeal dated 10 September 2012, the appellant gave no reasons for appeal, stating that he needs help from an advocate.

At the hearing, the appellant stated that he wasn't always like this - he has gone from what he considered to be a normal person, married and with a management job in a big company, to living alone in poverty. His chronic anxiety affects his daily functioning in many ways: even answering the phone or going to the mailbox brings on anxiety and going shopping is sometimes more than he can handle. He can't deal with going to the supermarket, as he is overwhelmed there. This has been going on for some years and he had been seeing a psychiatrist, but the anxiety persists. Despite his diabetes, he is unable to plan a healthy diet, instead managing on fruit cups, crackers and cheese and the occasional prepared meal heated up by his son. He stated that he also has no control over his spending - as soon as he gets money, it's gone. His son has to look after paying rent for him. He keeps to his apartment and has no social life. Although he is normally friendly with people he meets or who visit, he can't stand any conversation over a few minutes. He also stated that walking is very difficult for him, having to take a rest after half a block and he soon tires. It takes him forever to get up a staircase, and then only by using both handrails.

In answer to a question, the appellant stated that he is able to put on his "game face" and occasionally work as a security guard, but no longer at a nightclub. The security work involves one or two shifts a week out of necessity when he needs the money. He said that this work is very hard on him, walking or standing and being on his feet for 12 hours.

In answer to a question, he stated that his GP did not know that he had a history of dyslexia and the GP did not understand the issue with budgeting and did not appreciate his difficulties with social functioning and his tendency to isolate.

The ministry stood by its position at reconsideration.

The panel finds that the new information provided by the appellant at the hearing concerning his medical condition is in support of the information and records that were before the ministry at the time of reconsideration. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2 of the EAPWDA.

Specifically the Ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The Ministry did determine that he met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

2 (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.
- (3) For the purposes of subsection (2),
 - (a) a person who has a severe mental impairment includes a person with a mental disorder, and
 - (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.

The following section of the EAPWDR applies to this appeal:

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.

The panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severity of mental impairment

The position of the ministry is that it is not satisfied that the information provided is evidence of a severe mental impairment. In the reconsideration decision the ministry noted that in the PR the GP reports no deficits to cognitive and emotional functioning, no difficulty with communication, and no restrictions to social functioning. The ministry goes on to note that the GP does report three major impacts on daily functioning in the AR: to emotion, motivation and other emotional or mental problems not otherwise described. Nine other aspects in this category have no impact at all. Social functioning is independent in three of five aspects, with periodic support/supervision required to develop and maintain relationships and to deal appropriately with unexpected demands. The ministry noted that the additional information provided in the GP's letter regarding mental functioning include sleep disturbance, impulse control, attention/concentration and motor activity. However there is no description of how these aspects affect daily functioning nor is it clear whether these aspects are due to chronic pain or depression and anxiety. The ministry noted that this category of impacts is meant to be completed for applicants with an identified mental impairment or brain injury - physical factors such as chronic pain are not eligible criteria. The ministry concluded that as the appellant is able to make decisions about personal activities, care and finances and is able to relate to communicate and interact with others adequately, the ministry is not satisfied that the information provided is evidence of a severe mental impairment.

The position of the appellant is that the evidence shows that he has a severe mental impairment, with his GP diagnosing him with chronic depression and anxiety and PTSD, and reporting major impacts to emotion, motivation and other emotional or mental problems, with cognitive and emotional functioning impacted in the areas of bodily functions (sleep disturbance), emotion, impulse control, attention concentration, motivation and motor activity. Taken together with the appellant's evidence with respect to his tendency to isolate himself and his inability to manage money, the information conclusively demonstrates the severity of the appellant's mental impairment. The advocate argued that the ministry has failed to consider that the appellant has both mental and physical conditions, that that they are interrelated and exacerbate the impact of the impairments.

In addressing this criterion, the panel has drawn upon the ministry's definition of "impairment," as set out on the top of page 8 of the PR. This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." The cause is usually set out as a diagnosis of a disease, condition, syndrome or even a symptom (e.g. pain). Under this definition, the diagnosis or symptoms related to the cause are not as relevant as the restrictions – the impact. A severe impairment requires the identified cause to have a severe impact. The assessment of severity is therefore based on of the impact on daily functioning, in such areas as functional skill limitations, cognitive and emotional deficits, restrictions on the ability to manage DLA and assistance required. These impacts can range from mild to major and one medical practitioner's assessment might differ from another's. The panel therefore finds it reasonable that the ministry, in order to assess the severity of these impacts, would expect some descriptive detail or examples as to how, to what extent, when, for how long or under what circumstances these impacts are manifested.

In the present appeal, the GP has provided diagnoses in the PR with respect to the appellant's mental health - chronic depression and anxiety and PTSD, and identified major impacts in three areas of daily functioning, with the comments "PTSD, anxiety, chronic ongoing depression" and no other narrative. In the additional letter provided, the GP agreed that the appellant states that there are also major impacts in six other areas of functioning, with no comments by the GP to elaborate on these impacts or an explanation for the change in his assessment. Although the appellant's evidence with respect to his social functioning is that it is at a minimal level and he has an inability to manage money, in the letter provided, his GP disagrees that the appellant states there is a need for assistance with either budgeting or social functioning. There is no detailed descriptive information as to how these impacts are manifested in daily functioning. Although the appellant had been seeing a psychiatrist, there was no psychiatric assessment provided. Without this information the panel finds that the ministry reasonably determined that a severe mental impairment had not been established.

Severity of physical impairment

In terms of physical impairment, the ministry noted that in the PR the GP indicates that the appellant is able to walk 1-2 blocks and to climb 2-5 steps unaided, lift 15 – 35 pounds, and to sit less than 1 hour. The ministry stated that the appellant is independently able to do all aspects of mobility and physical abilities, albeit these activities take longer than typical - how much longer is not described. The ministry also referred to the additional information contained in the GPs letter, including a self report that the appellant is only able to walk half a block before needing to stop and rest, that he requires a handrail to climb stairs, and can carry up to 10 pounds at a time, although the GP adds: "In good days he can do more," and to sit for 15 to 20 min. a time. The ministry stated that these physical limitations are not severe in nature: it appears that once rested the appellant could continue to walk further and is able to lift more than 10 pounds on good days. The ministry concluded that the functional skills limitations are more in keeping with a moderate degree of physical limitation. While chronic pain is the limiting factor aggravated by physical work, a remedial measure in the form of narcotic analgesic is in place to ameliorate symptoms. The ministry is therefore not satisfied that the information provided is evidence of a severe physical impairment.

The position of the appellant is that he has been diagnosed with chronic liver disease, diabetes, psoriasis, DDD, with accompanying chronic low back pain, and joint pain. The GP has reported that as a result of these conditions, he has significant mobility restrictions: he can walk only 1-2 blocks, needing a rest after half a block and climbing stairs requires the use of a handrail. Most days he can only lift and carry up to 10 pounds. It is only reasonable to conclude that these restrictions, caused by constant pain, demonstrate a severe physical impairment.

The panel finds the evidence relating to the severity of the appellant's physical impairment to be inconclusive and contradictory. The panel notes the physical skill limitations reported by the GP are that the appellant can walk 1-2 blocks unaided, while the appellant reports he needs a rest after half a block, the GP reported that he can climb 2 to 5 steps unaided, while the appellant stated that he cannot climb stairs without the use of a handrail, and the GP reported that the appellant can lift 15 to 35 lbs., while the appellant stated that he can only lift up to 10 lbs., to which the GP commented "on good days, he can do more". There is no information provided as to the frequency of the appellant's good days. In the AR, the GP assessed the appellant as independent with walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding, with all activities except walking

indoors taking significantly longer than typical ("due to back pain it is difficult for him to climb, lift, carry and walk for more than 10 min.") The appellant's own evidence is that he continues to work occasionally as a security guard, with long periods of standing and walking, seeming to indicate better functionality than reported. The GP reports in the PR that no assistive device is required to compensate for his impairment yet notes in the AR that a cane is routinely used. Joint pain has been identified as an issue, but which joints are affected has not been specified. DDD has been diagnosed, but no diagnostic imaging report has been provided that would have assisted the ministry in assessing the severity of that condition. On the basis of the above, the panel finds that the ministry reasonably determined that a severe physical impairment had not been established.

Whether DLA are significantly restricted

The position of the ministry is that it is not satisfied that the information demonstrates a severe mental or physical impairment that in the opinion of a prescribed professional significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The ministry noted that in the PR the GP reports restrictions to daily shopping and mobility inside and outside the home. No restrictions are reported for seven of 10 other tasks including social functioning. The ministry also noted that in the AR the GP reports that 26 of 28 activities are performed independently with periodic help with laundry and basic housekeeping due to back pain. There is no indication of the frequency or duration of periodic assistance. The ministry also noted that the appellant is independently able to perform three of the five aspects of social functioning. The ministry noted the additional information provided in the GP's letter that the appellant requires help to regulate diet, to go to/from stores, to make appropriate choices and carrying purchases home. The ministry stated that it is understood that the appellant has limitations to walking and lifting/carrying which would explain the need for help for longer distances and heavier weights. However the appellant lives in a small city with public transit and could use this to shop and use a personal shopping cart to transport purchases home. The ministry concluded that as the majority of DLA are performed independently or require little help from others with longer distances and heavier weights, the information from the prescribed professional does not establish that he's impairments significantly restricts DLA either continuously or periodically for extended periods.

The position of the appellant is that the application sets out ample evidence to demonstrate that his ability to perform DLA is significantly restricted. In the PR, the GP clearly indicates that he is restricted in daily shopping and his mobility inside the home and outside the home, on a continuous basis. In the additional information provided, the GP agrees that the appellant is in need of continuous assistance or is unable to do six listed tasks/activities due to the combination of his conditions and that he has to rely on his ex-wife and son to complete these tasks for him. Clearly it is the opinion of his prescribed professional that he meets this criterion.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, not established in this appeal, and be in the opinion of a prescribed professional. As with the severity of impairment criteria discussed above, it is reasonable that the ministry would expect that the opinion of a prescribed professional be substantiated by information that would satisfy the ministry that the direct and significant restrictions in the ability to perform DLA, either continuously or periodically for an extended period, are validated. No such detail is provided in the present appeal. In the PR, the GP assessed the appellant as not restricted with the DLA of personal self care, meal preparation, management of medications, basic

housework, use of transportation, management of finances and social functioning. In the AR, the GP assessed the appellant as independent with all tasks of personal care and shopping, with periodic assistance required for laundry and basic housekeeping, commenting only "problems with back pain." He indicated that the DLA of meal preparation, management of finances, medication and transportation were not applicable. Although the GP agreed in the letter provided that the appellant states he is in need of continuous assistance with some tasks of personal care, housework and shopping, for example, no information is confirmed by the GP as to how often the ex-wife or son helps with the cleaning or shopping or what they actually do to help that the appellant cannot do for himself. Without the information to substantiate the tick marks in the documentation, or explain the significant discrepancy between what was contained in the GP's letter and the information in the AR regarding DLA, the panel finds that the ministry reasonably determined that the information provided did not establish that this criterion had been met.

Whether help to perform DLA is required

In the reconsideration decision, the ministry held that as it had not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

The position of the appellant is that he needs significant help to perform DLA on a continuous basis. He needs the help of his ex-wife and son for shopping and cleaning; further, his son has taken over management of his finances, including paying the rent. The appellant also requires the use of an assistive device - a cane - for mobility. Clearly the evidence shows that this criterion has been met.

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.