

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry's) reconsideration decision dated September 17, 2012 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 has an impairment that 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 was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, 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 ministry representative requested permission for an observer from the ministry to attend the hearing. The appellant was consulted and had no objection.

The information before the ministry at reconsideration comprised:

- a PWD application which included; a Physician Report (PR) and a Assessor Report (AR) both completed and signed by the appellant's general practitioner (GP) on June 10, 2012;
- a Self Report (SR) dated April 22, 2012;
- a letter dated July 12, 2000 from Dr. B indicating that the appellant had been involved in 3 motor vehicle accidents, his problems continue to be persistent neck and back pain, which is worse when standing or in a flexed holding position and recommends he should maintain his activity level;
- a letter dated April 4, 2012 from a cardiologist indicating that the appellant has made a good recovery following his recent heart attack and he is recommended to increase his activity and walking to see if he can get into better aerobic shape;
- a letter dated May 10, 2012 from the same cardiologist recommending that the appellant continues everything that he is doing at the moment because he is having no problems; and
- a Request for Reconsideration dated August 31, 2012.

Diagnoses

The appellant's GP, who has known the appellant for 3 months and seen him 2-10 times, diagnoses him with chronic neck and back pain and acute myocardial infarctions.

Mental Impairment

In the PR, the GP indicated the appellant has no significant deficits with cognitive and emotional function. The two sections in the AR that are to be completed only for applicants with an identified mental impairment or brain injury were noted as follows: under cognitive and emotional functioning, the GP reported no impact for all 14 items and under social functioning, the appellant was described as having good functioning with both immediate and extended social networks.

In his SR, the appellant states that he suffers from anxiety, depression and feelings of helplessness. In his request for reconsideration, the appellant indicates he has been prescribed anti-depressant medication.

Section 2(1)(b) of the EAPWDR identifies two DLA that are specific to a person with a severe mental impairment: (i) make decisions about personal activities, care or finances; and (ii) relate to, communicate or interact with others effectively. In the AR, the GP reported the appellant as having a good ability to communicate in all areas, (speaking, reading, writing and hearing) and as being independent with respect to personal care, medications and paying rent and bills and social functioning.

Physical Impairment

The appellant's GP indicates that the appellant has not been prescribed any medications and/or treatments which interfere with his ability to perform DLA. With respect to functional skills, the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ stairs unaided, lift 15 to 35 lbs., and has no limitation to remain reseeded. The GP notes that the appellant gets pain on repetitive movements and lifting. In the AR, the GP

reports that all aspects of mobility and physical ability are independent.

The appellant wrote that he has back, neck and leg pain which are debilitating at times and that he is unable to walk, stand or sit for long periods of time, finds driving difficult and getting in and out of bed and climbing stairs draining and painful. The appellant also noted that he is unable to carry anything heavy.

DLA

The GP reports in the PR that the appellant's impairment does not directly restrict his ability to perform DLA.

In the SR, the appellant indicates that he relies on others to perform tasks such as grocery shopping, carrying heavy items and cleaning his home.

Help with DLA

Under the DLA listed in the AR, the GP reports that all areas of DLA are independently managed.

Information Received at Hearing

Distributed at the hearing, a letter dated March 25, 2013 from the appellant's new physician (January, 2013) reports that the appellant, after having suffered a myocardial infarction in 2012, and following the advice of his medical team, quit smoking and then gained a considerable amount of weight. The appellant has not been able to exercise or get in better shape because of his chronic neck and back pain. Measures are being taken to intervene in this cycle and address the pain. "Unfortunately he is in a vicious cycle of pain leading to inability to exercise leading to poor conditioning leading to further weight gain leading to worsening pain." The physician writes that the appellant's functional skills as reported at the time of his PWD application would take a great deal of time and tax him significantly. The physician adds that he doesn't believe that the appellant could complete all of these tasks in one day or for any meaningful length of time in the case of lifting. The physician also indicates that the appellant finds it difficult to ask for help and to admit that he needs help. This may be why his application reflects that the appellant may be functioning better than he actually is.

At the hearing the appellant testified that he cannot function as a normal person and takes a lot longer to do simple tasks. He imposes a 1 ½ hour walk on himself daily even though he must stop because of pain. He has difficulty tying his laces and it takes him longer than a normal person because of pain. The appellant indicates that he wakes up at 4:00 am and usually doesn't sleep very well. The appellant also stated that he was requested by his former GP to find a new doctor. The appellant argues that if his overall situation and medical conditions were considered all together then he would qualify for disability assistance.

The ministry expressed concerns that the letter from the appellant's new physician was speculative and provided a self-report from the appellant. Additionally, the ministry noted that the appellant's relationship with this physician was new.

The panel finds that the letter from the appellant's new physician as well as the appellant's testimony are further description of the impact of the appellant's previously diagnosed medical conditions and are thus admissible under section 22(4) of the Employment and Assistance Act as being in support of the information and records before the minister at reconsideration.

No additional evidence was provided by the ministry on appeal.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably concluded that the appellant has not met the all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods resulting in the need for 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 at least 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR which are set out below.

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

(4) The minister may rescind a designation under subsection (2).

2 (1) For the purposes of the Act and this regulation, **"daily living activities"** ,

- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
 - (i) prepare own meals;
 - (ii) manage personal finances;
 - (iii) shop for personal needs;

- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self-care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Severe Physical Impairment

With respect to the existence of a severe physical impairment; the appellant's position is that he has back, neck and leg pain which are debilitating at times. He is unable to walk, stand or sit for long periods of time, finds driving difficult and getting in and out of bed and climbing stairs draining and painful. The appellant is unable to carry anything heavy. The appellant argues that his overall situation and medical conditions must be considered all together which would qualify him for disability assistance.

The ministry's position is that the GP has reported that the appellant is independent in all the mobility and physical abilities and notes that he is unable to do repetitive movements. It is the ministry's opinion that as the appellant is able to independently manage his DLA and can stand for 15 minutes before pain sets that his functional skill limitations described by the GP are more in keeping with a moderate degree of impairment and that there is not enough evidence to establish a severe physical impairment.

With respect to the appellant's physical impairment, the panel finds that a medical practitioner has diagnosed the appellant with chronic neck and back pain and acute myocardial infarctions. In terms of the impact that these medical conditions have on the appellant's ability to function, the panel finds that the evidence establishes that despite his chronic pain, the appellant is able to maintain a reasonable level of physical function. In particular, the appellant manages a 1 ½ hour walk daily while stopping as required for pain. The evidence indicates that daily tasks take longer than typical for the appellant to accomplish however there is no specific information to indicate how much longer. The panel also finds that the evidence does not indicate that

the appellant requires an assistance device or the assistance of another person. In view of the above noted evidence respecting the appellant's level of independent physical functioning, the panel finds that the ministry reasonably determined that a severe physical impairment was not established under section 2(2) of the EAPWDA.

Severe Mental Impairment

With respect to a severe mental impairment, the appellant's position is that he suffers from anxiety, depression and feelings of helplessness and that he has been prescribed anti-depressant medication.

The ministry's position is that the evidence does not establish that the appellant has a severe mental impairment.

The panel finds that there was no diagnosis of a mental health condition by the appellant's GP to assess the severity of impairment and its impact on daily functioning. While the appellant indicates that he has prescribed medication; the panel finds that there is no evidence to indicate whether he is actually taking the medication or whether it is having any effect on him. The panel acknowledges that the appellant's new physician suggests that the appellant requires further mental health assessment.

In view of the above, the panel finds that the evidence does not confirm that the appellant has a loss or abnormality of psychological functioning causing a restriction in the ability to function independently, effectively or appropriately which is indicative of a mental disorder. For these reasons, the panel finds that the ministry was reasonable in not being satisfied that a severe mental impairment was established under section 2(2) of the EAPWDA.

Significant Restrictions to DLA

Regarding the degree of restriction with DLA, it is the appellant's position that; he is hardly able to get through his daily activities without taking many breaks or postponing errands for another day, is weak most days and not able to stand or walk for more than a few minutes. The appellant states that while he is not able to function as a normal person because of his chronic pain in his back, legs and neck; he is able to care for himself and also relies on others to perform tasks such as grocery shopping, carrying heavy items and cleaning his home.

The ministry's position is that the information provided by the appellant's GP is that all DLA and aspects of social functioning are independently managed and there was no indication that the appellant took significantly longer to perform. Therefore, the ministry is not satisfied that the information demonstrates that a severe mental or physical impairment significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

The panel finds that the appellant's physician's evidence is that the appellant performs all DLA independently and is not restricted but does experience pain with repetitive movements and lifting. The letter dated March 25, 2013 provides similar information to the appellant's evidence, where he identifies some limitations in his ability to manage DLA due to chronic pain in his neck, legs and back. The panel finds that without an opinion by a prescribed professional to indicate that as a result of a severe physical or mental impairment, the appellant is directly restricted in his ability to perform DLA, it is insufficient to establish that a significant restriction exists to DLA. The panel also finds that the legislation requires that the minister be satisfied that as a result of a severe physical or mental impairment, a person be directly restricted in the ability to perform DLA. Therefore, the panel finds the ministry was reasonable in not being satisfied that in the opinion of a prescribed professional

the appellant is directly and significantly restricted in his ability to perform DLA either continuously or periodically for extended periods under section 2(2) (b) (i) of the EAPWDA.

Help to perform DLA

Regarding the need for help with DLA, the appellant's position is that he manages to care for himself despite his chronic pain and depression but also relies on others to perform tasks such as grocery shopping, carrying heavy items and cleaning his home.

The ministry argues that it has not been established that DLA are significantly restricted and therefore, it cannot be determined that significant help is required from other persons.

Regarding the need for help with DLA, section 2(2) of the EAPWDA requires that the minister be satisfied that, in the opinion of a prescribed professional, a person needs help with DLA as a result of direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. Pursuant to section 2 of the EAPWDR, help is defined as a person requiring an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

Accordingly, the panel finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that help is required to perform DLA as a result of direct and significant restrictions as is required by 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.