

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 23 July 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 PWD Designation Application dated 11 January 2012. The Application contained:
 - The appellant's Self Report (SR1).
 - A Physician Report (PR) dated 03 March 2012 completed by the appellant's general practitioner (GP) who has known the appellant since January 2010 and seen him 11 or more times in the past year.
 - An Assessor Report (AR) dated 03 March 2012 completed by the same GP.

Attached to the Application are the following:

- A note from the GP dated 07 December 2011 to a specialist regarding a consult on gastroscopy.
- An emergency room Consultation and Progress Report regarding an overnight visit by the appellant on 12/13 December 2011.
- A Consultation and Gastroscopy Report from a GI specialist reporting on an examination during the same ER visit.
- A letter dated 20 December 2011 from a surgeon regarding a planned resection.
- A report from a Hepatitis Clinic, with lab results, dated 10 January 2012.
- Lab reports dated 25 January and 09 February 2012.
- A Surgery Pathology Consultation and an Operation Report from a laparoscopic cholecystectomy, liver biopsy and repair of umbilical hernia performed on 03 February 2012.

2. The appellant's Request for Reconsideration, dated 20 July 2012, including a statement by the appellant giving his reasons for reconsideration (SR2).

In the PR, the GP diagnoses the appellant with 1) active Hepatitis C with Cirrhosis, 2) Anger management issues/poor impulse control, possibly secondary to brain injury, 3) Anxiety, 4) Depression, and 5) Substance-related disorders – in remission, except tobacco.

The panel will summarize the evidence from the PR, AR and SRs relating to the appellant's impairments as it relates to the PWD criteria at issue.

Physical impairment

PR:

- Health history/severity: the GP writes:
 "Patient is very fatigued. Hepatitis C is thought to be responsible. However he has also recently had problems with cholecystitis (resulting in cholecystectomy) and gastric ulcer/gastritis which is under medical treatment. Recent liver biopsy confirms Hep C is causing cirrhosis. Treatment for Hep C is scheduled for future ... Prognosis guarded. He has also had significant weight loss. His endurance for physical activity is markedly reduced. His physical strength is significantly reduced due to loss of muscle mass. He is thought to have COPD based on tobacco -- we do not have pulmonary function tests - clinical diagnosis."
- Appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA.

- No prostheses or aids are required.
- Functional skills: able to walk 4+ blocks unaided, climb 5+ steps, lift 15 to 35 pounds, and remain seated for less than an hour. No difficulties with communications.

AR:

- Mobility and physical ability: independent for walking indoors, walking outdoors, and standing; periodic assistance from another person required for lifting; takes significantly longer than typical for climbing stairs and carrying and holding. Comment: used to be able to carry 2 five gallon buckets of paint (75 pounds each), now only able to carry ½ bucket.

SR1:

- The appellant writes that because of his Hepatitis C, in the past two years he has lost 75% of his strength. Two years ago he could carry two pails of paint up three flights of stairs; now it is a struggle to go up two flights of stairs with one pail.
- He has no strength or stamina. Five years ago he worked 54 10 hour days, had a three-day nap and went back to work.
- He is a painter. If he uses his hands for more than 2 to 3 hours they cramp up -- very painful. After 15 years of hepatitis C (he was diagnosed in 1997) he is always tired, with poor appetite.
- COPD: he worked 20 years in a very dirty industry and is a lifelong smoker.

SR2:

- The appellant writes that at the time of the original PWD application, he had not started the Hepatitis C treatment. The side effects after starting the treatment are debilitating. He states that he requires assisted living. He also indicates that he has developed Parkinson's disease. He lists his medications.

Mental impairment

PR

- Health history/severity: the GP writes: "He also suffers with anger management issues, poor impulse control, anxiety and depressed mood which impair his cognitive functioning."
- Cognitive and emotional deficits: 5 indicated: executive, memory, motivation, impulse control and attention or sustained concentration.

AR

- Daily cognitive and emotional functioning: major impacts in 8 areas: bodily functions, emotion, impulse control, attention/concentration, executive, motivation, other neuropsychological problems, and other emotional or mental problems. Comment: anxiety impairs sleep. Insight and judgment better with respect to drug addiction. Has to read something 5x in order to understand. Anger management problems.

SR:

- The appellant writes that he has very low self-esteem and self-worth. These have always been related to his ability to work and provide for himself.
- His anxiety and depression stems from abandonment and abuse. He has a hard time fitting in. He doesn't feel as if he belongs anywhere and that he is always intruding.

- Regarding substance abuse issues, it now feels good to feel better. He has no control over impulses.
- When he broke his knee and leg he was given a pain killer and lots of it. With that he was addicted to narcotics at the age of 16. He was left on his own to figure that out.

Ability to perform DLA

AR:

- The GP assesses the appellant independent in all aspects of personal care, basic housekeeping, shopping, meals, medications and transportation. For paying rent and bills, periodic assistance required for budgeting; independent for banking and pay rent and bills.
- Social functioning: periodic support/supervision required for appropriate social decisions and able to deal appropriately with unexpected demands; independent for develop and maintain relationships, interact appropriately with others and secure assistance from others.
- Relationships: good functioning with immediate social network and marginal functioning with extended social that works.

Help required/provided:

AR:

- Help required for DLA is provided by spouse. No other help or assistive devices are reported as provided or required.

In his Notice of Appeal dated 19 December 2012, the appellant writes:

"My ability to work is severely restricted due to severe leg injury @ age 16. Hospital records are available from [hospital in another province]. Anxiety and depression predate treatment for Hep C by 30+ years. Anger management, impulse control, trust issues caused by physical, psychological & sexual abuse"

At the hearing, the appellant presented a submission. In the submission and in answer to questions, the appellant, with the assistance of his spouse, gave the following evidence.

- After 32 years his leg injury has progressed to the point where it severely limits mobility and functionality, and has restricted blood flow. Stairs are next to impossible to access, as well as uneven terrain. Functionally, he can no longer go up and down ladders, or work on his hands and knees without experiencing a great deal of pain. He has lost the ability to articulate his ankle due to restricted blood flow.
- He can no longer walk further than 50 m without experiencing considerable pain in his right leg and hip; if he sits for more than 30 minutes to an hour, everything seems to seize up and is very difficult to get moving again.
- Not being able to work like a normal person has been psychologically devastating and very depressing, as his self-worth has always been directly linked to his being able to provide an income for himself and his wife.
- When he broke his leg in the 1970s, he spent 12 weeks in traction and that leg is about 1/2 inch shorter. This alters his gait and has an impact on his lower back and hip on the right side. The surgeon who did the reconstruction told him that he almost decided to amputate because of loss of circulation and that he would eventually need to use a cane. He now uses a cane. Now if he bends his knee more than 90° he becomes lame.

- He also has an ongoing nervous anxiety disorder, combined with addiction issues and abuse issues. His psychiatrist will be referring him to the clinic for further treatment when his Hepatitis C treatment is finished.
- He suffers from the inability to swallow foods or liquids without an esophageal spasm, occurring 10 to 15 times per day. An upper gastrointestinal scope will be required to determine the cause of this.
- His inability to swallow and his ulcer and gallbladder problems are all prior to his treatment for Hepatitis C.
- For the Hepatitis C, since May 2012 he has been on the "triple therapy" and this will last until May of this year. He has an injection once a week and takes 22 pills a day. The day of the injection and the day following is spent mostly asleep. The treatment is extremely debilitating -- sleeping 40 hours, continuously vomiting, dizzy spells upon standing, following over, extreme migraines and light and sound sensitivity. He would have starved to death were not for the help of his wife. She is always waking him up to take more pills and give him food.
- As for appointments, the appellant and his wife depend on the good-will of their neighbors as he can no longer afford insurance and with a severely restricted the immune system simply cannot afford the risk of public transit. The cold or the flu would put him at risk for a life threatening respiratory illness. Falling on ice could crack or break a bone and the infection would be devastating.

Further to his testimony regarding his difficulties mobilizing because his right leg injury, the appellant also presented a Medical Equipment Request and Justification form dated 14 January 2013 completed by his GP. The GP describes the medical condition as follows: Patient has R leg instability following a remote fracture, therefore at risk for falls. Also low hemoglobin due to Hep C treatment. "The GP recommends a cane, grab bars in shower and near stairs to entrance of trailer.

With the exceptions noted below, the panel finds the appellant's testimony at the hearing is in support of information that was before the ministry on reconsideration. The evidence relating to the debilitating impact of the Hepatitis C treatment is further to the appellant's reference to this matter in his Request for Reconsideration (SR2). (See however the panel's discussion of the applicability of this evidence in Part F below). The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act. The panel cannot accept as evidence the references to the appellant's leg instability as raised in the appellant's testimony and in the Medical Equipment Request and Justification form, as this was not a diagnosed condition put forward in the PR or AR and therefore not before the ministry at reconsideration. While the appellant did refer in SR1 to a broken leg when he was 16, that was in reference to becoming addicted to narcotics while recovering from the surgery and not in relation to any physical impairment.

The ministry presented a submission summarizing the reconsideration decision. The panel accepted the submission as argument.

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 impairment

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the appellant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's GP) identify the impairment and confirm that impairment will continue for at least two years. In the present appeal, the GP has diagnosed the appellant with 1) active Hepatitis C with Cirrhosis, 2) Anger management issues/poor impulse control, possibly secondary to brain injury, 3) Anxiety, 4) Depression, and 5) Substance-related disorders – in remission, except tobacco. At the hearing, the appellant has also brought forward two issues that have developed since the original application:

- The right leg instability, as raised at the hearing. For the reasons set out at the end of Part E above, the panel was unable to admit the appellant's testimony and supporting documentation as evidence, and therefore cannot consider this medical condition as it might contribute to a severe physical impairment.
- The treatment for Hepatitis C, begun in May 2012 and scheduled to continue until May of this year. While the panel acknowledges the debilitating side-effects of this treatment, this aspect of the appellant's impairment has not been identified by the GP, nor has he confirmed that it will continue for at least two years. For these reasons, the panel is unable to consider these side-effects in considering the reasonableness of ministry's decision.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment," as set out in section A, Diagnoses, 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 disease, condition, syndrome or even by a symptom (e.g. pain). A severe impairment requires the identified cause to have a severe impact. The assessment of severity is therefore based on the impact on daily functioning, in such areas as functional skill limitations, cognitive and emotional deficits and impacts, restrictions on the ability to manage DLA and assistance required.

Physical impairment

The position of the ministry is that, as the appellant's GP noted no significant functional skill limitations and has indicated that he is independently able to do most aspects of mobility and physical abilities with periodic help to lift, the ministry was not satisfied that the information provided was evidence of a severe physical impairment.

The position of the appellant is that the evidence shows that due to muscle mass loss and reduction in stamina, his inability to lift, carry and climb stairs precludes employment in his trade. Further, an old leg injury has progressed to the point where he can now only walk 50 m. The debilitating effects

of his hepatitis C treatment have a huge impact on his daily functioning. All this establishes a severe physical impairment.

The evidence is that the GP has diagnosed the appellant with active Hepatitis C with Cirrhosis; there is also evidence from the medical reports submitted of certain gastro-intestinal difficulties. The panel acknowledges that the appellant's medical conditions have resulted in the deterioration of his ability to work in his chosen trade. However, employability is not a criterion for PWD designation. As explained above, the panel is limited to considering the medical conditions identified by the GP that will continue for at least 2 years and their impact on daily functioning. The evidence is that the GP has assessed the appellant able to walk 4+ blocks unaided, climb 5+ steps, lift 15 to 35 pounds, and remain seated for less than an hour. The GP reported that the appellant is independent for most of these activities, and independent in the ability to perform almost all aspects of DLA requiring physical exertion (see below). Considering this evidence available at the time of the reconsideration decision, the panel finds that the ministry reasonably determined that a severe physical impairment had not been established.

Mental impairment

The position of the ministry is that the evidence does not support a severe mental health condition that severely limits the appellant's ability to function either continuously or periodically for extended periods. Moreover, the ability to make decisions about personal activities, care and finances, and the ability to relate to, communicate and interact with others effectively does not indicate a severe mental impairment.

The positions of the appellant is that the assessments by the GP of deficits with cognitive and emotional function, and their impact on daily functioning and on social functioning, establish a severe mental impairment.

The GP has diagnosed the appellant with anger management issues/poor impulse control, possibly secondary to brain injury, anxiety, depression, and substance-related disorders – in remission, except tobacco. He has identified five deficits with cognitive and emotional function with a major impact in eight areas of daily cognitive and emotional functioning, with periodic support/supervision required in two of the five listed areas. However, except for a note that anxiety impairs sleep and the need to read something 5x to understand it, no information is provided as to how these deficits and impacts manifest in daily living. For instance, no description is provided as to how, how often and under what circumstances his anger management issues appear, and what interpersonal or other consequences arise. Without the information that would substantiate the assessments made, the panel finds that the ministry reasonably determined that a severe mental impairment had not been established.

Whether DLA are significantly restricted

The position of the ministry is that, as the vast majority of DLA including social functioning are performed independently or require little help from others, the information from the appellant's GP does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

The appellant's position is that he is directly and significantly restricted in a number of DLA.

The evidence is that the GP has assessed the appellant independent in all aspects of the DLA requiring physical effort except for moving about indoors and outdoors where periodic assistance from another person is required for lifting and taking significantly longer than typical for climbing stairs and carrying and holding.

As to the DLA relating to a person with a mental impairment, the DLA under EAPWDR section 2(1)(b) are: (i) make decisions about personal activities, care or finances; and (ii) relate to, communicate or interact with others effectively. With regard to (i), the GP indicates in the AR that the appellant requires periodic support/supervision regarding making appropriate social decisions and dealing with unexpected demands. Respecting (ii), the panel notes that anger management issues had been identified but, as discussed above, not described. The panel finds that as a severe mental impairment has not been established, and absent any further information as to restrictions in social functioning, the panel finds it difficult to conclude that these two DLA were significantly restricted.

Taking this evidence into consideration, the panel therefore finds that the ministry reasonably concluded that this criterion had not been met.

Whether help to perform DLA is required

The position of the ministry is that, as it had been established that DLA are not significantly restricted, it can be determined that significant help is not required from other persons. The appellant does not require the services of an assistance animal.

The appellant's position is simply that he relies on ongoing help from his spouse and neighbour, particularly as he goes through the Hepatitis C treatment with its debilitating side-effects.

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.