

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of November 16, 2012, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- 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; or that
- the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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 did not attend the hearing. Having confirmed that the ministry was notified of the hearing, the panel proceeded with the hearing in accordance with s. 86(b) of the Employment and Assistance Regulation.

The information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a physician's report (PR) and assessor's report (AR) both completed and signed by the appellant's physician on July 11, 2012. The application also included a self-report signed by the appellant on July 26, 2012.
- A letter from the ministry to the appellant, dated September 11, 2012 including a decision summary advising the appellant that he had been found ineligible for designation as a PWD.
- The appellant's written submissions to the ministry's reconsideration officer, dated October 11, 2012 and October 22, 2012.

Mental Impairment

- In the PR the physician indicated that he did not know whether the appellant had any significant deficits with cognitive and emotional function, and indicated the appellant has no difficulties with communication. In the AR, section B.4 (which deals with cognitive and emotional functioning) and the social functioning portion of section C are to be completed only if the applicant has "an identified mental impairment, including brain injury." The physician left both sections blank except for noting "N/A" at the top of each.

At the appeal hearing the appellant stated that he is seeing another physician for depression and anxiety, and that he is taking prescribed medication for those conditions. The ministry took no position on admissibility of this new information. As depression and anxiety are potential new diagnoses that were not before the minister at the time of reconsideration, and as there is no supporting evidence or information from a medical practitioner related to these diagnoses, and in consideration of the restrictions imposed on admissibility of new evidence by s. 22(4) of the *Employment and Assistance Act*, the panel has decided not to admit this evidence. The balance of the appellant's testimony was admissible as being in support of the information and records that were before the minister at the time of reconsideration.

Physical Impairment

- The physician diagnosed the appellant in both the PR and the AR as having mechanical right knee pain, and in the AR he mentioned swelling in the knee. He noted the symptoms have not changed since June 2010.
- In terms of functional skills the physician noted the appellant can walk more than 4 blocks unaided on a flat surface (The physician also provided evidence that the appellant's walking is restricted to 100 m.), can climb 2-5 stairs, can lift 15 to 35 pounds, and can remain seated for

less than 1 hour. In the AR the physician commented that the appellant avoids stairs and in the PR that the appellant is unable to go up and down stairs.

- At the appeal hearing the appellant said that his knee makes popping noises in the morning and has a sensation of pins and needles. He is in pain every day but avoids prescription pain killers as he is wary of becoming addicted. Walking up and down stairs causes the worst pain.
- In response to a question about frequency of the pain, the appellant said that he is in pain 3 to 4 times a week, and "almost every day."
- At the hearing, the appellant said that he wasn't sure how far a block is, but he is limited to walking 100m, or a bit more than a block, and occasionally takes the dog for a 10 minute walk. The appellant subsequently said that after walking 2 blocks he has to stop. He has difficulty moving about in his house.
- The appellant reported that his capacity for lifting is limited to 25 pounds. He used to move furniture, but doesn't lift much now because it hurts to bend.
- In answer to a question as to whether the physician has suggested any medical solutions, the appellant said that the physician suggested physiotherapy but that has not been successful. The physician keeps telling him the knee will heal, but the symptoms have not changed.
- The physician has suggested the appellant try to find work.
- In response to a question about other medical evidence, the appellant said that MRIs and x-rays show nothing. His only options are physiotherapy or pain medications.
- In response to a question the appellant said that he was not with the physician when the physician filled out the PR and SR, but that the physician did ask him some questions with respect to ability to lift, etc.

DLA

- In the AR the physician noted the appellant needs periodic assistance from another person for carrying and holding, commenting "no shopping." The physician noted that the appellant's wife helps him with 2 of 5 aspects of shopping – "going to and from stores" and "carrying purchases home." There is no indication of how frequently or to what extent the appellant's wife assists with these tasks. The appellant is independent with respect to the other 3 aspects of shopping – "reading prices and labels", "making appropriate choices", and "paying for purchases."
- The physician also indicated the appellant requires continuous assistance with respect to laundry and basic housekeeping. The appellant's wife does these things for him.
- In his self-report the appellant said that it is painful for him to walk for activities such as washing dishes, taking out the garbage and other household chores.
- At the appeal hearing the appellant said that his ability to do housekeeping is limited by his problems with mobility. With respect to shopping, he needs help to get to and from the store, and with carrying purchases. He usually uses a shopping cart to help with walking and carrying. His problem with shopping is mobility.
- In the AR, the physician assessed the appellant as being independent with all tasks of personal care as well as managing meals, medications, transportation and paying rent and bills.

Help

- The physician noted the appellant requires no prostheses or aids and he does not have an

assistance animal.

- In response to a question, the appellant said that the physician has not suggested a cane, walker or other assistive devices.
- The appellant stated in his SR that his wife does all the household work.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

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.

EAPWDR section 2(1):

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.

Mental Impairment

The appellant did not advance an argument with respect to severe mental impairment, other than to acknowledge the lack of information currently available from a medical practitioner.

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

Panel Decision

The appellant's physician has provided no diagnosis of a mental health condition. The appellant noted that a person's mental state can have an impact on his well-being, but there is no medical

evidence that the appellant's mental state has any impact on his ability to perform DLA independently.

In light of the limited evidence of severe mental impairment, the panel finds that the ministry reasonably found that this legislative criterion was not satisfied.

Severe Physical Impairment

The appellant's position, as expressed by his advocate, is that the appellant's evidence considered in conjunction with the physician's evidence demonstrates a severe physical impairment.

The ministry, while acknowledging that the appellant's impairment may impact his physical functioning due to right knee pain and swelling, takes that position that there simply is not enough evidence to establish a severe physical impairment.

Panel Decision

To assess the severity of an impairment one must consider the nature of the impairment and its impact on daily functioning as evidenced by functional skill limitations and the degree of independence in performing DLA. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional.

The panel is troubled by inconsistencies in the evidence with respect to the appellant's functional limitations. The physician has provided inconsistent evidence with respect to whether the appellant can walk more than 4 blocks unaided or whether he is limited to 100 m. This inconsistency is reflected by the appellant's statement that he isn't sure how far a block is, but that he can walk only 100 metres, or just a bit more than a block, or about 2 blocks or for "10 minutes" with the dog. There is also inconsistency with respect to the frequency of the pain experienced by the appellant, with the evidence variably being "every day", "3 to 4 times a week", and "almost every day." After considering the evidence, the panel finds that the appellant's walking ability is more likely in the range of blocks, rather than metres, and the frequency of disabling pain is something less than "daily". These factors, coupled with the appellant's ability to lift at least 25 pounds, and his ability to perform most aspects of most DLA independently, indicates to the panel that the appellant's physical impairment is more accurately described as "moderate" rather than "severe".

Based on the foregoing, the panel finds that the ministry reasonably concluded that the appellant does not have a severe physical impairment.

Significant Restrictions to DLA

The appellant's position, as expressed by his advocate, is that the appellant is significantly restricted in at least 3 DLA: mobility, housework, and daily shopping.

The ministry's position is that there is not enough evidence to establish that the appellant's impairments significantly restrict his ability to manage his DLA, either continuously or for extended periods.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician. This doesn't mean that other evidence shouldn't be factored in, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

The appellant contends that he is significantly restricted with respect to 3 DLA. The physician noted that the appellant experiences some restrictions of some aspects of the same 3 DLA. The panel acknowledges that the appellant's mobility is impacted by his injured right knee, and that his inability to lift more than 25 pounds may curtail some aspects of some DLA. However, in the panel's view the ability to lift 25 pounds is not a significant restriction with respect to basic housekeeping, mobility, or shopping. The panel also notes that the appellant did not directly address the suggestion, made by the ministry in the reconsideration decision, that the DLA of housekeeping and shopping performed by the appellant's wife represent a preferred domestic arrangement or whether he has the ability to perform those DLA independently. There is no evidence as to why the appellant is not able to perform at least the lighter aspects of basic housekeeping. The physician has not provided any evidence of the frequency or duration of the periodic assistance required by the appellant to go to and from stores or to carry purchases home. There is also no evidence that the appellant cannot use a wheeled shopping cart to carry purchases home or out to his vehicle – indeed the appellant said that he usually does use a shopping cart in stores to help with mobility. In the panel's view, the demonstrated restrictions on aspects of 3 DLA cannot be said to be a "significant" restriction on the appellant's ability to manage his DLA.

Based on the foregoing analysis, the panel finds that the ministry reasonably determined that the appellant has not demonstrated that his ability to perform DLA is significantly restricted either continuously, or for extended periods of time.

Help with DLA

The appellant's position is simply that he relies on ongoing help from other people, namely his wife.

The ministry's position is that as it has not been established that DLA is significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

The evidence is that the appellant receives help from his wife with aspects of 3 DLA – shopping, housekeeping and aspects of mobility, such as transporting the appellant to stores. The physician's evidence is that the appellant performs all other DLA independently. There is simply insufficient evidence to show that the appellant relies upon "the significant help or supervision of another

person.” The appellant does not use assistive devices or an assistance animal, and the evidence of the appellant is that the physician has not recommended the use of any assistive devices.

Accordingly, the panel finds that the ministry reasonably concluded that the appellant does not need help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry’s decision declaring the appellant ineligible for PWD designation was reasonably supported by the evidence and was a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry’s decision.