

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated October 31, 2012 which found that the appellant did not meet three of the five 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 that his 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; and,
- the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal 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 evidence before the ministry at the time of the reconsideration decision included the following:

- 1) Person With Disabilities (PWD) Application comprised of the applicant information dated August 14, 2012, a physician report and an assessor report both dated August 23, 2012 and completed by the appellant's family physician of 15 years; and,
- 2) Request for Reconsideration- Reasons.

Diagnoses

The appellant has been diagnosed by his general practitioner with valvular heart disease with a date of onset of 1986, Hepatitis C (1990), degenerative joint disease and obstructive sleep apnea.

Physical Impairment

- In the physician report, the general practitioner indicated that the appellant has a long medical history and is "chronically disabled." He has required cardiac surgery on two occasions and has Hepatitis C from a blood transfusion. He also has significant joint disease for a young man with hip arthroplasty, shoulder repair, and is waiting for complex joint surgery of left knee which is very unstable. Respiratory testing suggests obstructive sleep apnea.
- In the additional comments, the physician added that the appellant is physically impaired by cardiac, respiratory and joint disease. His employment history is one of physical labour and he has no training or skills to be employed in a sedentary trade or employment. He is at risk of further cardiac events. He is waiting consultation for treatment of Hepatitis C. His large joints have significantly deteriorated (hips, knees) and, despite surgery, this will continue to limit all physical activity.
- In the assessor report, the physician commented that with walking, squatting, and stairs every step is painful in the left knee and fatigue is also a problem.
- Functional skills reported in the physician report indicated that the appellant can walk 2 to 4 blocks unaided, he can climb 5 or more steps unaided, he can lift 15 to 35 lbs. and has no limitation with remaining seated.
- The physician reported that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform his daily living activities (DLA) and he does not require any aids for his impairment.
- In the assessor report, the appellant is reported as being independent with walking indoors, with the comment that it is painful and awkward, and with standing, and he takes significantly longer than typical with walking outdoors (knee pains and swells) and with climbing stairs (slowly with pain). The appellant requires periodic assistance with lifting and carrying holding (lifts 15 lbs.) and the comment is that there are musculoskeletal limitations.
- In the appellant's self-report, the appellant stated that he is waiting for another knee replacement and has severe pain when he stands, sits, walks or goes up and down stairs. His knee swells sometimes requiring him to use crutches for 4 to 5 days since he cannot walk on it. He had two open heart surgeries to replace his aortic valve and it was found that his heart was damaged from a heart attack. He requires further surgery to his shoulder which is "bone to bone" causing pain and discomfort when he moves it or does any lifting. He had his left hip replaced in 2007 because of severe arthritis. He also suffers from Hepatitis C contracted from a blood transfusion in 1986 and he experiences pain in his liver, abdominal pain and irritation, fatigue, vomiting, nausea and body aches.
- In his Request for Reconsideration, the appellant added that he is taking medications as a result of his previous heart attack and pain medication for his left knee and right shoulder.

Mental Impairment

- The general practitioner did not diagnose a mental disorder.

- The general practitioner reported the appellant has a good ability to communicate and there are no significant deficits identified with cognitive and emotional function.
- In the assessor report, the general practitioner indicated that there is a minimal impact to the appellant's cognitive and emotional functioning in the area of memory, with a comment added that the appellant has a history of concussions and finds that his memory is impaired.
- The general practitioner indicated that the appellant independently manages all 5 listed aspects of social functioning and has good functioning in both his immediate and extended social networks..

DLA

- In the assessor report, the general practitioner reported that all 8 listed tasks of the DLA personal care are performed independently without any noted restriction.
- The appellant is independent with doing his laundry and takes significantly longer than typical with doing basic housekeeping, with the explanation added that "...maintenance of yard takes longer because of physical limitations from knee- shoulder."
- The appellant is independent with all 5 tasks of shopping, while the general practitioner has made a comment of "restricted" with respect to the task of carrying purchases home.
- All listed tasks for the DLA meals, paying rent and bills, medications, transportation and social functioning are managed independently with no noted need for assistance.
- In his self-report, the appellant stated that household chores, like cutting the lawn, gardening, sprinkling, take longer and add stress. For shopping, walking up and down the aisles causes pain and discomfort.

Need for Help

- The general practitioner reported that the appellant sometimes requires crutches as an assistive device.
- In the assessor report, the general practitioner crossed out the section to describe from whom help for DLA is received and required.

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision because he knows people in his community who have PWD designation that are in better health than him and that he feels he is being treated unfairly.

Prior to the hearing, the appellant provided a letter dated November 30, 2012 addressed to him from a liver clinic and notifying him of two upcoming appointments.

At the hearing, the appellant provided the following oral evidence:

- The appellant reported that he has gone through a number of surgeries, including a repair of his ACL, a hip replacement, a knee replacement, repair of his shoulder and repair of his aortic valve. During surgery for his heart, it was discovered his heart had been damaged by a heart attack and he is permanently on medications to control his heart beat.
- The appellant stated that it is hard for him to get around with pain in his knee and hip. He went through surgery on January 2, 2013 for his knee replacement and he will be laid up, using a walker, for 6 to 7 months. He lives across the street from the hospital and that will allow him to get to his physiotherapy treatments.
- The appellant stated that even though extensive surgery is being recommended to rebuild his shoulder, since it is "bone on bone", he will likely not pursue this option.
- The appellant stated that was diagnosed with Hepatitis C from an operation in 1986 where he required a blood transfusion and the November 30, 2012 letter shows he is booked for appointments to begin his

treatment for this condition. The appellant stated that he experiences stomach and intestinal upset and nausea as well as fatigue.

- The appellant reported that he is renting a room in a house, he lives with a roommate, with independent living although the roommate is currently taking care of the household chores. The appellant helps him with doing dishes when he can. The appellant stated that before his knee operation, he was doing more around the house, including shoveling snow.

The panel admitted the oral evidence of the appellant as well as the November 30, 2012 letter, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail regarding the impact and treatment of the appellant's diagnosed conditions and being in support of information that was before the ministry on reconsideration.

At the hearing, the ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of the impacts from a combination of health conditions, including symptoms from Hepatitis C and the pain experienced from his degenerative joint disease, and that he is restricted in his activities as a result.

The ministry points out that the appellant's general practitioner of 15 years assesses his functional skills as in the moderate range, being able to walk 2 to 4 blocks unaided, to climb 5 or more steps unaided, to lift between 15 and 35 lbs. and having no limitation with remaining seated. While the physician indicates that the appellant takes significantly longer than typical with walking indoors and climbing stairs due to knee pain and swelling and that he "walks slowly with pain", he has not provided information on how much longer it takes the appellant. The physician stated that the appellant's physical ailments affect his strength and mobility and that he is unemployable and the ministry argues that employability is not an eligible criterion for designation as a PWD. The ministry argues that while the physician reports that the appellant's large joints have deteriorated despite surgery and continue to limit all physical activity, these limitations are more in keeping with a moderate degree of impairment.

Panel Decision

The legislation clearly provides that the determination of severity of impairment 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 respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's long-time general practitioner, has diagnosed the appellant with valvular heart disease, Hepatitis C, degenerative joint disease and obstructive sleep apnea and described the appellant as 'chronically disabled'. While the physician reported that the appellant's joint disease as "significant" for a young man, that his large joints have significantly deteriorated (hips, knees) and, despite surgery, this will continue to limit all physical activity, the appellant's mobility is nevertheless assessed in the moderate range. He is able to walk 2 to 4 blocks and to climb 5 or more steps without the use of an assistive device or the assistance of another person to perform these tasks. The general practitioner also assessed the appellant as being independent with walking indoors, with the comment that it is painful and awkward, and he takes significantly longer than typical with walking outdoors (knee pains and swells) and with climbing stairs (slowly with pain), with no detail provided of how much longer it takes him. The appellant explained at the hearing that prior to his recent knee replacement surgery, his knee would sometimes swell up and, during this time, he used crutches for 4 to 5 days. The appellant stated that he is currently using a walker and it will take about 6 to 7 months for him to recuperate from the surgery, but the expectation is that his knee condition will be improved. The appellant stated that it is hard for him to get around with pain in his hip as well as his knee.

The general practitioner indicated that the appellant requires periodic assistance with lifting and carrying holding and that he lifts up to 15 lbs. and there are "musculoskeletal limitations", but no description is provided of the frequency that periodic assistance is required. The appellant stated that he requires further surgery to his shoulder which is "bone to bone" causing pain and discomfort when he moves it or does any lifting, but no diagnostic or specialist reports were provided to support the appellant's assessment. The appellant also stated that prior to his recent knee replacement surgery he was doing more around the house, including shoveling snow, which the panel finds indicates a relatively high level of physical functioning despite the pain that the appellant experiences. The evidence demonstrates that the appellant is impaired in his physical functioning; however the panel finds that the ministry reasonably determined that the information currently provided shows a moderate rather than a severe degree of impairment. Therefore, the panel concludes that the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant did not argue that he has a severe mental impairment although he stated that he experiences stress.

The ministry's position is that there are no significant deficits with cognitive and emotional functioning reported by the physician and only a minimal impact to memory due to the appellant's history of concussions and, therefore, there is not enough evidence to establish a severe mental impairment.

Panel Decision

The general practitioner has not diagnosed a mental disorder. The appellant is assessed as having a good ability to communicate, there are no significant deficits identified with cognitive and emotional function, and the appellant independently manages all 5 listed aspects of social functioning. The only impact identified by the general practitioner is minimal in the area of memory. For these reasons, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical impairments directly and significantly restrict his ability to perform DLA to the point that he requires assistance in various areas of DLA, including tasks of housekeeping and that tasks like shopping, cutting the lawn, gardening, and sprinkling take longer.

The ministry's position is that the prescribed professional, the appellant's long-time physician, reported that the appellant is independent with most of his DLA and, despite the physician's comment that the appellant is physically impaired by cardiac, respiratory and joint disease which limit his DLA, there is no indication that he takes significantly longer to perform them. The only restrictions identified by the physician are with one of 5 tasks of shopping (carrying purchases home), which is also identified as independent, and that it takes significantly longer than typical with basic housekeeping- maintenance of yard- because of physical limitations from the appellant's knee and shoulder.

Panel Decision

The evidence of a prescribed professional, the appellant's general practitioner of 15 years, is that the appellant is independent with walking indoors and, although he takes longer than typical with walking outdoors, he can manage distances of 2 to 4 blocks and climbing 5 or more steps without the use of an assistive device. The majority of the listed tasks for all DLA are managed independently, including all tasks associated with personal

care, meal preparation, paying rent and bills, medications, transportation and all aspects of social functioning. The only restrictions to DLA identified are unspecified restriction with carrying purchases home, possibly with lifting and carrying and holding more than 15 lbs. as assessed by the physician, and that basic housekeeping takes significantly longer than typical. The general practitioner commented that housekeeping and yard maintenance take longer because of physical limitations from his knee and shoulder and the appellant stated that cutting the lawn, gardening, and sprinkling take longer. The appellant stated that he is performing these heavier tasks, although they take him longer than typical, and the panel finds these tasks require a high degree of physical functioning. The panel concludes that the noted restrictions in the appellant's ability to perform some aspects of some DLA were reasonably viewed by the ministry as not constituting a direct and significant restriction of the appellant's ability to perform DLA in the opinion of a prescribed professional thereby not satisfying the legislative criterion of s. 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that he requires the use of crutches as an assistive device and the significant assistance of another person to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the panel finds that the evidence of the prescribed professional establishes that the appellant requires some assistance, which the appellant stated is received from his roommate, with tasks of some DLA and the occasional use of crutches as an assistive device, the panel also 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 the appellant requires help to perform DLA as a result of those restrictions.

Conclusion

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