

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 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 September 19, 2012. The application also included a self-report signed by the appellant on August 8, 2012.
- A letter from the ministry to the appellant, dated October 3, 2012 including a decision summary advising the appellant that he had been found ineligible for designation as a PWD.

Mental Impairment

- The physician did not make a diagnosis of mental impairment.
- In terms of functional skills in the PR, the physician noted no difficulties with communication, and no significant deficits with cognitive and emotional function.
- Section B4 of the AR, dealing with cognitive and emotional impacts, and section C, dealing with social functioning, are to be completed only for an applicant with "an identified mental impairment or brain injury."
- The physician completed section B4 and identified moderate impacts to 2 out of 13 categories – sleep disturbance and motivation. The other 11 categories are identified with "no impact."
- Similarly, section C of the AR was completed, with the appellant shown as independent in 5 of 5 categories of social functioning, and described as "good functioning" in terms of both immediate and extended social networks.

Physical Impairment

- The physician diagnosed degenerative disc disease, affecting 1 or more nerves in the appellant's left leg. The appellant has consulted with a neurosurgeon who has recommended surgery. The appellant is considering that option.
- In terms of functional skills the appellant is described as being able to walk unaided on flat surfaces for 1 to 2 blocks, climb 2 to 5 steps unaided, to lift 2 to 7 kilograms, and to remain seated for less than 1 hour.
- The physician wrote that according to the appellant ("per patient"), he did not have any major problems until he was injured at work about 3 years ago.
- In written submissions and at the appeal hearing, the appellant said that the physician did not do a physical assessment of his functional skills, and that she relied solely upon him when she completed this portion of the form. He said that he can lift only up to 2 kilograms, not 2 to 7 kilograms, and that he can remain seated for less than one half hour.
- In his self-report the appellant wrote that he suffers from back pain that disturbs his sleep, and prevents him from working. The pain starts from the first step when he is climbing stairs.

DLA

- In the PR the physician indicated that the appellant requires periodic assistance with 5 of 10 prescribed DLA: meal preparation, basic housework, daily shopping, mobility, and use of

transportation. His activity is unrestricted with respect to the other five prescribed DLA: personal self-care, management of medications, management of finances, decision-making, and social functioning.

- The physician explained that she used the term “periodic” as meaning that the appellant has problems with the indicated DLA, and wrote that as an example the appellant can walk outside for about a half hour before needing a rest period of unspecified duration.
- The AR provides more detail with respect to management of DLA. The physician indicated that the appellant requires periodic assistance from another person climbing stairs, and continuous assistance carrying/holding/lifting. He is restricted in the amount of time he can spend walking or standing. The appellant requires periodic assistance with 2 of 8 tasks associated with personal care – transfers to/from bed and chair. He needs continuous assistance with housework.
- The physician indicated the appellant needs assistance with 2 of 3 tasks associated with shopping – going to and from stores, and carrying purchases home. She also indicated he needs continuous assistance with 2 of 4 tasks related to meals – food preparation and cooking. The physician wrote that she did not know if the appellant requires help getting in or out of a vehicle, or using public transit, but he is independent with using transit schedules and arranging transportation.
- At the appeal hearing, in response to a question as to whether he does any shopping, the appellant said “not often”, but that he does if he has to. He also said that he doesn’t do any cooking but he can use a microwave.

Help

- In the AR the physician indicated the appellant receives help from his wife with respect to shopping, housework and cooking meals.
- In his self-report the appellant wrote that he needs help from his wife for shopping, housework, meal preparation and laundry.
- At the appeal hearing the appellant said that sometimes if his wife is at home she even helps him to put on his clothes. He used to do 90% of the housework before he was injured.
- The physician indicated that the appellant uses no assistive devices or prostheses, and that he does not have an assistance animal.

Oral Testimony

The appellant was represented at the appeal hearing by an interpreter. The appellant substantially relied on evidence that was previously provided to the ministry. He supplied limited additional detail with respect to the impacts he experiences as a result of his impairment, and the panel accepts the appellant’s oral testimony as being in support of the information and records that were before the minister at the time of reconsideration in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry substantially relied on its reconsideration decision and did not proffer any new evidence.

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.

The ministry's position as expressed in the reconsideration decision is that there is no mental health diagnosis and therefore no mental impairment.

Panel Decision

The appellant's physician has provided no diagnosis of a mental health condition. There is no evidence that the appellant has any difficulty with decision-making or social functioning, and the evidence shows little to no impact in terms of cognitive and emotional functioning.

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

Severe Physical Impairment

The appellant's position is that he suffers severe pain, and the evidence that he cannot work shows his impairment is severe and prolonged. He says that the physician's use of the term "major problems" is the answer for the question of severity, and that the physician's use of the term "periodic" does not mean that the impairment is not severe.

While acknowledging that the appellant does have some functional limitations as a result of his physical condition, the ministry takes the position that those limitations are more in keeping with a moderate degree of impairment, and the ministry is not satisfied that the information provided is evidence of 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 extent of the appellant's ability to engage in paid work is not relevant to the legislated test for severity. 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 concerned with the appellant's assertion that the physician did not independently assess his functional skills, but relied solely upon his description of those skills and limitations. He argued that any difference between what he asserted as limitations and what the physician indicated must be attributed to miscommunication, so that the appellant's version should be accepted. As noted above, the legislated test relies substantially on the opinion of a prescribed professional. The panel does not expect that the physician will independently observe the appellant performing all functional skills, but she is expected to exercise her own professional judgment in forming an opinion as to his ability to function. Overall, the physician appears to have taken care to describe her understanding of the appellant's impairment and its impacts. Accordingly, where the physician's description of functional limitations differs from the appellant's, the panel generally prefers the physician's evidence.

The evidence shows that the appellant does have a painful physical impairment that limits his functional skills. On balance, however, the panel cannot say that the ministry was unreasonable in finding that the appellant's functional skill limitations as described by the physician are more in keeping with a moderate degree of impairment. In the context of the physician describing the history and presumed origin of the appellant's injury "per patient", her use of the term "major problems" does not mean that she was making a statement about the severity of the impairment. Further, as detailed below, the evidence falls short of showing that the appellant's impairment translates into direct and significant restrictions in his ability to manage his DLA independently.

Based on the evidence and the legislation, the panel finds that the ministry reasonably concluded that the appellant does not suffer from a severe physical impairment.

Significant Restrictions to DLA

The appellant's position is that requiring periodic assistance does not mean that he is "normal". The pain is continuous – "around the clock". The physician checked 6 of 9 boxes in the PR to indicate that these activities are restricted.

While acknowledging that the appellant's functional limitations directly restrict his ability to perform some aspects of DLA, the ministry says that no severe impairment has been established, and that the majority of tasks associated with DLA (18 of 28) are performed independently. Therefore, the ministry concluded, the information does not establish that the appellant's impairment significantly restricts his DLA either continuously or periodically for extended periods.

Panel Decision

The physician and the appellant have indicated that the appellant's impairment directly restricts aspects of the DLA of mobility, shopping, meal preparation, housekeeping, and use of public or personal transportation facilities. Additionally, the appellant says that occasionally his wife helps him with 1 aspect of one other DLA - self-care – by helping him get dressed. The physician's evidence is that the appellant performs all other DLA independently.

With respect to mobility, the evidence of the physician is that the appellant needs periodic assistance in climbing stairs, but that he is otherwise independent in walking indoors and outdoors. He is restricted as to the amount of time he can walk, but the physician's evidence is that he needs a rest and then, implicitly, is able to resume the activity. With shopping, the appellant is independent except for needing periodic assistance to get to and from stores, and carrying purchases home. There is no evidence to suggest that the appellant is not capable of using a wheeled shopping cart to carry purchases home or out to the vehicle. Regarding meal preparation, the physician notes that the appellant needs continuous assistance with 2 of 4 aspects, but there is no information as to how his impairment restricts the appellant from preparing food or cooking, and the appellant confirmed that he does use a microwave for cooking. Similarly, there is no explanation as to how the appellant's impairment restricts him from doing lighter housework. With respect to use of public or private transportation facilities, the physician indicated that the appellant can independently use transit schedules and arrange transportation, and that she (the physician) does not know if he can independently get into or out of a vehicle, or if he is capable of using public transit.

On balance, considering the physician's use and description of the term "periodic" to describe the level of assistance that the appellant receives for some DLA, and the fact that the appellant is independent with most aspects of even the DLA where he requires some assistance, the panel finds that the degree of restriction in DLA experienced by the appellant is not "significant" as required by the legislation.

Based on the foregoing analysis, the panel finds that the ministry reasonably concluded that the appellant has not satisfied this legislative criterion.

Help with DLA

The appellant's position is that if not for the help of his wife, he would be in serious trouble. He says the ministry is wrong if it believes that because he has his wife's help he is not disabled.

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

Panel Decision

Given the foregoing analysis of the limited restrictions experienced by the appellant, the panel finds there is simply insufficient evidence to show that the appellant requires "the significant help or supervision of another person" to manage his DLA. The appellant also does not use assistive devices or an assistance animal.

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.