

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated January 17, 2013 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 September 16, 2012, and a physician and assessor report both completed by the appellant's family physician of approximately 12 years and dated September 30, 2012; and,
- 2) Request for Reconsideration- Reasons.

Diagnoses

The appellant has been diagnosed by his general practitioner with Hepatitis C (onset of April 2003) Cirrhosis (November 2006), diabetes (May 2010), osteoarthritis/knee degeneration (February 2005), and substance abuse (2000).

Physical Impairment

- In the physician report, the general practitioner indicated for the appellant's health history that his "...most serious condition is cirrhosis of the liver. This is probably due to hepatitis C but may be affected by past alcohol abuse. The patient has had several occasions when he has become jaundiced in recent year indicating acute inflammation of the liver with potential liver failure. He is showing signs of confusion and memory difficulties which can be indicative of hepatitis C cirrhosis. This is a very serious condition. Due to cognitive impairment the patient cannot be employed and should not drive. The patient has chronic pain in his joints from osteoarthritis as well as abdominal pain from chronic pancreatitis. He has had hypercalcemia which can further impair cognition."
- The physician reported that the appellant has been prescribed narcotic pain medications that interfere with his ability to perform his daily living activities (DLA) however medication is "...not the main cause of his cognitive impairment." The appellant does require an aid for his impairment, with the explanation that "...he may require knee braces for his chronic knee pain."
- Functional skills reported in the physician report indicated that the appellant can walk 1 to 2 blocks unaided, he can climb 5 or more steps unaided, he can lift 15 to 35 lbs. and has no limitation with remaining seated.
- Additional comments by the general practitioner were that the combination of chronic knee and abdominal pain and fluctuating confusion causes significant confusion for the appellant.
- The general practitioner also indicated in the assessor report that the appellant uses a cane as an assistive device as well as splints and braces, with the comment that he "...does not use braces but would likely help knee pain." For additional information, the physician commented that the appellant has "...deteriorating health. Easily could decompensate requiring hospitalization or need for assisted living."
- In his self-report, the appellant wrote that he has Hep C and high blood pressure and two bad knees that need operations. He needs two knee replacements. He has cirrhosis of the liver, arthritis in the knee and elbow joints. His body feels lousy every day. He has cramps in all his bones. His body is in rough shape.

Mental Impairment

- The general practitioner diagnosed substance abuse as a substance-related mental disorder.
- The general practitioner reported the appellant has no difficulties with communication.
- The general practitioner reported significant deficits with cognitive and emotional function in the areas of consciousness and memory, with a comment that his "...level of confusion is variable. Good days and bad."
- In the assessor report, the physician indicated a major impact with cognitive and emotional functioning

in the area of consciousness as well as moderate impacts in emotion, impulse control, insight and judgment, attention/concentration, memory, and motivation, and minimal or no impact in the remaining 7 areas. The physician wrote that he is seeing "...increased memory problems and confusion in recent months. Has an addictive personality. If he abuses drugs or alcohol it causes major affect on cirrhosis causing impact on orientation and confusion."

- The general practitioner reported that the appellant is independent with developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others, and requires periodic support/supervision with making appropriate social decisions. The physician wrote that "...if the cirrhosis causes further confusion he will need assistance with shopping, etc. Drug abuse is main safety risk. More at risk of OD (overdose) as liver not functioning well." The appellant is assessed with good functioning in both his immediate and extended social networks.

Daily Living Activities (DLA)

- In the assessor report, the general practitioner indicated that the appellant is independent with walking indoors and standing and requires periodic assistance from another person with walking outdoors, climbing stairs, lifting and carrying and holding, with the comment that: "...pain in knees is main impediment."
- In the assessor report, the general practitioner reported that all 8 listed tasks of the DLA personal care are performed independently with no noted restrictions.
- The appellant is also assessed as independent with doing his laundry and basic housekeeping, with no further comments added.
- For shopping, the appellant is independent with 4 of 5 tasks and requires periodic assistance from another person with going to and from stores, with no further explanation or description provided by the general practitioner.
- All listed tasks for the DLA meals, paying rent and bills and transportation are managed independently, with a note that the DLA meals "...may worsen in future." The additional comments are that with his difficulty with knee pain, he may need someone to drive him to stores to purchase items if he is not on a transit route.
- For managing medications, the appellant is assessed as independent with taking medications as directed and with safe handling and storage but as requiring periodic assistance from another person with filling/refilling prescriptions, with the note that "...recent confusion causes him to forget to fill prescriptions."

Need for Help

- The general practitioner indicated in the assessor report that help required for DLA is provided by the appellant's friends, with the comment that he "...often has friends get him to appointments or to go shopping or to the drug store."
- In response to the request to describe what assistance is necessary if help is required but none is available, the physician wrote "taxi."

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision. The appellant stated that he has 5 major ailments that make it hard to deal with everyday life.

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

- The appellant stated that he was a journeyman plumber which was a physical job and hard on his body. Now he has diabetes, Hepatitis C, pancreatitis, liver cirrhosis, and two bad knees. He needs two knee replacement operations but he has been told he is too young to receive a replacement at this point.
- The appellant stated that where he used to be able to lift pipes weighing up to 100 lbs. for his job, now he cannot lift much.

- The appellant stated that with all his conditions, he has to see his doctor 2 to 3 times each month. He is getting different pills for his diabetes all the time. He does not sleep well due to anxiety. His body is trashed and all his diseases have been confirmed in writing by his doctor. The doctor said that at any time his liver or his pancreas could give out. With these conditions, he could "drop dead in 2 minutes." Or, the other risk is that he could "pass out."
- The appellant stated that he would like to go back to work because the extra money would help out but his body cannot handle it.
- The appellant stated that his knees and the pancreatitis are painful and when they are acting up, he can hardly walk at all.
- The appellant stated that he can do his laundry if he does one small load at a time. It is not easy to bend down, to get in/out of the bath.
- The appellant stated that he can do most things for 5 to 10 minutes and then he needs to take a break, so everything takes longer. He moves slowly and has to be careful. The appellant stated that his doctor knows that it takes him much longer to do everything because he has to take breaks and the appellant expressed frustration that his doctor did not communicate this information in the assessor report.
- In response to a question, the appellant stated that he did not use to have problems with his memory or with confusion, that he believes it is due to his problems with sleeping. He has gone up to a week without sleep. Also, his "insides are messed up" so it is hard to sleep properly.
- The appellant stated that he does not use a cane and he will not use braces for his knees unless he will be walking around lots. He finds that the braces do not help much. The appellant stated that his doctor told him not to walk much because his knees cannot take it.
- The appellant stated that he had gone to an advocate who provided information to his doctor but they disagreed and his doctor would not simply sign off on the advocate's documentation. The appellant stated that he appreciates that his doctor has a professional responsibility to provide accurate information.

The panel admitted the appellant's oral evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail of the impact of his medical 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 his several serious medical conditions, including Hepatitis C, cirrhosis of his liver, diabetes, and osteoarthritis/knee degeneration, resulting in risk to his life and the requirement to move slowly and take many breaks when completing any physical activities.

The ministry points out that the appellant's general practitioner reported that the appellant is able to walk 1 to 2 blocks and to climb 5 or more step unaided, to lift 15 to 35 lbs., and that he has no sitting limitation. The ministry argues that the physician indicated that the appellant is independently able to walk indoors and stand and requires periodic help to walk outdoors, climb stairs, and lift/carry/hold and no assistive devices are currently used but he may require knee braces for chronic knee pain. The ministry argues that the appellant's functional skill limitations are not significantly restricted, aside from walking outdoors, and 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 medical practitioner or prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of about 12 years, has diagnosed the appellant with Hepatitis C, cirrhosis of the liver, diabetes, and osteoarthritis/knee degeneration and indicates that his most serious condition is cirrhosis of the liver. The physician reported that the appellant has had several occasions recently when he has become jaundiced which indicates acute inflammation of the liver with potential liver failure. The appellant is showing signs of confusion and memory difficulties which can be indicative of hepatitis C cirrhosis, which the physician describes as "...a very serious condition." The physician commented that the appellant has "...deteriorating health. Easily could decompensate requiring hospitalization or need for assisted living." The definition of 'impairment', as set out in the PWD application, includes a loss or abnormality of anatomical or physiological function which causes a restriction in the ability to function independently and effectively for a reasonable duration. The panel acknowledges that the evidence demonstrates that the appellant has serious medical conditions which could be life threatening. However, the issue is whether, despite these conditions, the appellant maintains adequate physical functioning. For his functional skills, the physician reported that the appellant can walk 1 to 2 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 indicated that the appellant does require an aid for his impairment, with the explanation that "...he may require knee braces for his chronic knee pain." The appellant stated that he does not use a cane and does not like to

use a knee brace but will if he will be walking for a long distance, even though his doctor counsels against walking much since his "knees cannot take it." The physician indicated in the assessor report that the appellant is independent with walking indoors and standing and requires periodic assistance from another person with walking outdoors, climbing stairs, lifting and carrying and holding, with the comment that: "...pain in knees is main impediment," with no other details provided by the physician regarding the assistance required. The appellant stated that his knees and the pancreatitis are painful and, when they are acting up, he can hardly walk at all; however, there was no further detail provided of the frequency of the appellant's "bad days." The appellant stated that he needs two knee replacement operations but he has been told he is too young to receive a replacement at this point. For the above reasons, the panel concludes that the ministry reasonably determined that the appellant's current 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 argues that he has a severe mental impairment as a result of substance abuse and the confusion and anxiety he experiences due to his serious medical conditions.

The ministry's position is that the level of confusion reported by the physician is variable, that the appellant has good days and bad days. The ministry argues that there are two deficits identified to cognitive and emotional functioning, with consciousness and memory; however impacts on daily functioning are mostly minimal and moderate with one major impact in the area of consciousness. The ministry argues that the physician reported that the appellant is independent with his social functioning. The ministry argues that the narrative supports a periodic impairment but is not sufficient to establish a severe mental health condition that significantly limits his ability to function.

Panel Decision

The general practitioner diagnosed substance abuse as substance-related mental disorder. Significant deficits are reported with cognitive and emotional function in the areas of consciousness and memory, with a comment provided by the general practitioner that the appellant's "...level of confusion is variable. Good days and bad." In the assessor report, the physician indicated a major impact with cognitive and emotional functioning in the area of consciousness as well as moderate impacts in emotion, impulse control, insight and judgment, attention/concentration, memory, and motivation, and minimal or no impact in the remaining 7 areas. The physician wrote that he has noticed "...increased memory problems and confusion in recent months. Has an addictive personality. If he abuses drugs or alcohol it causes major affect on cirrhosis causing impact on orientation and confusion." The appellant stated that he does not sleep well due to anxiety about his health conditions and he believes that he experiences confusion and memory difficulties when he has not been sleeping for a long period. The general practitioner reported that the appellant is independent with 4 out of 5 aspects of social functioning, including developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others, while he requires periodic support/supervision with making appropriate social decisions. The appellant is assessed with good functioning in both his immediate and extended social networks and he independently manages all other listed "mental" tasks of daily living, with the exception of filling/refilling prescriptions, which requires the periodic assistance of another person due to the appellant's confusion and memory difficulties. The physician wrote that "...if the cirrhosis causes further confusion he will need assistance with shopping, etc. Drug abuse is main safety risk. More at risk of OD (overdose) as liver not functioning well." The panel finds that the evidence shows a connection between the appellant's "addictive personality" and the potential for serious exacerbation of his physical health conditions but that he currently able to function independently and appropriately. Therefore, 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 and mental impairments directly and significantly restrict his ability to perform DLA to the point that he requires the use of assistive devices or the assistance of another person in tasks of his DLA, or all tasks take significantly longer than typical.

The ministry's position is that the evidence of the prescribed professional is that the appellant performs the majority of his DLA independently or requires periodic help to go to/from stores and to fill prescriptions. The ministry argues that the appellant independently performs 4 out of 5 aspects of social functioning with periodic support/supervision to make appropriate social decisions explained as "...risk of alcohol and drug abuse ongoing problem" which does not describe the degree or duration of the support or supervision required to function. The ministry argues that the majority of DLA are performed independently or require little help from others and the information from the prescribed professional does not establish that the appellant's impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant is independent with mobilizing indoors and requires unspecified periodic assistance with walking outdoors and he can independently manage distances of 1-2 blocks. While the physician listed a cane, braces and splints as assistive devices used by the appellant, he also commented that the appellant "...does not use braces but would likely help knee pain" and the appellant stated that he does not use a cane and only uses a knee brace when walking for a long time. The majority of the listed tasks for all other DLA are managed independently, including personal care, basic housekeeping, all tasks associated with meal preparation ("may worsen in the future"), paying rent and bills and using transportation. The only restrictions identified to DLA are with the tasks of going to and from stores and filling/refilling prescriptions (confusion), and with making appropriate social decisions (alcohol and drug abuse). The appellant stated that he can do most things for 5 to 10 minutes and then he needs to take a break, so everything takes longer. The appellant stated that he moves slowly and has to be careful, and expressed frustration that his physician did not communicate this information in the assessor report. The physician commented that the appellant has "...deteriorating health. Easily could decompensate requiring hospitalization or need for assisted living," and the panel finds that the evidence demonstrates that there is a risk that the appellant's functioning may decrease sometime in the future. The panel concludes that currently 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 assistive devices and the significant assistance of others to perform his DLA, or it takes him significantly longer than typical to perform all tasks.

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, and that the requirement for knee braces is indicated for the future.

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 it is recommended that the appellant use a cane, splints and knee braces as assistive devices, the panel also finds that the ministry reasonably determined that it is not clear that these are currently required and, 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.