

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of December 13, 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
- as a result of those restrictions, 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 18, 2012. (The physician added some additional commentary to the PR and AR on November 16, 2012.) The application also included a self-report signed by the appellant on August 22, 2012.
- The appellant's Request for Reconsideration, inclusive of the appellant's written submission to the ministry's reconsideration officer, dated December 4, 2012.
- Various supporting medical notes and reports.

Mental Impairment

- The appellant's physician did not provide a diagnosis of a mental health condition in the PR.
- The physician did indicate that some of the appellant's medications make him forgetful and drowsy.
- In the PR the physician indicated that the appellant has significant deficits with cognitive and emotional function in the areas of executive function (*planning/organizing*), emotional disturbance (*depression/anxiety*), motivation, and attention/sustained concentration. In the AR's detailed description of impacts on DLA due to cognitive and emotional deficits, the physician noted a major impact related to motivation, 4 moderate impacts, and 9 areas out of 14 with minimal or no impact.
- In the PR the physician noted the appellant has no difficulty with communication.
- In his additional comments of November 16, 2012 the physician noted "Severe emotional ups + downs; very disturbed sleep; poor concentration, organizing skills."
- The physician completed the social functioning portion of the AR, which is to be completed only "...if the Applicant has an identified mental impairment, including brain injury." The physician reported the appellant as being fully independent with respect to all aspects of social functioning, and good with respect to both his immediate and extended social networks.
- In his written submission of December 4, 2012 the appellant wrote that he is experiencing severe mood changes, disturbed sleep, and poor concentration and organizational skills.
- At the appeal hearing the appellant testified that though he tries to be upbeat, chronic pain and depression go hand in hand and he believes that depression is becoming an issue.

Physical Impairment

- As a result of a car accident in November 2011 the appellant has been diagnosed by his physician with a torn supraspinatus tendon and a split in the long head of the biceps tendon, both in his left arm.
- In a consultation report dated November 8, 2012, the appellant was diagnosed by a consulting physician as having abnormalities to his thoracic outlet, which according to the appellant produces symptoms of weakness, numbness and tingling into his hand.
- In terms of functional skills the appellant's physician indicated that the appellant can walk 1 to

2 blocks unaided on a flat surface, can climb more than 5 steps, can lift under 5 pounds, and can remain seated for 1 to 2 hours.

- In his comments of November 16, 2012 the physician noted "After walking 1 block lt. arm/shoulder pain and finger numbness, severe."
- In describing the appellant's impairment in the AR, the physician noted that the appellant is "not able to lift/use lt. arm."
- In his December 4, 2012 submission to the ministry's reconsideration officer, the appellant wrote that he has been experiencing extreme pain, weakness and loss of function in his left shoulder. He reported that in compensating for his left shoulder by using his right shoulder for most tasks, his right shoulder is now becoming painful.
- At the appeal hearing the appellant said that he is scheduled for surgery on his left shoulder on January 28th, though since it is considered "elective surgery" there is a risk it could be cancelled before then.

DLA

- In the AR the appellant's physician noted that he takes significantly longer than typical walking outdoors and that he needs continuous assistance lifting/carrying/holding.
- They physician also indicated the appellant takes longer than typical transferring in/out of a vehicle. The appellant is independent in other aspects of transportation.
- With respect to shopping, the physician reported the appellant as taking longer than typical getting to/from stores and as needing continuous help carrying purchases.
- In all other aspects of shopping and in all other DLA the physician reported the appellant as managing independently.
- In his Dec. 4, 2012 submission the appellant wrote that he has difficulty preparing his own meals, has difficulty shopping on his own, has difficulty driving, cannot do housework, and has difficulty with several aspects of personal self-care.
- At the appeal hearing the appellant said that he took a bus ride recently that badly shook up his left arm, causing extreme pain.
- In response to a question from the panel with respect to restrictions of his ability to prepare meals, the appellant said that if something is about to spill he didn't think he could stop it because sudden movement causes intense pain.
- He also explained that he can't push a shopping cart because of the difficulties steering with one hand. He takes his son or daughter shopping and one of them will push the shopping cart. He said that he is unable to reach for items at the store.

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 that his wife now provides significant help with respect to DLA which she did not do prior to his accident. He said that his wife does all cooking, shopping and cleaning, and that she assists him with getting dressed, bathing and drying off afterwards. He indicated that if no one is present, he has managed to learn to use a towel rack to assist himself in getting dressed.

New Information

At the appeal hearing the appellant submitted a letter from his physician stating that because of his impairment the appellant is not able to take part in gainful employment, that so far none of the surgeons has provided any significant hope for improvement with surgery, and that the disability may have to be considered permanent. Employability is not a statutory criterion that is relevant to a determination of PWD designation. The information with respect to the potential duration of the impairment does, however, provide additional detail with respect to a matter that was before the ministry's reconsideration officer. The panel has admitted the letter along with the appellant's oral testimony as evidence 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 submitted a document which the panel assessed and accepted as written argument. It substantially reiterates the findings of the reconsideration decision.

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, though he did say that he thought depression is starting to become an issue, and that he is experiencing severe mood changes, disturbed sleep and poor concentration and organizational skills.

The ministry's position is that there is not enough evidence to 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 physician has

indicated that the appellant has some deficits in cognitive and emotional functioning, but in the AR the deficits are overwhelmingly described as having moderate, minimal or no impact on the appellant's functioning.

The AR indicates no impact on the appellant's ability to manage the two DLA that are specific to a severe mental impairment – decision-making and social functioning/communication. The physician's additional comments of November 16, 2012 refer to "severe" emotional ups and downs, "very" disturbed sleep, and "poor" concentration/organizational skills. However, these adjectives conflict with the physician's previous observations that these functions were only moderately or minimally impacted. He has provided no explanation for the inconsistency. It may be that the appellant's condition deteriorated during the interim, or it may be that the physician had misapprehended the degree of impact of the appellant's impairment, or there may be some other reason. The panel notes that despite adding the subsequent commentary, the physician did not seek to change or amend his earlier assessment of the degree of impact. There is insufficient medical evidence to indicate that the appellant's mental state has a significant impact on his ability to perform DLA independently.

On considering the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that the appellant has a severe mental impairment.

Severe Physical Impairment

The appellant's position is that the evidence demonstrates a severe physical impairment. He has a torn rotator cuff, a split tendon, and thoracic outlet syndrome which together cause extreme ongoing pain, which significantly impacts his ability to manage DLA.

The ministry, while acknowledging that the appellant's impairment may impact his physical functioning, found that the functional skill limitations were more in keeping with a moderate degree of impairment, and that there was 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.

In terms of functional skills the most substantial limitations are with respect to walking outdoors and lifting/carrying. The appellant is limited to walking 1 to 2 blocks because walking causes severe pain in his left arm. Though the appellant's lifting capacity is reported as being under 5 pounds, there is no indication from the physician as to why the appellant's lifting capacity with his right arm is limited by the injury to his left shoulder. The appellant has stated that overuse is starting to cause pain in his right shoulder as well but there is no medical corroboration of this, or any evidence to support the contention that his right arm is impaired to this extent.

There is little in the way of evidence from the physician that these functional limitations translate into direct or significant restrictions on the appellant's ability to manage DLA independently.

Accordingly, the panel finds that the ministry reasonably concluded that the evidence does not establish that the appellant has a severe physical impairment.

Significant Restrictions to DLA

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

The ministry's position is that there is not enough evidence to establish that the appellant's impairments significantly restrict his ability to manage the majority of 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".

In this case, the physician's evidence indicates that the appellant is not directly or significantly restricted with respect to 7 of the 10 prescribed DLA – meal preparation, managing finances, managing medications, decision making, personal self-care, basic housekeeping and social functioning/communication – as he performs these functions independently. The appellant contends that he is directly and significantly restricted with respect to meal preparation, personal self-care and housekeeping. When questioned as to how his medical conditions restrict him from preparing meals, the appellant said that if something is going to spill, he didn't think he could stop it because of the intense pain caused by sudden movements. The panel finds that fear of not being able to prevent a spill is not a direct or significant restriction to the appellant's ability to prepare meals. With respect to self-care, the appellant maintains that his wife has to help him with aspects of dressing and bathing, but he also indicated that he has learned to deal with at least dressing when no one is around by leaning on a towel rack. With respect to housekeeping, there is no evidence to indicate why the appellant is directly or significantly restricted from performing at least the lighter aspects of this DLA.

Regarding the 3 remaining DLA – ability to move about indoors and outdoors, use public or personal transportation facilities, and shopping – the physician has indicated some restrictions to some aspects. With respect to moving about indoors and outdoors, the evidence is that the appellant is restricted to walking 1 to 2 blocks outdoors, after which his left arm is in severe pain. There is, however, no indication that the appellant is restricted in any way from moving about indoors. With respect to use of transportation, the only noted restriction is a degree of difficulty getting into or out of a vehicle. The appellant is able to drive his own vehicle. With respect to shopping, the physician indicated that the appellant requires continuous help with lifting/carrying/holding, and that he takes significantly longer than typical getting to and from the stores. The physician provided no narrative to support or explain the appellant's contention that he cannot reach items in the store. The panel did not find the appellant's evidence with respect to not being able to independently steer a shopping cart

sufficiently compelling to establish a significant restriction.

Viewed as a whole, the panel finds that the evidence reasonably supports the ministry's conclusion that the appellant's ability to perform DLA is not directly or significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he relies on ongoing help from his wife with respect to several DLA – help which she did not provide prior to his injury. He also gets help from his children with aspects of shopping.

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

Panel Decision

The evidence indicates that the appellant receives assistance from others with some aspects of some DLA. In the panel's view 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.

The panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant is suffering from a painful medical condition that is affecting his ability to function. However, 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 is reasonably supported by the evidence and is a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.