

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 05 March 2013 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2.

Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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. After verifying that the ministry had been notified of the hearing, the panel proceeded pursuant to section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 24 October 2012. The Application contained:
 - The appellant's Self Report (SR).
 - A Physician Report (PR) dated 07 November 2012 completed by the appellant's general practitioner (GP) who has known the appellant since June 2010 and seen him 2 - 10 times in the past year.
 - An Assessor Report (AR) dated 07 November 2012, completed by the same GP.
 - A consult letter dated 02 October 2010 from a neurosurgeon (Neurosurgeon Report or NR)
2. The appellant's Request for Reconsideration, dated 25 February 2013, including a submission by the appellant.

In the PR, the GP diagnoses the appellant with degenerative disc disease (DDD) of the lumbar spine and osteoarthritis in the right knee, both with onset more than two years ago. In the AR, the GP identifies a herniated disc into at L5-S1 with spinal bifida and osteoarthritis in back.

The panel will first summarize the evidence from the PR, AR and the NR, relating to the appellant's impairments as it relates to the PWD criteria at issue.

Severity/health history

Physical impairment

PR:

The GP writes: "[The appellant] is limited due to chronic pain. Not a surgical candidate. Did not respond to cortisone injections or high dose opioids."

The GP notes that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA and does not require any prostheses or aids for his impairment.

NR:

The neurosurgeon reports that the appellant presents with lower back pain precipitated by most physical activities. The appellant also reports osteoarthritis in the right hip, and neck and lumbar spine. The neurosurgeon reports that the appellant has an allergy to certain analgesics. At that time, he was not taking any medications. The lower back pain is now relatively constant. It is aggravated by all physical activities including walking, standing, sitting, and even lying.

Physical examination reveals a man with diffuse tenderness mainly at the lumbosacral level. He has 90° of straight leg raising but with lower back pain from the left side. He could flex to reach 17 inches from the floor. Extension and lateral bending of the lumbar spine were all restricted. Trendelenburg's test was negative. He was able to heel and toe walk without any difficulty.

The neurosurgeon reports on the CT of the lumbar spine of 25 July 2010. At the L5- S1 level there is some evidence of a disc bulge or herniation on the left side. Facet joint arthritis is noted bilaterally and there is spinal bifida occulta of L5 and possibly S1.

The neurosurgeon concludes by noting that the appellant has chronic lower back pain which is definitely mechanical in nature. It relates to the extensive degenerative changes which are noted in his lumbar spine. He states it is doubtful that his back pain can be improved by surgical means.

Functional skills

PR:

The GP reports that the appellant is able to walk less than 1 block unaided (uses brace on right knee), able to climb 5+ stairs unaided, limited to lifting 10 pounds and can remain seated less than one hour (due to back pain).

Mental impairment

PR:

The GP does not identify any mental health condition as an impairment.

The GP does not report any difficulties with communication

The GP reports that the appellant has a significant deficit with cognitive and emotional function in the area of attention or sustained concentration, commenting "Attention deficit disorder. Poor concentration"

AR:

The GP assesses the appellant's ability to communicate as good for speaking, reading and hearing and satisfactory for writing.

No cognitive or emotional impacts on daily functioning are reported.

Ability to perform DLA

AR:

Mobility and physical ability

The GP assesses the appellant taking 2x longer than typical for walking indoors, able to walk < 1 block 2x longer than typical, climbing stairs 2x longer than typical, able to stand < 10 minutes and needing help for lifting and carrying and holding > 9 lbs. The GP comments that the appellant wears a brace on his right knee.

Other DLA (GP's comments in parentheses)

Personal care: dressing – takes significantly longer than typical (needs to sit); grooming – takes 2x longer; bathing – uses an assistive device and takes significantly longer (showering only, uses rails); toileting, feeding self and regulating diet – independent; transfers in/out of bed – takes 2x longer; transfers on/off of chair – takes 3x longer.

Basic housekeeping: laundry – takes 2x longer; basic housekeeping – much longer due to pain.

Shopping: going to and from stores – takes 3x longer; reading prices and labels, making appropriate choices, and paying for purchases – independent; carrying purchases home – continuous assistance from another person required (needs help to carry).

Meals: meal planning and safe storage of food – independent; food preparation and cooking – continuous assistance from another person required or unable (not cooking in months due to pain; roommates cook).

Pay rent and bills: independent in all aspects.

Medications: independent in all aspects.

Transportation: getting in and out of vehicle – takes 2x longer; using public transport and using transit schedules – NA

Social functioning

The GP does not report any support/supervision required in the five listed areas of social functioning and does not provide an assessment of impacts with respect to the appellant's relationships with his immediate or extended social networks.

Help required

AR:

The panel notes that page 20 of 23 of the AR headed "D – Assistance Provided for applicant" is missing from the appeal record. The panel notes references to help required or provided elsewhere in the application: the use of a knee brace, bathroom rails in the home and help from room-mates for cooking, shopping and housework.

In his SR, written with the assistance of an advocate, the appellant refers to his diagnoses and states that he has so much pain that he cannot sleep without taking sleeping medication and often still can't sleep because pain keeps him awake.

As to his DLA, he states that he is limited with his mobility due to pain. He has to wear a knee brace on his right knee for stability. If he didn't wear a knee brace he would collapse without the support it provides. Due to pain in his hips and back he cannot carry anything more than a couple of hundred feet and his lifting is limited to less than 9 pounds. He takes a lot of pain medication on a daily basis to help him get through a day but it never eliminates pain, only dulls it a bit and sometimes he does nothing. He cannot walk far, less than one block, then needs to take a break due to pain in his knee, hips and back

He states he has a hard time focusing or concentrating on anything. Although undiagnosed, he feels he has ADHD. Lack of concentration is also a result of pain and the medication he takes.

Dressing is a slow process, bending is very difficult for him so putting on socks and shoes is a struggle and takes him about twice as long.

He has to do housework over a couple of days. Vacuuming is particularly painful due to the repetitive motion necessary. When he washes his clothes, it takes him at least two times longer and bending over the machines is painful and he has to sit down to fold his clothes.

When he shops it takes him at least three times longer. He has to walk to the store and take at least 3 – 4 breaks and rest. He always has help to carry his purchases home as he cannot carry them the two blocks he has to go to get to the store. Sometimes his roommate goes for him because it's just too painful.

As to meals, he does not have an appetite and his roommates are always trying to get him to eat. They cook for him because he won't.

In his Request for Reconsideration the appellant reviews his diagnoses and states that he cannot do any of the following: dress, cook, clean, eat, stand, sit, walk, climb up/down stairs, do laundry, all without being in crippling pain (agony). He states that he does not sleep and that he cannot take care of himself without help. His diet is very poor and he can't go to the food bank: he cannot walk or carry anything. His mental health is deteriorating – cannot remember 90% of his life, can easily get confused, distracted and lose interest. He is mentally impatient. When pain is in full swing his medication does not have any effect. He has taken enough strong doses of pain killer that would kill a horse.

In his Notice of Appeal, dated 07 March 2013, the appellant refers to his diagnoses of spinal bifida (a crippling disease), arthritis and a crushed/collapsed disk in the lower back and emphasizes that painkillers do not work and that he cannot bend, sit, stand, or walk for more than 2 minutes.

At the hearing, the appellant reviewed the spinal and arthritis conditions and knee problem diagnosed by his general practitioner and neurosurgeon. He has not seen the neurosurgeon since his visit in 2010 as there is nothing the surgeon can do: his conditions will be lifelong, with no treatment or cure available. As a result of these conditions, he is restricted in everything he does: walking, climbing stairs, standing, lifting, and bending. His GP says that he takes enough painkillers "to numb an elephant." Over the years he has been prescribed some 40 different pain medications and none of them have given much relief. He stated that he needs the help of his roommates for cooking and shopping and a friend comes to help him bathe. He is fortunate that where he lives was formerly occupied by a handicapped person and there are rails throughout the house that he can use to move about. There is also a special bathtub with rails that he uses for showering. With respect to his knee brace, about five years ago the ministry, on the recommendation of the specialist, provided him with a full-length leg brace. This turned out to be uncomfortable and he subsequently bought with his own money an off-the-shelf knee brace at a sporting goods store.

Referring to his mental health, the appellant stated that, despite taking sleeping medication, his pain frequently causes insomnia and he will not get any sleep for days at a time. As a result, he will get confused and disoriented. On those occasions, he needs someone with him at all times so that he does not hurt himself. For instance, he might be cutting an onion and cut himself and in that state would not notice, with serious consequences.

The panel finds the additional comments provided by the appellant in his testimony at the hearing are in support of information that was before the ministry on reconsideration. His evidence of his restrictions to daily functioning and help required is further to the information provided by the GP and neurosurgeon in the original application and the testimony further elaborates on his medical conditions and living situation. The panel therefore admits this new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2 of the EAPWDA.

Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The Ministry did determine that he met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

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.

The following section of the EAPWDR applies to this appeal:

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.

Severity of impairment

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the appellant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's physician) identify the impairment and confirm that impairment will continue for at least two years.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." The cause is usually set out as a disease, condition, syndrome or even by a symptom (e.g. pain). A severe impairment requires the identified cause to have a significant impact on daily functioning.

Physical impairment

The position of the ministry is that, while acknowledging that the appellant has some functional limitations as a result of his physical conditions, in the ministry's opinion his functional skill limitations are more in keeping with a moderate degree of impairment. The ministry was not satisfied that the information provided is evidence of a severe physical impairment.

The position of the appellant is that his DDD and spinal bifida, together with the osteoarthritis in his knee, hips and back, are serious medical conditions for which there are no cures or treatments. The pain resulting from these conditions is constant and is exacerbated by any physical activity. Pain-killers only dull the pain, and then only in massive doses. The resulting restrictions and the need for help in the form of a knee brace and assistance from other people clearly demonstrate a severe physical impairment.

The panel notes that in the reconsideration decision the ministry did not refer to the appellant's use of a knee brace. The GP did mark "No" in answer to the question as to whether the appellant requires any prostheses or aids for his impairment, but the panel considers this to be a misunderstanding of the question as the GP did mention the knee brace twice. The panel finds that the knee brace is an assistive device as defined in the EAPWDA.

The evidence is that the appellant suffers from much pain due to his spinal and arthritic conditions. The neurosurgeon wrote: "The lower back pain is now relatively constant. It is aggravated by all physical activities including walking, standing, sitting and even lying. There are no specific relieving factors. He has only had transient relief of pain from [pain medication]." He goes on to write: "This

man has chronic lower back pain which is definitely mechanical in nature. It relates to the extensive degenerative changes which are noted in the lumbar spine." The evidence from the GP is that the appellant is limited to walking unaided for less than one block. The appellant's testimony is that he can walk somewhat further, but he uses his knee brace at all times and he must stop and rest frequently. The GP's evidence is that the appellant takes 2 or 3 times longer than typical for most physical activities, including walking, showering, dressing and grooming, and getting in/out of a chair or bed, with a standing tolerance of 10 minutes. Physical activities requiring more physical effort, such as carrying purchases home from shopping, heavier housework and cooking meals require the help of others. Taking all this evidence together indicates to the panel that the assessment of the appellant's physical impairment must take into account the bigger picture of the extent and causes of the appellant's restrictions and not be limited to only the functional skill limitations upon which the ministry relied in its determination. Putting these restrictions on the appellant's daily functioning into the context of pain aggravated by any physical activity, and for which strong pain medication provides little relief, the panel finds that the ministry was not reasonable in determining that a severe physical impairment had not been established.

Mental impairment

The position of the ministry is that the information provided did not establish a severe mental impairment.

The position of the appellant is that he suffers from attention deficit disorder, which together with pain induced insomnia and the side-effects of his powerful pain medications, frequently causes him to be confused and disoriented. He submits that this is sufficient to establish a severe mental impairment.

The panel notes that the GP has not identified a mental health condition as an impairment. While the GP did mention attention deficit disorder in connection with an emotional and cognitive deficit in the area of attention/concentration, the GP did not identify any impacts in this regard on daily functioning. No difficulties with communication or social functioning were identified. The panel therefore finds that the ministry was reasonable in determining that a severe mental impairment had not been established.

Significant restrictions in the ability to perform DLA.

The position of the ministry is that while acknowledging that the appellant's functional limitations affect his ability to perform some aspects of his DLA, with many tasks taking longer than normal, the majority of DLA are still performed independently. As no severe impairment had been established, the ministry determined that the information provided did not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

The appellant's position is that he is directly and significantly restricted in a number of DLA, including mobility inside and outside the home, shopping and preparing meals.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion which the panel has determined has been established, and be in the opinion of a prescribed professional. This does not mean that other evidence should not 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" that this criterion is met.

The evidence from the GP, with some clarification and detail provided by the appellant, is that the appellant is restricted in most DLA requiring physical effort:

- Move about indoors and outdoors: the appellant relies on a knee brace at all times; without it is limited to walking less than one block; while he can walk a couple of blocks to the store, it takes him two times longer than typical, having to stop and take a rest frequently; indoors he relies on rails placed through the home.
- Shop for personal needs: in addition to his mobility restrictions going to and from stores, he requires help carrying purchases home.
- Prepare own meals: he has not cooked in months – his roommates do the cooking for him.
- Perform housework to maintain the person's place of residence in acceptable sanitary condition: takes much longer than typical due to pain.
- Perform personal hygiene and self care: all aspects dressing and grooming take 2 to 3 times longer than typical, with putting on socks and shoes a challenge. He is someone help him bathe occasionally.

Based on the foregoing, it is difficult for the panel to consider these restrictions to DLA as being anything other than significant and continuous. The restrictions to the 3 DLA relating to mobility, shopping and cooking are, in the opinion of a prescribed professional, restricted on a continuous basis to the extent that significant help is required, either through the use of an assistive device or from other people, or both. While the evidence may suggest that he can manage the DLA of housekeeping and personal care "independently," doing so takes significantly longer than typical due to his pain. On the basis of all the information provided, the panel finds that the ministry was not reasonable in determining that the information provided did not establish to the ministry's satisfaction that in the opinion of a prescribed professional the appellant's severe physical impairment directly and significantly restricts his ability to perform daily living activities on a continuous basis.

Help with DLA

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.

The position of the appellant is that the evidence shows that he requires help to manage his significantly restricted DLA. This includes the help from his roommates for shopping and cooking and the use of a knee brace.

The evidence is that the appellant's ability to perform DLA is significantly restricted on a continuous basis. The panel finds that the evidence clearly demonstrates the appellant requires help in relation to the significantly restricted DLA: due to his mobility restrictions, he requires the use of a knee brace as an assistive device; and due to the pain associated with any physical activity, he relies on the his roommates for cooking his meals and for carrying purchases home from the store. Therefore the panel finds that the ministry was not reasonable in determining that the information provided did not establish that this criterion had not been met.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was not reasonably supported by the evidence. The panel therefore rescinds the ministry's decision in favour of the appellant.