

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of April 25, 2013, which found that the appellant satisfied all but two of the 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 meets the age requirement; that the appellant has a severe mental impairment; and that the appellant's impairment is likely to continue for at least two years.

The ministry was not, however, satisfied that - in the opinion of a prescribed professional:

- the appellant's severe impairment directly and significantly restricts his ability to perform daily living activities (DLA) either continuously, or periodically for extended periods, and
- as a result of those restrictions, the appellant requires help 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 information before the ministry at the time of reconsideration included the appellant's application for PWD designation, including:

- a self-report signed by the appellant on November 19, 2012;
- a physician's report (PR), signed by the appellant's physical medicine rehabilitation specialist (the Specialist) of approximately 6 years on November 19, 2012;
- an assessor's report (AR) signed by the appellant's general practitioner of approximately 6 ½ years, on January 2, 2012.

Also before the ministry was a written reconsideration submission from the appellant.

In the PR the appellant is diagnosed with chronic recurrent musculo-ligamentous sprain/strain of cervical spine and upper thoracic spine with intermittent a) cervicobrachialgia, b) cervicogenic headaches, and c) traumatic dystonia. He is also diagnosed with subsequent escalation anxiety from sleep deprivation. In the AR the general practitioner diagnosed chronic pain, depression, attention deficit hyperactivity disorder (ADHD), and intermittent substance abuse.

The appellant suffered a left-side neck and shoulder injury in a car accident in 1998. His injuries result in almost continuous spasms in the muscles of his left shoulder and neck area. To control these painful spasms the appellant has undergone multiple Botox injections in the affected area every 4 months for the past 6 years or so. He also uses both prescription and over-the-counter pain relief medication as needed. As a result of his injuries the appellant was forced to abandon his chosen career in landscaping and construction, and for the past several years has pursued retraining through post-secondary education.

For many years the appellant was able to fund his studies with the assistance of employment insurance benefits and various grants and scholarships available to students with disabilities. Now, however, those sources of funds have dried up and the appellant can no longer afford to continue with his studies. He works part time in the garden centre at a building supply store but is finding the work requires some heavy lifting and is more physically demanding than he had thought it would be.

Restrictions to DLA

- In the PR the Specialist, who is a medical practitioner, indicated that the appellant is unrestricted in 7 of the 10 prescribed DLA – *self-care, meal preparation, management of medications, use of transportation* (with the comment that the appellant can't drive because of limited range of movement of his neck), *management of finances, social functioning, and decision-making*.
- Also in the PR the Specialist indicated that the appellant is periodically restricted in the DLA of *mobility inside and outside the home* (the restriction applies only to mobility outside the home), *basic housework, and daily shopping*.
- In terms of physical functioning the Specialist noted the appellant can walk more than 4 blocks unaided and can climb more than 5 stairs. She indicated he is limited in his ability to lift more than 5 to 15 pounds, and that he can remain seated for 1 to 2 hours but that he must shift position occasionally.
- In the AR the general practitioner indicated the appellant is fully independent with respect to 5

of the 10 prescribed DLA – *self-care, meal preparation, management of medications, mobility inside and outside the home and use of transportation.*

- With respect to *management of finances* (pay rent and bills), the general practitioner noted that the appellant periodically “needs help of financial advisor for these areas”.
- The general practitioner indicated a number of impacts to the appellant’s cognitive and emotional functioning, resulting primarily in drowsiness, occasional low motivation, poor impulse control with respect to periodic alcohol binges, and poor financial planning.
- Regarding *social functioning*, the general practitioner indicated that the appellant requires periodic support/supervision in some aspects, but that he nevertheless has “good functioning” with both immediate and extended social networks.
- The general practitioner noted shoulder pain as a periodic restriction to the appellant’s ability to do aspects of *basic housekeeping*, and he noted periodic restrictions to aspects of *daily shopping* as “mostly due to financial limits” and “difficulty making appropriate financial choices.” He also noted that the appellant makes multiple trips when shopping and that he uses a dolly to carry items home.
- In his self-report the appellant wrote that his DLA are greatly restricted by the pain from his injuries.
- In his reconsideration submission, the appellant wrote that the most problematic aspect of a DLA that he undertakes is dishwashing, which he finds to be extremely painful because of the repetitive motion and the need to hunch uncomfortably over the sink because of his height.
- He also wrote that the PWD application made him much more conscious of his difficulties with housekeeping, grocery shopping, and carrying his books to and from school. He generally uses a backpack, but also uses a dolly to move items that are too heavy for him to carry. He limits the amount of housework that he does in a day, and doesn’t keep his home up to the standards he would like.
- The appellant wrote that pain and lack of sleep cause him to restrict his social activities.
- In oral testimony on appeal, the appellant said that his disabilities had been recognized by the federal government’s employment insurance program, and by the two post-secondary educational institutions which he has attended since his accident.
- The appellant stated that when he lived in residence at school he had friends who would do various tasks for him such as helping with dish washing and laundry. Now that he lives alone he has had to learn to adapt to do these things himself.
- With respect to management of finances, the appellant noted that he often was overly generous buying drinks for friends at the pub. He is currently behind on his rent but has done some work, such as vacuuming the hallways, for the property manager and is seeking other sources of funding to help with the rent. The appellant noted that he would like to be employed doing maintenance work on the apartment building in which he lives.
- In response to a question from the panel the appellant said that he is not entirely certain why the general practitioner commented on his ability to make financial decisions. He said that he is responsible for his own financial decisions, has consolidated his credit card debt on the advice of his landlord’s account manager, and has been “wheeling and dealing” with his creditors.
- Also in response to a question from the panel, the appellant said that while he is not capable of independent travel since he can’t drive a car, he has no problem with using public transportation and uses the bus pass he receives as part of his student status.

Help

- In the PR the Specialist indicated that the appellant does not require any prostheses or aids for his impairment.
- In the AR the general practitioner indicated that the appellant could use the services of a financial advisor and some help with housework/shopping/carrying. He indicated that assistance for DLA is provided by the appellant's friends.
- With respect to assistive devices, the general practitioner checked "lifting device", commenting "dolly/backpack".
- The general practitioner indicated that the appellant does not have or need an assistance animal.
- In his reconsideration submission the appellant said that he relies on several aids including an orthopedic pillow, neck brace support pillows, battery-powered personal massagers, a digital massage therapy system, an elevating shelf for his laptop, and an ascending/descending office chair.
- In his oral testimony the appellant confirmed that he doesn't need to be reminded about managing his medications, or safe storage etc., saying "I can handle those things."
- The appellant said that he has had to learn to adapt to continue handling his DLA himself. He stated that without the Botox treatments he wouldn't be able to do those things.

Admissibility of New Information

The appellant's oral evidence provided more detail of the history of his disability and the restrictions on his DLA. The panel admitted this information as oral testimony in support of the information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and did not submit 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 - 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.

Restrictions to DLA

The appellant argued that pain and lack of sleep caused by his injuries make it difficult for him to manage his DLA. It is only through the Botox treatments and necessity that he has learned to adapt and to get by on his own. The appellant said that he has been recognized as being disabled by other government agencies and the post-secondary institutions he has attended, and believes the same recognition should apply with respect to PWD designation.

The ministry's position is that it relies on information from the physicians to determine the degree of restriction caused by an impairment. In the appellant's case, the ministry said that there was not enough evidence from the Specialist or the general practitioner to establish that the appellant's impairments significantly restrict his ability to manage his DLA continuously or periodically for

extended periods.

Panel Decision

The appellant's eligibility for designation as a PWD must be assessed against the requirements of the enabling legislation. The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the ministry to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's Specialist and general practitioner. 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".

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant – it must be more than a bothersome inconvenience. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The evidence of the Specialist and the general practitioner are consistent in opining that the appellant is unrestricted with respect to the DLA of *self-care, meal preparation, and management of medications*. *Use of transportation* is restricted only to the extent that the appellant does not own or drive a vehicle. *Mobility inside and outside the home* and *daily shopping* are restricted only to the extent that the appellant uses a dolly if required to carry items exceeding his lifting capacity. The appellant has made some financial choices in the past that in retrospect may not have worked out as intended, but the appellant's evidence is that he independently *manages his finances* other than taking occasional advice with respect to debt management. There is no evidence that he is restricted in terms of *decision-making*. He is managing well in terms of *social functioning*. The evidence indicates that the appellant suffers discomfort from doing *basic housework*, but there is no evidence that the housework remains undone for extended periods. For those DLA where the physicians have indicated that periodic assistance is required, there is no evidence as to the frequency or duration of those periods.

On balance, the panel finds that the ministry reasonably determined that the evidence falls short of showing that the appellant is significantly restricted in his ability to manage his DLA continuously or periodically for extended periods.

Help with DLA

The appellant's position is that because he does not have anyone else to assist with his DLA, he has learned to adapt to do them himself. He says that doesn't mean that he doesn't need help, and that his assessment for PWD designation shouldn't be negatively affected only because he doesn't have

anyone to help him with his 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 ministry argues that the dolly and the backpack are not assistive devices as defined in the legislation.

Panel Decision

The evidence is that the appellant's impairment does affect his ability to manage DLA. There is, however, little or no evidence that the appellant receives or requires any assistance to manage his DLA.

The panel notes that there may be situations in which a person may "require" help but not be receiving it. In the panel's view the word "require" indicates a degree of necessity so that it is something that a person cannot reasonably do without. If the person does not get the help he requires, the DLA goes undone either continuously or periodically for extended periods. In the panel's view there is simply insufficient evidence to show that the appellant's DLA go undone for any significant period of time, or that he relies upon "the significant help or supervision of another person" as required by s. 2(3)(b)(ii) of the EAPWDA. The evidence shows that the appellant performs all of his DLA for himself independently.

The panel finds that the various "aids" referred to by the appellant do not constitute "assistive devices" as defined in the legislation as they were not designed to enable a person to perform a DLA.

The appellant does not use 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 enduring medical conditions that affect 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. The panel therefore confirms the ministry's decision.