

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision of May 1, 2013, 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

With the consent of the parties, the hearing was conducted in writing in accordance with s. 22(3)(b) of the *Employment and Assistance Act*.

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 an assessor's report (AR) both completed and signed by the appellant's HIV specialist (the specialist) in January, 2013. The application also included the appellant's handwritten self-report signed by the appellant on January 29, 2013.
- A 2 page typewritten self-report prepared for the appellant by an advocacy agency in December, 2012.
- A "to whom it may concern" letter from the appellant's general medical practitioner (GP) dated April 19, 2013 (the April 19 letter).
- An undated memo from the appellant to the specialist, apparently sent to the specialist in December, 2012.
- Letters from the specialist to the GP, dated September 24, 2012 and December 20, 2012.

Admissibility of New Information

In his Notice of Appeal the appellant – in response to comments made by the ministry in the reconsideration decision – indicated that he had been a patient of the GP since 2009 and of the specialist since July 2012. The appellant also provided a one-page handwritten appeal submission dated May 29, 2013 and a prescription receipt for an antidepressant, dated May 15, 2013. The appeal submission provided more detail with respect to the respective roles of the GP and the specialist – specifically that the specialist will deal only with the HIV issue(s) and the GP will deal with any other physical, mental or emotional issues. The ministry stated no position on admissibility of the new information. The panel has admitted the new information as being in support of 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 submitted no new information.

Physical Impairment

- The specialist did not complete the Diagnosis section of the PR form, but subsequently wrote "HIV infection but he is on appropriate therapy. His major problem is depression + anxiety disorder."
- The specialist indicated that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA, and he wrote in the September 24 letter to the GP that the potential adverse side effects of the HIV medication "...are really quite minimal."
- In terms of functional skills, the specialist noted no limitations with respect to the appellant's unaided walking ability on a flat surface, stair-climbing ability, and lifting capacity. He reported

the appellant as being limited in his ability to remain seated for 2 to 3 hours.

- The specialist commented that the appellant is able to ride his bicycle 10 to 12 blocks, and that he had fractured his right lower leg 8 years ago, which has left him with chronic swelling of the leg.
- In the Additional Comments section of the PR the specialist wrote that the appellant is not ill with any infections.
- In the April 19 letter, the GP wrote that the HIV medications cause nausea and fatigue.
- In his handwritten self-report the appellant wrote that he suffers from HIV and associated depression, nausea, fatigue, gout, diarrhea, and constipation. He reported that the intestinal and bowel problems had been ongoing for 3 years, that he is tired and weak from lack of appetite, and that stomach pain and soreness affect his daily life.
- The typewritten self-report indicated the appellant was diagnosed with HIV about 6 months before. It notes that even with the HIV medications the appellant suffers from symptoms of the disease including severe and chronic fatigue, susceptibility to illness, gout, abscesses and hives.
- The typewritten self-report stated that side effects of the HIV medications exacerbate the appellant's fatigue, reduce his appetite, and cause chronic and severe stomach and intestinal problems. It also reported that the appellant cannot support weight on his ankle and so must avoid lifting and carrying heavy objects.
- In his memo to the specialist, the appellant wrote that in the last couple of years, between throat infections and abscesses, gout, intestinal troubles and rotten and broken teeth, he has not been very well.
- In his December 20th letter to the GP, the specialist reported that after two months on HIV medication the appellant's viral load had been significantly reduced.

Mental Impairment

- In the PR the specialist wrote that the appellant's "major problem is depression + anxiety disorder."
- The specialist reported significant deficits with 3 out of 11 areas of cognitive and emotional function – depression/anxiety, loss of motivation, and problems with attention/sustained concentration.
- The specialist indicated the appellant has had depression and addictions for over 10 years.
- In the AR the specialist indicated the appellant's mental impairment has a moderate impact on 2 out of 14 categories of cognitive and emotional functioning (depression/anxiety and motivation), minimal impact on 1 category, and no impact on the remaining 11 categories.
- The specialist indicated the appellant is completely independent in terms of all DLA, including *social functioning* and *decision-making*, the 2 prescribed DLA that are specific to a mental impairment.
- In the April 19 letter, the GP reported that the specialist is not fully informed as to the nature of the appellant's impairments. He wrote "The reality is that [the appellant] is severely impaired on a daily basis by his significant generalized anxiety disorder, social phobia and major depressive disorder. He is unable to function normally in social relationships and interactions, and unable to make appropriate decisions to even ask for help...In my opinion he is genuinely and severely impaired by his medical conditions."
- In his handwritten self-report the appellant expressed his opinion that the intestinal issues and the HIV led to his depression and anxiety. The typewritten self-report indicates the

depression and anxiety have worsened since the HIV diagnosis, and that they contribute to his fatigue and lethargy.

- In his September 24th letter to the GP, the specialist referred to the appellant's medical history when he wrote that the appellant suffers from "periodic stress and depression".
- In his appeal submission the appellant wrote that he'd been advised by the GP that "there is no psychiatrist available."

DLA

- In both the PR and the AR the specialist described the appellant as being completely independent with respect to all aspects of all DLA.
- In the AR the specialist indicated that the appellant is independent in terms of all aspects of *social functioning*, and that he has good functioning in terms of both immediate and extended social networks.
- In the April 19 letter the GP wrote that for the past 3 years the appellant has been "...completely reliant on his roommate for shopping, cooking, cleaning and household planning. He does not eat regular meals and neglects his health daily... He is at serious risk for homelessness and worsening of his chronic illnesses due to his social isolation and self-neglect."
- The typewritten self-report indicated that it takes the appellant significantly longer than an able-bodied person to get dressed and take care of personal hygiene, and that he is too weak to perform other DLA such as household chores, laundry, grocery shopping, or banking.
- The typewritten self-report also indicated that the appellant's roommate "sometimes" shares meals with him, that the appellant eats irregularly and does not cook, but that he eats simple foods that can be prepared using a microwave.

Help

- In the PR and the AR the specialist indicated the appellant does not require aids or prostheses for his impairment, and in the AR he indicated that appellant does not have an assistance animal.
- In the AR the specialist noted that help required for DLA is provided by friends.
- In the April 19 letter the GP wrote that the appellant "...requires daily constant supervision and assistance to survive, which fortunately his roommate has provided so far, but this is not certain to continue. In my opinion he is genuinely and severely impaired by his medical condition."
- The typewritten self-report states that "As a result of his disabilities, [the appellant] is highly dependent upon his roommate. His roommate does all the household chores and shopping and provides assistance to [the appellant] when [his] symptoms are incapacitating. [The appellant's] roommate also provides encouragement... [the appellant] would struggle to live independently and will continue to require significant assistance in the future."

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.

Severe Physical Impairment

The appellant did not expressly advance an argument with respect to having a severe physical impairment, but it is implicit in his self-reports that his HIV and related conditions such as the intestinal issues and side effects of the HIV medication are sufficiently severe as to leave him "unable to function."

The ministry, while acknowledging that the GP's evidence has convinced the ministry that the appellant's impairments impact his life more significantly than the specialist's evidence would indicate, noted that the GP did not specify any physical diagnosis and did not provide any information on physical functional skills. The ministry took the position that the specialist would presumably be a reliable expert with respect to how the appellant's HIV impacts his DLA and physical activities, and

accordingly said that the ministry was not satisfied that the information demonstrates a severe physical impairment.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. One person with HIV may be significantly restricted from being able to manage DLA independently, while another person with HIV may be virtually unrestricted. Accordingly, to assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage his DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry PR form describes this approach well when it defines the word "impairment" as being "*a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.*" Of course, this definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

The legislation makes it clear that the determination of severity is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed along with any other evidence.

In the appellant's case, the specialist was clear in his opinion that the appellant's physical medical condition is secondary to his mental condition. The GP also emphasized the appellant's mental condition in describing impacts to the appellant's ability to manage his DLA. Neither physician provided any information as to how or to what extent the appellant's physical medical condition restricts his ability to independently manage his DLA. The specialist described the appellant as having virtually no limitations with respect to physical functional skills, and his evidence in this regard was not refuted by the GP's evidence.

In contrast to the professional opinions, which stressed the appellant's mental condition as being primary, both the handwritten and typewritten self-reports emphasized the appellant's physical symptoms and referred to the depression and anxiety as being secondary or contributory impairments.

Given the specialist's expertise in this area, the panel finds that the ministry was reasonable in giving more weight to the specialist's evidence with respect to any adverse side effects of the HIV medication.

Viewing the evidence as a whole, the panel finds that the ministry was reasonable in concluding that the information doesn't demonstrate a severe physical impairment.

Severe Mental Impairment

The appellant's position is that he suffers from severe depression, emotional stress and confusion. He argues that he was unable to function long before he contracted HIV, and that the depression and anxiety contribute to his fatigue and lethargy.

The ministry's position, as set out in the reconsideration decision, is that when viewed as a whole, the evidence is insufficient to satisfy the ministry that the appellant has a severe mental impairment.

Panel Decision

Both the specialist and the GP confirm that the appellant suffers from depression and anxiety, with the GP adding that the appellant has a social phobia. The depression is being treated by the GP with an antidepressant. There is no evidence of any other treatment regime for the mental health conditions, except the appellant's evidence that no psychiatrist is available.

According to the specialist's evidence, the mental health conditions do not significantly restrict the appellant's ability to manage his DLA independently, having at most a moderate impact on some aspects of his cognitive and emotional functioning. This is in stark contrast to the GP's evidence, which describes the appellant's mental impairment as "severe" and "significant". With respect to the 2 prescribed DLA that are specific to mental impairment – *social functioning* and *decision-making*, the GP wrote that the appellant is unable to function normally in social relationships, and that he is completely reliant on his roommate for household planning. The specialist on the other hand described the appellant as functioning well socially, and as being unrestricted with respect to managing his medications and finances. The GP didn't provide any information about the appellant's ability to manage his medications or his personal finances, which are other indicators of decision-making ability.

Given the greater length of time that the GP has known the appellant, the panel would generally be inclined to prefer his evidence over that of the specialist with respect to severity of mental impairment. However, considering the evidence as a whole, specifically the lack of information with respect to how the mental impairment affects the appellant's ability to manage DLA along with inconsistencies between the GP's evidence and that of the appellant, as detailed below, the panel finds that the ministry was reasonable in concluding that the evidence fell short of demonstrating a severe mental impairment.

Restrictions to DLA

The appellant argues that he is directly and significantly restricted in his ability to manage his DLA by perpetual exhaustion, chronic pain, depression, anxiety and feelings of hopelessness.

The ministry's position is that the specialist's evidence – which describes the appellant as being completely independent with respect to all DLA - should be given more weight than that of the GP. The ministry stated that the nature of the help required, and why, is not clear. The ministry argues that the information, considered as a whole, is not sufficient to satisfy the ministry that the appellant's impairments directly and significantly restrict his ability to manage DLA continuously or periodically for

extended periods.

Panel Decision

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, or substantial. 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.

In this case, the evidence is inconsistent as among the specialist, the GP and the appellant. The specialist says that the appellant is entirely unrestricted and independent with respect to all aspects of all 10 prescribed DLA. The GP says that the appellant is "completely reliant" on his roommate for the DLA of *shopping, meal preparation, basic housekeeping, social functioning, and decision-making* (assuming that "household planning" equates to *decision-making*). That the GP considers the appellant's restrictions to be "continuous" is supported by the GP's statement that the appellant "requires daily constant supervision and assistance to survive."

The appellant's typewritten self-report, however, conflicts with the GP's evidence in terms of whether the assistance provided by the roommate is continuous or periodic for extended periods. The typewritten self-report, for example, indicates that the appellant does prepare "simple foods" that can be "prepared using a microwave", and that "sometimes" his roommate shares meals with him. This contrasts with the GP's evidence that the appellant is "completely reliant" on his roommate for "cooking". The typewritten self-report also raises the issue of periodicity when it states that the appellant's roommate "...provides assistance to [the appellant] when [the appellant's] symptoms are incapacitating." There is no evidence provided by the appellant or by the GP as to the frequency or the duration of these periods of incapacity. The notion that there is some degree of periodicity to restrictions experienced by the appellant is supported by the specialist's observation in his September 24 letter that the appellant's stress and depression are "periodic".

Viewed as a whole, there is no evidence provided to explain exactly what restrictions the appellant faces with respect to his DLA. The ministry's application forms break each DLA down into a number of different tasks, from which the decision-maker can form an opinion of the significance of the restrictions. In the appellant's case, the specialist indicated that there are no restrictions. The GP and the appellant indicated that there are restrictions with respect to a number of DLA, but provided either no detail, or conflicting detail, as to the nature or extent of the restrictions and whether the restrictions are continuous or periodic for extended times. It is this level of detail which is necessary in order to form an opinion as to whether the appellant "requires" the assistance he is receiving from his roommate, or whether it simply reflects preferred household living arrangements. Viewing the evidence as a whole, the panel finds that the ministry reasonably concluded that it was insufficient to establish that this statutory criterion was satisfied.

Help with DLA

The appellant's position is that he is entirely dependent on his roommate to manage his DLA, and that he would struggle to live independently.

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 noted that no assistive devices are required.

Panel Decision

Section 2(3)(b) establishes that in order to be eligible for PWD designation, a person must "require" help in relation to DLA. 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. As detailed above, there is conflicting and inconclusive evidence as to the nature of the help the appellant receives, and of the frequency and duration of that help. In the panel's view, the evidence as a whole is simply insufficient to show that the appellant relies upon "the significant help or supervision of another person."

The panel finds that there is no evidence to indicate that the appellant uses assistive devices or that he has an assistance animal.

Accordingly, 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 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 a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.