

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry) reconsideration decision dated April 9, 2013 which found that the appellant did not meet all of the 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 the appellant has a severe physical impairment which was likely to continue for at least two or more years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- 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, 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 appellant was not in attendance at the hearing. After confirming that the appellant had been notified of the hearing, the panel proceeded with the hearing under section 86(b) of the *Employment and Assistance Regulation*.

The evidence before the Ministry at the time of the reconsideration decision consisted of copies of the following:

1. Person With Disabilities (PWD) Application: applicant self-report ("SR") dated November 26, 2012, physician report ("PR") dated December 5, 2012 and assessor report ("AR") dated December 5, 2012;
2. A 3-page medical consultation report dated April 26, 2012 and prepared by the Appellant's physician ("GP") commenting on the Appellant's right ear, elevated blood sugar and elevated TSH ("CR");
3. A 1-page medical discharge summary dated April 17, 2012 and prepared by the Appellant's physician commenting on the Appellant's cellulitis in his right foot, gangrenous toe, non-insulin-dependent diabetes and hypothyroidism ("DS #1");
4. A 1-page medical discharge summary dated May 1, 2012 and prepared by the Appellant's physician commenting on the Appellant's hypothyroidism and hyperglycemia ("DS #2");
5. A letter dated April 3, 2013 from the Ministry to the Appellant's physician enclosing a clarification log ("the Ministry letter");
6. A letter dated April 9, 2013 from the Appellant's physician to the Ministry setting out his answers to the clarification log questions ("Physician letter #1");
7. A letter from the Ministry addressed to the Appellant dated February 14, 2013 enclosing a PWD Designation Decision Summary of the same date;
8. A letter signed by the Appellant's medical specialist and orthotist and faxed to the Ministry on March 21, 2013 ("Physician letter #2");
9. The appellant's Request for Reconsideration dated March 8, 2013 requesting an extension due to his physician's absence; and
10. The appellant's Request for Reconsideration dated March 27, 2013 attaching 3 pages of written submissions.

In his Notice of Appeal dated April 19, 2013, the Appellant submits that it has been established that he has a serious physical impairment but that the issue appears to hinge on his physician's inability to narrate to the satisfaction of the ministry. He goes on to argue that it should be somewhat obvious that the loss of use of an ankle would result in problems with DLA. The appellant concludes by stating that a minimal intervention at this point may forestall considerable suffering, degeneration of his condition and resultant costs to himself and the ministries responsible.

The ministry relied on the reconsideration decision and submitted no new information.

Physical Impairment

While the ministry found in the Reconsideration Decision that the appellant has a severe physical impairment, the panel will summarize the evidence in that respect as it may have a bearing on the appellant's ability to manage his DLA.

In the SR, the appellant states that he has type 2 diabetes, a Charcot ankle, leg issues and imbalance which has generated issues in his lower back, legs and hips. He also notes that he has a damaged left ulnar nerve with secondary impairment of sensation, motion and strength in his hand as well as a persistent external ear infection and a chronic skin infection.

In the PR, the GP has diagnosed the appellant as suffering from Charcot joint secondary to diabetic neuropathy with onset in 2009. The physician comments that the appellant has limited ambulation due to

painful left ankle joint/foot due to Charcot joint secondary arthritis as a result of NIDDM (non-insulin-dependent diabetes mellitus)/diabetic neuropathy. The GP comments that the appellant limps, is unable to walk or weight bear on his left ankle/foot without support and that even with support he has limited mobility. The GP further comments that the appellant has COPD, chronic otitis media and a chronic mastoid infection. The GP does not indicate the appellant's height or weight and he notes that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. The GP states that the appellant's impairment is likely to continue for 2 years or more, commenting that there is no surgical option and that the appellant has been reviewed at a foot clinic, given appropriate support from a specialist and advised to apply for long-term disability. With respect to functional skills, the GP notes that the appellant is able to walk less than one block unaided, climb 2 to 5 steps unaided, lift 15 to 35 pounds, and has no limitation as to how long he can remain seated.

In the AR, the GP reports that the appellant suffers from inability to walk more than a block due to pain from Charcot joint/diabetic neuropathy due to NIDDM. The appellant's ability to communicate in speaking, reading, writing and hearing are all listed as good. The GP indicates that the appellant requires periodic assistance with walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding and that he requires an ankle/foot cast for walking indoors and outdoors and climbing stairs, all of which take significantly longer than typical. The GP also notes that the appellant uses an assistive device for standing but does not indicate what the device is and he notes lastly that the appellant takes significantly longer than typical in carrying and holding.

In the April 17, 2012 DS #1, the GP diagnoses the appellant with non-compliant type 2 diabetes, non-compliant hypothyroidism and cellulitis with a gangrenous toe on his right foot.

In the April 26, 2012 CR, the GP notes that the appellant suffers from non-compliant type 2 diabetes, hypothyroidism, amputation of his fourth toe on the right foot, COPD and prior history of alcohol abuse.

In the May 1, 2012 DS#2, the GP diagnoses the appellant with non-compliant hypothyroidism and hyperglycemia secondary to financial funds.

In the April 9, 2013 Physician Letter #1, the GP confirms that the appellant has a severe impairment relating to the Charcot ankle as a result of diabetic neuropathy which limits him to standing for 10 minutes and walking for 5 minutes.

In the March 21, 2013 Physician Letter #2, the medical specialist and Certified Orthotist note that the appellant has an acute Charcot ankle with an ulcer on his left second toe that has developed within the aircast boot and that he is at risk for amputation if he is not fitted with a custom device for basic mobility.

In the RFR, the appellant states that his physical condition includes type 2 diabetes, hypothyroidism, right ear infection, damaged left ulnar nerve, compression injury to his back, whole body candida infection, persistent sinus infection, Charcot left ankle, diabetic neuropathy and poor circulation. The appellant reports that he has significant muscle wasting and that he has had one toe amputated due to infection and diabetic complications and that he has a shortened left leg resulting in problems with his hip, back and right foot arch.

The appellant states in the RFR that the primary issue affecting him is his left ankle which until recently he had "powered over the pain and instability" but that more recently, an orthopedic specialist diagnosed the problem as a Charcot ankle secondary to diabetic neuropathy. The appellant notes that he was fitted with an interim air cast to stabilize the ankle and that a custom leg brace would be prepared and that he was advised not to work or walk at all if possible. The appellant states that he was advised that amputation of his foot would likely result regardless of this treatment and that the objective was to delay such an operation. He says he cannot stand for more than a few minutes, navigate uneven or rough ground and that he is incapable of walking more than a few steps without the air cast and that with it he is limited to approximately 50 steps. He says he could

lift 35 lbs off the ground but not carry it more than a few steps. He says his balance is poor and that he requires the use of a handrail to climb stairs. His ear infection is causing an increasing deafness, he has significant muscle wasting and his ulnar nerve condition has affected his left hand.

Mental Impairment

In the SR, the appellant states that he suffers from moderate depression and a lack of motivation towards most activities.

In the PR, the GP has not diagnosed the appellant with a mental condition and he indicates that the appellant has no difficulties with communication, and no significant deficits with cognitive and emotional function.

In the AR, for section 4, cognitive and emotional functioning, where asked to complete for an applicant with an identified mental impairment or brain injury, the GP assesses the degree the appellant's mental impairment restricts or impacts daily functioning as follows:

- Moderate impact on emotion, impulse control, motivation and motor activity.
- Minimal impact on bodily functions, insight and judgment.
- No impact on consciousness, attention/concentration, executive, memory, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems.

There are no major impacts noted by the GP or any further comments.

In the April 9, 2013 Physician Letter #1, the GP comments that the appellant's primary deficits relate to mobility rather than cognition and that the appellant shows evidence of reactive depression due to his left Charcot ankle deformity but that he has not been prescribed mood stabilizing medications.

In the RFR, the appellant says that he does not wish for mental health issues to be included in the request for reconsideration but also notes he has suffered long term depression, poor compliance with medical advice and medications, neglect of hygiene and diet, poor motivation and impulsiveness.

The ministry representative relied on the Reconsideration Decision and stated at the hearing that the minister found that the information provided does not establish a severe mental impairment.

DLA

In the SR, the appellant states that his conditions affect almost every aspect of his daily life in that he cannot walk far, stand for over a few minutes or negotiate stairs without considerable difficulty and that all movement is difficult and painful and affects all activities. The appellant states that meal preparation, laundry and showering are avoided if possible, manual work is impossible and items cannot be carried at waist level.

In the AR, the GP comments that the appellant's inability to walk more than a block due to pain from Charcot joint/diabetic neuropathy due to NIDDM impacts his ability to manage DLA. He then makes the following assessments:

- Personal care: independent for dressing, grooming, bathing, toileting, feeding self and regulating diet. The appellant requires periodic assistance from another person with transfers in/out of bed, transfers on/off chair.
- Basic housekeeping: the appellant is independent with laundry but requires periodic assistance from another person with housekeeping.
- Shopping: the appellant is independent for reading prices and labels, making appropriate choices and paying for purchases and carrying purchases home but requires periodic assistance from another

- person going to and from stores.
- Meals: independent in all aspects of meals.
 - Pay rent and bills: independent in all aspects.
 - Medications: independent in filling/refilling prescriptions and safe handling and storage but requires periodic assistance from another person taking his medications as directed.
 - Transportation: the appellant is noted as requiring periodic assistance from another person with getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.
 - Social functioning: independent in his ability to develop and maintain relationships and interacting appropriately with others but requires periodic support/supervision in making appropriate social decisions, dealing appropriately with unexpected demands and securing assistance from others.

The GP describes how the appellant's mental impairment impacts his relationships with both his immediate and extended social networks as marginal functioning. The GP comments that the appellant is isolated and has a minimal support system. The GP comments further that the support/supervision required by the appellant includes a brace for his left ankle and support in respect of his diet and medication to control his diabetes.

In the April 9, 2013 Physician Letter #1, the GP comments that the appellant's DLA are significantly impacted by his Charcot ankle and diabetic neuropathy. He goes on to say that the cast walker being used by the appellant has not improved his ability to perform DLA and that he requires periodic assistance for transportation beyond his household activities.

In the RFR, the appellant states that he can complete most household chores slowly but cannot do anything requiring walking, standing, extensive stairs, outdoor activities or balance. He says that he cannot get out of the house as he cannot walk, stand and wait, shop without a cart or exercise outdoors. He says he cannot get out shopping, pay bills, see medical providers, obtain medications, carry home goods, recreate or socialize. He says he has relied on another person to drive him to the grocery store and requires assistance lifting or carrying anything over a few pounds.

The ministry representative relied on the Reconsideration Decision and submitted that the evidence did not support a finding that the appellant needs continuous assistance or that his DLA are restricted continuously or that the appellant was periodically restricted for extended periods of time.

Need for Help

In the PR, the GP reports that the appellant requires a foot/ankle brace or boot cast.

In the AR, the GP notes that the appellant lives alone, receives assistance from Health Authority Professionals, has a poor support system and routinely uses a left ankle/boot cast to help compensate for his impairment. The appellant does not have an assistance animal.

In the April 9, 2013 Physician Letter #1, the GP comments that the appellant is wearing a cast walker to stabilize his ankle but that it has not improved his level of independence or ability to perform DLA.

In the March 21, 2013 Physician Letter #2, the appellant is described as using an air cast walker to stabilize his ankle and that he will likely require an amputation if his is not fitted with a custom devise for basic mobility.

In the RFR, the appellant states that he requires a full leg brace to assist with mobility and to delay an amputation and further disability. He also notes that he requires assistance with transportation, lifting or carrying anything over a few pounds and with meeting medical obligations.

The ministry representative relied on the Reconsideration Decision.

PART F – Reasons for Panel Decision

The issue on the 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 mental impairment;
- The appellant's DLA's are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- As a result of those restrictions, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

- (ii) manage personal finances;
 - (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

Severity of mental impairment:

The appellant comments in the RFR that he suffers from long-term depression but does not wish for mental health issues to be included in the review process. The appellant does not reference any mental impairment in the Notice of Appeal.

The Ministry takes the position that the information provided does not establish a severe mental impairment.

Panel Decision

The panel finds that the GP has not diagnosed the appellant with a mental impairment in the PR and he has indicated that the appellant has no significant deficits with cognitive and emotional function. Considering the AR, the panel finds that while the GP has indicated that the appellant's mental impairment has a moderate impact on emotion, impulse control, motivation and motor activity, there remains no stated diagnosis by the GP of a mental condition in the PWD application.

The panel notes that the GP has commented in the April 9, 2013 Physician Letter #1 that the appellant displays evidence of reactive depression but he also states that the appellant has not been placed on mood stabilizing medications and that the appellant's primary deficits relate to mobility rather than cognition. Finally, the panel notes that there is no indication that the appellant's depression is likely to continue for at least 2 years.

Considering all of the evidence the panel concludes that at the time of the reconsideration decision, the ministry reasonably determined that the evidence does not establish that the appellant has a severe mental impairment under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform all DLA to the point that he requires continuous assistance, an assistive device, and the ongoing assistance of others with shopping, meals, personal care and housekeeping.

The ministry's position is that help with DLA must be related to medical conditions diagnosed by the appellant's physician.

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. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably satisfy the ministry that they have been met.

In the AR, the GP indicates that the majority of the appellant's DLA are managed independently, including dressing, grooming, bathing, toileting, feeding self and regulating diet, laundry, reading prices and labels, making appropriate shopping choices, paying for purchases, carrying purchases home, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent and bills, filling and refilling prescriptions and safe handling and storage of medication.

The panel notes that the GP has indicated in the AR that the appellant requires periodic assistance with transfers both in and out of bed and on and off of chairs, basic housekeeping, going to and from stores, taking medications as directed, getting in and out of a vehicle, using public transit where available and using transit schedules and arranging transportation but for these areas, there is no explanation in the AR by the GP as to whether the periodic restrictions are for extended periods or otherwise.

The GP notes in the AR that the appellant requires periodic support and supervision with developing and maintaining relationships, dealing appropriately with unexpected demands and securing assistance from others but again, the GP does not provide further comment or explanation in the AR as to the extent or duration of assistance that is required. The panel notes that the AR indicates that the appellant is independent in developing and maintaining relationships and interacting appropriately with others.

The April 3, 2013 letter and clarification log sent by the ministry to the GP specifically asked the GP to review the AR and comment as to whether anything had changed in respect of the appellant's ability to perform his DLA. The GP's response in the April 9, 2013 Physician Letter #1 was that his cast walker had not improved his ability to perform DLA and that he required periodic assistance for transportation beyond his household activities. Overall, the panel finds that the GP's comments in Physician Letter #1 are consistent with the findings with respect to the appellant's DLA in the AR.

While the March 21, 2013 Physician Letter #2 comments on the possibility of an amputation becoming necessary if the appellant is unable to acquire disability benefits and a custom device, the panel finds that this comment is speculative in nature and does not meet the legislative requirement of demonstrating that the appellant's impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Based on the evidence, the panel concludes that the ministry was reasonable in finding that the appellant's impairment does not directly and significantly restrict his ability to perform DLA, either continuously or periodically for extended periods. In particular, the panel finds that the noted restrictions in the appellant's ability to perform some aspects of some DLA as described by a prescribed professional were reasonably viewed by the ministry as not constituting a direct and significant restriction of the appellant's ability to perform DLA in the opinion of a prescribed professional thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA.

Help with DLA

The appellant argues that he requires a full leg brace to assist with mobility and to delay an amputation and further disability. He also notes that he requires assistance with transportation, lifting or carrying anything over a few pounds and with meeting medical obligations.

The ministry's position is that as it has not been established that DLA's are directly and significantly restricted, it cannot be determined that significant help is required from other persons although it acknowledges that the appellant wears an ankle boot when walking.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Section 2(3) of the EAPWDA provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

While the panel finds that the evidence of a prescribed professional establishes that the appellant requires help performing DLA insofar as he requires an assistive device for his left ankle, the panel also finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration which determined that the appellant was not eligible for PWD designation was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.