

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision of April 25, 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

The appellant did not attend the appeal hearing. Having confirmed that the appellant was notified of the hearing, the panel heard the appeal in his absence in accordance with s. 86(b) of the Employment and Assistance Regulation.

With the consent of the tribunal chair, the ministry attended the appeal hearing by teleconference. The ministry relied on its reconsideration decision and provided no new evidence.

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 physician of 3 years, on November 3, 2013 and October 31, 2013 respectively. The application also included the appellant's handwritten self-report signed by the appellant on October 1, 2013.
- A Request for Reconsideration form, including a brief written submission from the appellant, dated April 12, 2013.
- A diagnostic report, dated February 14, 2002 on the results of an MRI examination of the appellant's cervical spine (the MRI Report).

Physical Impairment

- In the PR the physician diagnosed the appellant with wedge deformity 40% loss of height, osteoporosis T5-core – 3.3 L spine and whiplash injury to C-spine. The physician noted the appellant experiences episodic periods of severe neck pain.
- In terms of functional skills, the physician noted no limitations other than that the appellant is limited in his ability to remain seated to less than 1 hour.
- The physician noted that the appellant has had significant improvement in his back over the years, and that "His biggest problem is his NECK at the moment."
- In his self-report the appellant explained that he had suffered an injury at work, and then was subsequently injured in an auto accident.
- The appellant wrote that when aggravated, he has shooting pains and cramping in his neck, between his shoulder blades, and up under his skull. At times this causes dizziness, a ringing in his ears, and sleep startle.
- The appellant described his symptoms as intermittent, seasonal and accumulative, and wrote that he has had a disability for 22 years.
- The MRI Report indicated multiple level disc bulges in the cervical spine, with a strong suspicion of a significant central disc protrusion at the C6-7 level. Further examination was recommended to determine the potential extent of cord signal alteration.

Mental Impairment

- The physician did not diagnose a mental health condition in the PR, and indicated that the appellant has no significant deficits with cognitive and emotional function.
- In the AR the appellant indicated that the appellant's cognitive and emotional functioning is "NORMAL".

DLA

- In both the PR and the AR the physician indicated that the appellant is fully independent with respect to managing all aspects of all DLA.
- In the PR, the physician noted that the appellant's periodic neck pain does interfere with his DLA.
- The physician noted that the appellant is good functioning in respect of his immediate social network, and marginal functioning regarding his extended social networks.
- The appellant wrote that he takes care of himself, but that he has problems standing for any period of time, for example when doing dishes. He also has problems sitting any length of time.
- The appellant reported that he has given up all recreational activities except for walking and hiking, which he can only do when it is warm and dry.
- In his reconsideration submission the appellant wrote that he is unable to hold employment even though he can do his own housework.

Help

- The physician indicated that the appellant does not require any prostheses or aids for his impairment, and that he does not have an assistance animal.
- The physician commented that the appellant requires help when his neck is sore, but that it is very episodic in nature.
- In response to a question in the AR asking the physician to describe the assistance provided by other people, the physician simply drew a line through that section of the AR form.

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's position is that his neck injury constitutes a severe physical impairment that causes him intermittent severe pain.

The ministry's position is that there is not enough evidence to establish a severe physical impairment.

Panel Decision

The severity of an impairment has to be determined by considering the evidence of the nature of the impairment and the impacts it causes with respect to the appellant's functional skills and his ability to manage his DLA.

In the appellant's case, the evidence indicates that the appellant's neck causes him intermittent

severe pain, but there is no evidence as to how often these episodes occur, how long they last, or how they impact the appellant's ability to manage his DLA. The impairment does not appear to have limited the appellant's functional skills except to impact the length of time he can sit or stand. The appellant's evidence is that he cannot maintain employment; however employability is not a criterion set out in the legislation and is not sufficient to establish whether impairment is severe as contemplated by the legislation.

Considering the evidence as a whole, the panel finds that the ministry reasonably determined that the evidence falls short of establishing a severe physical impairment.

Severe Mental Impairment

The appellant has not advanced an argument with respect to a severe mental impairment.

The ministry's position is that the evidence does not establish a severe mental impairment.

Panel Decision

Section 2(2)(a) of the EAPWDA requires that a severe impairment must be established by the opinion of a medical practitioner. The appellant's physician has not diagnosed a mental health condition, and has indicated that the appellant has normal cognitive and emotional functioning. He has not provided an opinion with respect to there being a severe mental impairment.

The panel finds that the ministry reasonably determined that the evidence does not establish that the appellant has a severe mental impairment.

Restrictions to DLA

The appellant's position is that his neck pain directly affects his ability to manage DLA.

The ministry argues that the neck pain is episodic, and that there is no evidence of the frequency or duration of these episodes. Accordingly, the ministry's position is that there is insufficient evidence to establish that the appellant's impairments significantly restrict his ability to manage his DLA continuously or periodically for extended periods.

Panel Decision

Section 2(2)(b) of the EAPWDA provides that the minister may designate a person as a PWD if, along with the other legislative criteria being satisfied, a prescribed professional is of the opinion that a severe impairment directly and significantly restricts the person's ability to perform DLA either continuously or periodically for extended periods. In the appellant's case, the physician – a prescribed professional – has provided evidence to indicate that the appellant's neck pain does directly restrict his ability to perform unspecified DLA, but not sufficiently to restrict him from managing all DLA independently. Such restrictions as do occur are periodic in nature, but there is no evidence from the physician or from the appellant to indicate how often these periods occur or how

long they last.

Based on the foregoing analysis of the evidence and the legislation, the panel finds that the ministry reasonably concluded that this legislative criterion is not satisfied.

Help with DLA

The appellant has not expressly advanced an argument with respect to needing help to manage his DLA.

The ministry's position is that since 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

Other than the physician noting that the appellant requires help when his neck is sore, and his comment that the sore neck is very episodic in nature, there is no evidence that the appellant requires any help to manage his DLA. The evidence of the physician is that the appellant independently manages all his DLA. The appellant has provided no evidence of the help that he requires or receives. There is simply insufficient evidence to show that the appellant requires the "significant help or supervision of another person" as contemplated by EAPWDA s. 2(3)(b)(ii). The appellant does not use any assistive devices and does not have an assistance animal.

Accordingly, the panel finds that the ministry reasonably concluded that this legislative criterion was not satisfied.

Conclusion

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 therefore confirms the ministry's decision.