

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 14 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 physical impairment and that his impairments, 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 information provided established that the appellant has a severe mental impairment, and that he satisfied the other 2 criteria in the legislation: 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

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

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

1. The appellant's PWD Designation Application dated 06 July 2012. The Application contained:
 - The appellant's Self Report (SR).
 - A Physician Report (PR), date illegible, completed by the appellant's general practitioner (GP) who has known the appellant for 3 months and seen him 2 - 10 times in that period.
 - An Assessor Report (AR) dated 22 November 2012, completed by the same GP.
2. The appellant's Request for Reconsideration, dated 28 February 2013, including a submission by the appellant.

In the PR, the GP diagnoses the appellant with knee osteoarthritis, anxiety disorder and chronic pain syndrome, all with onset 2008. The GP comments: "fractured femoral condylar 2006."

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

Severity/health history

Physical impairment

PR:
The GP reports that the appellant complains of generalized pain and suffers from chronic pain. The GP lists a number of prescription medications, including analgesics, and indicates that the anticipated duration of these medications is unlimited. The GP states that the appellant's impairment is likely to continue for 2 years or more, commenting that the appellant had a fracture of his right femur, and developed pain and arthritis; this got worse as he was in a medical facility.

Functional skills: The GP reports that the appellant is able to walk 1 to 2 blocks unaided, climb 2 to 5 steps unaided, lift 5 to 15 pounds, and has no limitation as to how long he can remain seated.

Mental impairment

(Although the ministry has determined that a severe mental impairment has been established, the panel will summarize the evidence with respect to mental impairment as this might have a bearing on the appellant's ability to manage DLA.)

PR:
The GP indicates that the appellant has difficulties with communication, with the cause being identified as "cognitive." The GP comments: "anxiety and panic attacks."

The GP reports that the appellant has significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance, motivation and impulse control. The GP comments: "emotional & stress & hostility about [illegible]."

AR:

The GP assesses the degree the appellant's mental impairment restricts or impacts daily functioning as follows:

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

The GP comments:

- "Needs medication to sleep, without medication sleeps 1 to 2 hours."
- "High anxiety in public situations in closed spaces i.e., bus, restaurants"
- "Poor mgt for memory, everything must be written down - needs reminders."
- "Difficulty getting motivated."

Ability to perform DLA

PR:

Asked whether the appellant's impairment directly restricts his ability to perform DLA, the GP marks "Unknown." The GP goes on to report that the appellant has no restrictions on a continuous basis for the DLA of personal self care, management of medications, basic housework, daily shopping and management of finances. The DLA of meal preparation is marked as no restrictions and unknown, on both the continuous and periodic basis. The GP assesses the appellant restricted in the DLA of mobility inside the home and mobility outside the home, use of transportation and social functioning, all on a periodic basis. The GP explains "periodic" as "patient level of motivation, anxiety and depression prevents him from daily living." In explaining how social functioning is impacted, the GP writes "yes, since prison very anxious." Regarding restrictions, the GP adds "he is limited to [illegible]."

AR:

The GP made the following assessments:

- Mobility and physical ability: the appellant takes significantly longer than typical walking indoors (2x longer due to knee pain), walking outdoors (<2 blocks, 2x longer), climbing stairs (2x longer), standing (<10 min.), and carrying and holding (< 15 lbs 2-3x longer). The appellant is assessed as independent for lifting (< 18 lbs.). The GP comments that: "good days, min likely [word illegible] 2 – 3 x longer (2 days per week). bad days, 4 – 8 longer." (See Evidentiary considerations in Part F below.)
- Personal self care: independent for toileting, feeding self and regulating diet. The following take 2x longer: dressing, grooming, bathing, transfers in/out of bed, transfers on/off chair.
- Basic housekeeping: laundry and basic housekeeping take 2x longer.
- Shopping: independent for reading prices and labels (prescription lenses), making appropriate choices and paying for purchases and carrying purchases home (2x longer, < 15 lbs.); continuous help from another person is required for going to and from stores (needs help with transportation).
- Meals: independent in all aspects of meals.

- Pay rent and bills: independent for budgeting and paying rent and bills, continuous help from another person required for banking (needs help with transportation).
- Medications: independent in all aspects.
- Transportation: takes significantly longer than typical (bus stop too far to walk -- anxiety in public spaces); continuous assistance from another person required for using public transit and using transit show jewels and arranging transportation (can't understand schedule).
- Social functioning: independent in making appropriate social decisions (doesn't trust anyone) and able to secure assistance from others. The appellant is assessed as requiring continuous support or supervision in being able to develop and maintain relationships (has no trust since incarceration) and in being able to deal appropriately with unexpected demands (needs structure, things must be explained. No assessment is made regarding interacting appropriately with others (defensive, anxious, doesn't trust others).

The GP describes how the appellant's mental impairment impacts his relationships with both his immediate and extended social net works as marginal functioning. The GP comments that that the appellant has high anxiety in social situations, not able to trust others, cannot be in small spaces ([unreadable], bus, restaurant etc.).

Assistance required/provided

PR:

The GP reports that the appellant does not require any prostheses or aids for his impairment.

AR:

The GP notes that the appellant's aunt and uncle provide support.

The GP does not indicate that the appellant routinely uses any equipment or devices to compensate for his impairment.

The appellant does not have an assistance animal.

In his SR, the appellant writes that he had a knee operation after he was struck by a car while crossing the street. He spent two months in hospital, and after being released he had a physical therapist come to his home and was given pain medication. He lived with severe pain from the time of the accident in early 2006 until the hardware was taken out in 2007. He states that the pain sometimes is so bad he stays in bed for days.

He writes that he was recently incarcerated for over two years and while in prison spent most of his time in his cell. He was given a note from a doctor that stated that he was unfit for work while incarcerated and he is still unable to work.

The appellant writes that his disability affects his life because he is in constant pain and needs pain medication to be able to walk around comfortably. When he needs to get somewhere he relies on friends and relatives for transportation. He would like to get a pool membership so he can get some stretching exercise. He is basically a shut in, or so it feels like sometimes. He tries to get out and when he does he has good days and bad days. He has to go to see his doctor and get medication, and sometimes it is difficult to get a ride. He does not have the money for a taxi or to pay very much for gas to get a ride with someone.

His condition can sometimes feel worse, because he sometimes suffers from depression and his anxiety level can be really high sometimes. He takes medication for his anxiety and also so he can sleep. Some nights he cannot get to sleep. He is trying his best to adjust since getting out of prison.

In his Request for Reconsideration, the appellant states that he has a physical condition which is painful. He has to take medication to help with the pain. He has no car and has to take public transportation. He states that he also suffers with anxiety and depression, for which he has been taking medication since 2007. He notes that he was on income assistance before being incarcerated and was told by a worker then to apply for PW the designation because his condition was not going to improve.

The appellant filed his Notice of Appeal on 20 March 2013. Under Reasons, the appellant states that he will never be able to work and will never be able to afford to live a comfortable standard of life. His anxiety and depression are really bad for him right now. He would like to be able to buy better and more nutritious food, he sometimes needs medication the ministry doesn't cover and he also needs money for transportation, exercise equipment and unseen expenses.

In a written submission dated 12 April 2013 the appellant stated that he needs continued help – he is not doing well and his anxiety is very bad for him right now.

In an e-mail dated 17 April 2013, the ministry stated that it would not be providing a written submission, as it is relying on the reconsideration decision.

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 physical impairment and that in the opinion of a prescribed professional the appellant

- (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 the appellant has a severe mental impairment and 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.

Evidentiary considerations

In the PR and AR, many entries by the GP are either difficult to decipher or completely illegible, leading to either the evidence being misinterpreted or overlooked. For instance, in the AR, the ministry read a comment regarding use of transit schedules as "can't adjust schedule," while the panel thinks it may be "can't understand schedule." Of more serious consequence is a virtually unreadable comment in the AR under Mobility and Physical Ability, which the ministry overlooked. The panel has tried to decipher this comment, coming up with: "good days, min likely [word illegible] 2 – 3 x longer (2 days per week). bad days, 4 – 8 longer." The panel considers it reasonable for the ministry to expect that the evidence from the medical practitioner/prescribed professional required under the legislation be presented in a clear and legible form. For many of the entries in the PR/AR, the panel finds it reasonable that the ministry could not decipher the GP's writing, including the above comment, given the difficulties the panel encountered in this regard. The panel also notes that this comment was not referenced in either the original decision or the reconsideration decision. As there is no other reference to "good days" and "bad days" in the PR/AR, as the panel could not decipher the comment in its entirety and as the ministry did not refer to it, leading to the conclusion that it was not able to decipher it, the panel will not give the comment any weight.

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 GP) 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 that may impact his physical functioning due to his knee arthritis and chronic pain

syndrome, in the ministry's opinion his functional skill limitations are more in keeping with a moderate degree of impairment. The ministry determined that based on the information provided by the GP, there is not enough evidence to establish a severe physical impairment.

The position of the appellant is that the arthritis in his knee and constant pain significantly restricts his mobility and physical ability to function effectively. He can walk only 1-2 blocks, and that taking twice as long as typical. Many other daily activities, such as dressing and doing housework, also take twice as long as typical. The evidence clearly demonstrates that he has a severe physical impairment.

The evidence is that the appellant's physical functioning is limited by arthritis in the knee and chronic pain to being able to walk 1 to 2 blocks unaided, climb 2 to 5 steps, and lift 5 to 15 pounds; his standing tolerance is 10 minutes. As the GP reports in the AR, most physical activity, whether walking or dressing or doing housework, takes about twice as long as typical. Remedial measures are available, with the GP listing prescriptions for pain medications and the appellant stating in the SR that he needs pain medication to be able to walk around comfortably. In the SR, he also states that the pain sometimes is so bad he stays in bed for days. However, this impact on daily functioning has not been confirmed by his GP. The panel notes that there is no mention in the evidence of the use of any assistive devices, such as the use of a cane or of grab bars in the bathroom, and the GP explicitly indicated that no prostheses or aids are required for his impairment. While the appellant relies on family and friends to drive him to shop and to the bank or for medical appointments, this appears to be more due to a combination of his mental impairment -- anxiety disorder and anxiety over the use of buses -- and his living situation, some distance away from a bus stop.

In light of this evidence, the panel finds that the ministry was not unreasonable in characterizing the restrictions to the appellant's physical daily functioning as more in keeping with a moderate degree of impairment. The panel therefore finds that the ministry reasonably determined that a severe physical impairment had not been established.

Significant restrictions in the ability to perform DLA.

The ministry noted that it takes the appellant 2x longer to do various physical activities but that in the ministry's opinion 2x longer is not considered significant. Upon reviewing the other information provided by the GP, including that relating to social functioning, the position of the ministry is that, overall the ministry does not have enough evidence from the GP to establish that the appellant's impairments significantly restrict his ability to manage his 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 taking longer than typical for most mobility and other physical activities, while his anxiety disorder significantly restricts his ability to function in public, such as taking a bus.

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, with the ministry having determined that a mental, though not physical, impairment being 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 panel will first consider the two DLA applicable to a person with a severe mental impairment, as set out in EAPWDR section 2(1)(b), subparagraphs (i) and (ii). The panel notes that in the PR the GP has reported difficulties with communication caused by cognitive function, noting anxiety and panic attacks. In the AR, the GP has assessed the appellant's mental impairment (i.e. anxiety disorder) as having a major impact on bodily functions (needs medication for sleeping), emotion (high anxiety in public situations, closed spaces), memory (everything must be written down). The GP also comments that the appellant has difficulty getting motivated. With respect to the impact on sleeping, the GP reports mitigation through sleeping medication. As to the other major impacts, no description is provided, or examples given, that would present a clear picture as to how, how often, under what circumstances and to what extent these impacts restrict the appellant's ability to make decisions about personal activities, care or finances (subparagraph (i)) or relate to, communicate or interact with others effectively (subparagraph (ii)). The panel therefore finds that the ministry was reasonable in determining that the information provided did not establish that these DLA were significantly restricted.

As to the DLA that apply to both severe mental and physical impairments, the GP has indicated that it takes the appellant 2x longer to do many activities requiring physical effort, such as dressing, grooming, bathing, transfers in/out of bed and on/off of chair, carrying purchases home, and getting in/out of vehicle. The panel finds that the ministry is reasonable in considering taking 2x longer as not a significant restriction. With respect to needing help for transportation going to and from stores and for banking, and not using public transit, it is unclear to what extent this is situational, the bus stop being beyond his 1 – 2 block walking ability from the home or due to anxiety over being in small public spaces. In either case, since no information is provided as to how often he needs their rides, it is difficult for the panel to consider this restriction as "significant."

Taking this evidence into consideration, the panel therefore finds that the ministry reasonably concluded that this criterion had not been met.

Whether help to perform DLA is required

The position of the ministry is that, as it had been established that DLA are not significantly restricted, it can be determined that significant help is not required from other persons. The appellant does not require the use of an assistive device.

The appellant's position is simply that he relies on ongoing help from others, particularly for transportation to and from stores and to the bank.

The GP has indicated in the AR that the appellant requires continuous support/supervision in being able to develop and maintain relationships and being able to deal with unexpected demands, but no information has been provided describing the degree and duration of the support/supervision required. The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

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 reasonably supported by the evidence and therefore confirms the ministry's decision.