

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “Ministry”) August 19, 2013 reconsideration decision in which the Ministry determined that the Appellant was not eligible for Persons with Disabilities (“PWD”) designation because he did not meet all the requirements in section 2(2) of the Employment and Assistance for Persons with Disabilities Act. The Ministry was not satisfied that the Appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (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 was satisfied that the Appellant has reached 18 years of age and in the opinion of a medical practitioner his impairment 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

For its reconsideration decision the Ministry had the following evidence:

1. Appellant's PWD application dated April 5, 2013 consisting of his self-report ("SR"), a physician's report ("PR") completed on January 25, 2013 and an assessor's report ("AR") completed on April 5, 2013, both by the appellant's family physician who indicated that the Appellant had been her patient for 4 months and she had seen him between 2-10 times.
2. Appellant's request for reconsideration dated August 5, 2013 with additional information.

Diagnoses

In the PR, the physician diagnosed the Appellant with degenerative disc disease, bilateral carpal tunnel, and Osgood-Schlatters disease – knees. In the health history section of the PR, the physician wrote: 1. Lower back pain- difficulty sitting and standing for prolonged periods of time; difficulty lifting and carrying more than 10 lbs; 2. Bilateral carpal tunnel- pain both wrists and hands, limitation with grip; and 3. History of Osgood-Schlatters disease- bilateral knee pain- difficulty standing for prolonged period of time. Dyslexia was noted under deficits with cognitive and emotional function.

In the AR, the same medical practitioner reported that the Appellant had a rotator cuff injury and his ability to communicate was good for speaking, satisfactory for hearing and poor for reading and writing.

Physical Impairment

The Appellant described his disability as follows:

- severe lower back pain caused by degenerative arthritis in 5 discs, carpal tunnel in both hands and wrists - difficulty gripping objects, Osgood Schlatters disease in both knees, torn rotator cuff in left shoulder, 70% hearing loss in left ear and 30% in right ear and mild dyslexia with reading, writing and comprehension.
- painful to walk more than few blocks (back and knees), to stand, to take out garbage and to take the bus.
- stairs are difficult – each step causes sharp pain in knees, lifting causes pain in back and knees, gripping objects is very hard, rising from sitting for more than 20 minutes becomes difficult, balance is off, cannot kneel or squat, shopping, cooking, driving and housework are limited and painful, using toilet is difficult (sitting and rising), dressing is difficult, cannot lie in bed for more than 5-6 hours, wakes in pain every day, sleep is often disrupted by pain and cannot walk dog as he jars his spine.
- dyslexia makes it not possible to use a computer effectively.
- often requires the use of cane or crutches to aid mobility and balance (lift himself from the toilet or chair and when shopping) which is increasingly episodic as his disease progresses.
- often unable to walk or rise at all, confined to bed until pain and swelling subsides during which time he is unable to perform daily living activities without assistance and
- chronic pain and discomfort while performing daily living activities.

In the PR, the physician wrote that the Appellant:

- has chronic conditions which have been present for many years.
- can walk 2-4 blocks unaided, climb 2-5 steps unaided, lift 5-15 lbs. and can remain seated for less than 1 hour.

In the AR, the same medical practitioner reported under mobility and physical ability that:

- the Appellant is independent walking indoors, walking outdoors, climbing stairs, standing,

lifting, and carrying and holding. A comment indicated that all activities take longer than usual and cause pain.

Mental Impairment

The Appellant stated that it is emotionally difficult to deal with these progressive limitations and he often feels depressed.

In the PR, the physician reported that:

- the Appellant has significant deficits with cognitive and emotional functioning, specifically in the areas of language with a comment "Dyslexia".

In the AR, the same medical practitioner reported that the Appellant did not have a mental impairment or brain injury that impacts his cognitive and emotional functioning.

Daily Living Activities

In the PR, the physician reported that the Appellant has not been prescribed any medications or treatments that interfere with his ability to perform daily living activities and he does not require any prosthesis or aids.

In the AR, the same medical practitioner reported that the Appellant is independent in managing 13/28 aspects of daily living activities and takes significantly longer than typical in 15/28 aspects of daily living activities as follows:

- takes significantly longer than typical with all aspects of personal care (dressing, grooming, bathing, toileting, feeding self, transfers (in/out of bed) and transfers (on/off chair) and independent for regulate diet.
- takes significantly longer than typical with all aspects of basic housekeeping (laundry, basic housekeeping).
- takes significantly longer than typical with all aspects of shopping (going to and from stores, carrying purchases home) and independent for reading prices and labels, making appropriate choices and paying for purchases.
- takes significantly longer than typical with all aspects of meals (food preparation, cooking) and independent for meal planning.
- is independent in all task associated paying rent and bills and medications.
- is independent in using transit schedules, and takes significantly longer getting in/out of a vehicle and with using public transit.

The physician also indicated that Social Functioning was n/a.

Help with Daily Living Activities

In the AR, for help required the physician noted "Cannot assess presently." She also indicated n/a for assistance provided by others. A cane and back brace were noted as equipment or devices used routinely by the Appellant to compensate for his impairment and no other assistive devices were reported as being needed by the appellant. Assistance is not being provided by assistance animals.

Admissibility of New Information

In the Notice of Appeal, the Appellant states that he is unable to retain employment because of his progressive and degenerative conditions and that his daily living is severely limited, most tasks requiring high levels of pain killers to perform, leaving him injured and bedridden. The frequencies of these episodes occur every other day after performing household tasks. His roommate assists as much as possible but is also disabled and limited to what she can do. The Appellant states that he has other conditions such as diverticulosis and hemorrhoids.

Subsequent to reconsideration but prior to the hearing, a letter dated September 11, 2013 prepared by the Appellant and signed by both himself and his physician was submitted which contained the following details:

- The Appellant requests that the physician sign and date the letter if she feels that the following limitations are consistent with his injuries.
 - the Appellant's daily living activities are not performed exclusively independently as he receives considerable assistance from his room-mate,
 - housework, shopping, cooking etc. are not performed at all when the room-mate is unable to assist,
 - his restrictions are continuous and assistance is needed on a continuous basis,
 - 2-3 days a week are spent on bed rest after performing basic tasks,
 - each evening, he ices swollen joints,
 - he uses a back brace in a chair and when driving,
 - he uses a cane for balance and mobility at least 2-3 times per week,
 - he is unable to negotiate stairs,
 - rising from a sitting position after an extended period is always difficult and painful,
 - 2-3 days a week he is unable to carry or hold any amount of weight and
 - he has 70% hearing loss on his left side and 30% on the right and reads lips to aid communication.

Subsequent to reconsideration but prior to the hearing, the Appellant submitted his Radiology Report dated January 12, 2013 which reported the following findings:

Bilateral Knees- Chondrocalcinosis is present associated with minimal tricompartmental degeneration.

Lumbar Spine- Mild degeneration is present in the upper lumbar spine and in the facet joints- no compression fracture or alignment abnormality.

At the hearing, the Appellant testified that although it is difficult because of carpal tunnel in his wrists and hands; he uses a one armed crutch as an assistive aid for mobility. He stated that without his medications and the help from his roommate, he cannot perform daily living activities. The Appellant indicated that both he and his physician had difficulty filling out the required PWD forms and that it took 5 visits to his physician to correct errors and inconsistencies. He reported that he had knee surgery 17 years ago and that his physician has advised that there is only a 50% chance of recovery for his carpal tunnel and won't recommend an operation.

In response to a question by the Panel, the Appellant confirmed that his back support was not a brace or prescribed by a medical practitioner but rather a rigid form that he obtained for driving and sitting. When asked about taking significantly longer than typical for numerous daily living activities as reported in the AR, the Appellant indicated that often he can't stand due to pain.

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

The ministry stated that she had no objection to the admissibility of the new information and found it was in support of the information that was before the Ministry at reconsideration.

The Panel finds that the new information provided by the Appellant in his testimony, his Notice of Appeal, the letter dated September 11, 2013 which the Appellant prepared and was signed by both himself and his physician and the Radiology Report are further description of the Appellant's medical situation and its impact and are therefore in support of the information and records that were before the Ministry at the time of reconsideration. The Panel admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that that the Appellant was not eligible for PWD designation because he did not meet all of the requirements in section 2(2) of the EAPWDA, and specifically, that the Appellant does not have a severe mental or physical impairment that in the opinion of a prescribed professional (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 eligibility criteria for PWD designation are set out in the following section of the EAPWDA:

2 (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 "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

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.

Severe Physical Impairment

The Appellant's position is that his degenerative disc disease, bilateral carpal tunnel, torn rotator cuff, Osgood Schlatters disease, hearing loss and mild dyslexia affect his ability on a continuous basis to perform daily living activities. The Appellant states that although his symptoms are episodic in nature, the episodes are more frequent as his disease progresses and that his daily living is severely limited, most tasks requiring high levels of pain killers to perform, leaving him injured and bedridden.

The Ministry's position is that the Appellant's functional skill limitations as reported by the doctor are more in keeping with a moderate degree of physical dysfunction and not a severe physical

impairment.

The Panel's Findings

The EAPWDA provides that the determination of the severity of impairment is based on whether the Minister is satisfied that the information provided establishes a severe impairment, taking into account all of the evidence including that of the Appellant. However, that legislation is also clear that the fundamental basis for the assessment is the evidence from a prescribed professional respecting the type of impairment and its impact on daily functioning.

The Appellant described his physical impairment as having chronic pain and discomfort while performing daily living activities, often requiring the use of a one armed crutch to aid mobility and balance which is increasingly episodic as his disease progresses. He is often unable to walk or rise at all and confined to bed until pain and swelling subsides.

The physician described the Appellant's diagnosis as degenerative disc disease, bilateral carpal tunnel, rotator cuff injury and Osgood-Schlatters disease. She also reported that the appellant's physical functional skills are limited to walking 2-4 blocks unaided on a flat surface, climbing 2-5 steps unaided, lifting 5-15 lbs. and remaining seated for less than 1 hour. The physician also indicated that the Appellant is independent walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding and that all these activities take longer than usual and cause pain. The Panel notes that both the PR and AR were completed after the Appellant's Radiology Report.

The Panel finds that while the prescribed professional indicates that the Appellant's impairment has an impact on his daily functioning, 'takes significantly longer than typical', the evidence does not explain how much longer than usual the daily living activities take the Appellant or to describe the type or amount of assistance that is required by the Appellant. The Appellant testified that both he and his physician had difficulty filling out the required PWD forms and that it took 5 visits to his physician to correct errors and inconsistencies however, the Panel finds that the recent documented information about the deterioration of the Appellant's physical impairment appears to reflect information that was given to the prescribed professional by the Appellant rather than an assessment by that prescribed professional who previously reported a good level of independence. Given that the new evidence is not supported by either the Radiology Report which indicates minimal degeneration in the bilateral knees and mild degeneration in the upper lumbar spine or the functional skills report contained in the PR and AR, the Panel finds that the medical information does not establish that the Appellant's impairment is severe.

Based on this evidence, the Panel finds that the Ministry reasonably determined that the information provided did not establish a severe physical impairment.

Severe Mental Impairment

The Appellant's position is that it is emotionally difficult to deal with these progressive medical limitations and he often feels depressed.

The Ministry's position is that the Minister was not satisfied that the information provided is evidence of a severe mental impairment.

The Panel's Findings

While the physician reported that the Appellant has significant deficits with cognitive and emotional functioning, specifically in the area of language noting "Dyslexia"; the same medical practitioner reported that the Appellant did not have a mental impairment or brain injury that impacts his cognitive and emotional functioning.

Therefore, the Panel finds that the Ministry reasonably determined that the evidence does not establish that the Appellant has a severe mental impairment.

Daily Living Activities

The Appellant's position is that his daily living activities are not performed exclusively independently as he receives considerable assistance from his room-mate. Housework, shopping, cooking etc. are not performed at all when the room-mate is unable to assist. The Appellant indicates that his restrictions are continuous and assistance is needed on a continuous basis. He spends 2-3 days a week in bed after performing basic tasks and each evening, he ices swollen joints. The Appellant states that; taking a bus is painful, using the toilet is difficult (sitting and rising), dressing is difficult, he cannot lie in bed for more than 5-6 hours, he wakes in pain every day, his sleep is often disrupted by pain, dyslexia makes it not possible to use a computer effectively and he often requires the use of a crutch to aid mobility and balance (lift himself from the toilet or chair and when shopping) which is increasingly episodic as his disease progresses. The Appellant reports that the frequencies of these episodes occur every other day after performing household tasks.

The Ministry's position is that a severe impairment has not been established and the physician reports that the Appellant is not restricted in his ability to perform all daily living activities. The information from the prescribed professional indicates that the Appellant takes longer with areas of personal care, basic housekeeping, shopping, meals and transportation however; she does not provide information to explain how much longer is taken to manage these areas. The physician does note that the appellant uses a cane and back brace however, no information is provided to describe the frequency, the degree or duration that these assistive devices are required. The Appellant does report that the use of these devices is episodic in nature while no other information is provided to explain the frequency or duration of the episodes or describe the degree in which the assistive devices are required. The Ministry also notes that the physician reports that the Appellant is unrestricted in his ability to manage social functioning. Therefore, the Ministry has determined that as the majority of daily living activities are performed independently and that little information is provided about the assistance required by the Appellant, the Ministry finds that the information from the prescribed professional does not establish that the Appellant's impairment significantly restricts daily living activities either continuously or periodically for extended periods.

The Panel's Findings

Section 2(2)(b) of the EAPWDA requires the opinion of a prescribed professional to confirm that the Appellant's severe impairment directly and significantly restricts his daily living activities. In other words, the restrictions to those activities must be directly caused by the severe impairment. The physician who completed the PR and the AR is the prescribed professional in this case. While the physician reported that the Appellant is independent in managing 13/28 aspects of daily living activities and takes significantly longer than typical in 15/28 aspects of daily living activities, she does not describe how much longer or explain the type and amount of assistance required and/or any safety issues. In the AR, for help required the physician noted "Cannot assess presently." She also indicated n/a for social functioning and assistance provided by others. The Panel finds that the new

information from the prescribed professional does not establish that the Appellant's impairment directly and significantly restricts daily living activities either continuously or periodically for extended periods but rather reflects what has been reported by the Appellant. Based on the evidence, the Panel finds that the Ministry reasonably concluded that the information provided does not establish that the Appellant has satisfied the requirements in section 2(2)(b)(i) of the EAPWDA.

Help with Daily Living Activities

The Appellant's position is that he regularly uses a one armed crutch and a back brace and requires continuous help from his room-mate with daily living activities.

The Ministry's position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot determine that significant help is required from other persons.

The Panel's Findings

Section 2(2)(b)(ii) of the EAPWDA also requires a prescribed professional to confirm that as a result of his restrictions the Appellant requires help with his daily living activities. The Panel finds that there is some evidence that the Appellant needs help with certain daily living activities such as personal care and basic housekeeping however, there is insufficient evidence regarding how often or to what extent such help is needed by the Appellant. Therefore, the Panel finds that the Ministry reasonably determined that because direct and significant restrictions in the Appellant's ability to perform daily living activities have not been established, it cannot be determined that the Appellant needs help to perform those activities.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the Panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation, was reasonably supported by the evidence. Therefore, the Panel confirms the Ministry's decision.