

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated July 17, 2013 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his 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; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of 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

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the Employment and Assistance Act.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated January 3, 2013 in which the appellant did not describe his disability or how it affects his life, as well as a physician report and an assessor report both dated November 2, 2012 and completed by the appellant's family physician of approximately 8 years, as well as the following:

- 1) Letter dated June 23, 2013 from the appellant's family physician to an advocate stating in part that the appellant has been in regular attendance at the physician's office since 2004. His medical history included injury to his pelvis, hip, and right leg and foot in a 2004 motorcycle accident after which he was left with chronic pain and disability. He also tested positive for HCV after a blood transfusion related to his accident. After the accident, the appellant underwent several surgical procedures and his right leg was spared amputation. He continued to suffer chronic pain related to his right lower limb injury and he uses a cane when needed. His walking is limited to 1 to 2 blocks and he also experiences difficulty walking indoors. He has limitations to his standing. His lifting ability varies but did not exceed 40 lbs. The appellant described needing periodic assistance with regulating his diet, preparing meals, feeding himself and transferring in and out of bed and chairs. He described needing periodic assistance with housekeeping. He described needing continuous assistance with shopping. The appellant also had a depressed mood related to his injury and chronic pain. He described major impact to his executive thought processes and memory. He described moderate impact to his emotions, attention and concentration, motivation, and motor activity. He described minimal impact to his impulse control and negative impact to his interpersonal relationships. The appellant's injuries are permanent and he has no further specialist consultation planned; and,
- 2) Request for Reconsideration- Reasons dated July 11, 2013 in which the appellant wrote that he feels he meets the criteria for PWD, that he requires assistance with the activities of daily living both on a continuous basis and periodically for extended and frequent periods of time. This is due to the severity of his conditions as set out in the doctor's letter dated June 23, 2013.

Diagnoses

The appellant has been diagnosed by his general practitioner with right foot/ lower limb injury and chronic pain, right hip pain ("chronic"), and HCV post transfusion.

Physical Impairment

- In the physician report, the general practitioner indicated in the health history that the appellant was in a motorcycle accident in 1984 with trauma to his right hip/ pelvis and right lower limb and foot. He underwent multiple surgical procedures with consideration given to amputation of his right lower limb, although this was spared. The appellant suffers with chronic pain to his right hip/ pelvis and lower leg/ foot.
- Functional skills reported in the physician report indicated that the appellant can walk 1 to 2 blocks unaided on a flat surface, he can climb 5 or more steps unaided, his lifting ability varies to a maximum of 40 lbs. and he can remain seated less than 1 hour.
- The general practitioner reported that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform his daily living activities (DLA) and he requires a prosthesis or aid for his impairment, namely he uses a cane "as needed."
- In the assessor report, the general practitioner indicated that the appellant requires periodic assistance from another person, uses an assistive device and takes significantly longer than typical with walking indoors and walking outdoors. The appellant takes significantly longer with climbing stairs and with lifting. He requires periodic assistance and takes significantly longer with carrying and holding and

uses an assistive device for standing. The general practitioner did not provide further comments.

- For additional information in the assessor report, the general practitioner wrote that the appellant's right hip/ leg condition is permanent and a prior surgical consult has not advanced his recovery. No further surgical or specialist consults are indicated now.

Mental Impairment

- In the physician report, the general practitioner did not diagnose a mental disorder. In the health history, the general practitioner noted that the appellant's chronic pain also impacts his mood negatively.
- The general practitioner reported the appellant does not have difficulties with communication and he has a good ability to communicate in most areas, with the exception of writing which is satisfactory to poor.
- The general practitioner reported a significant deficit with cognitive and emotional function in the area of emotional disturbance (e.g. depression, anxiety), with no further comments provided.
- In the assessor report, the general practitioner indicated major impacts to cognitive and emotional functioning in the areas of executive and memory, as well as moderate impacts to emotion, attention/ concentration, motivation, and motor activity and a minimal impact to impulse control.
- For social functioning, the general practitioner reported that the appellant is independent with making appropriate social decisions and requires periodic support/ supervision with developing and maintaining relationships, interacting appropriately with others, and dealing appropriately with unexpected demands. He requires continuous support/ supervision with securing assistance from others. The general practitioner noted that "...periodic assistance required for extended periods of time."
- The appellant is assessed as having marginal functioning in both his immediate and extended social networks, with no further comments provided by the general practitioner.

Daily Living Activities (DLA)

- In the assessor report, the general practitioner indicated that 4 tasks of the DLA personal care are performed independently while the tasks of feeding self, regulating diet, and transfers in/out of bed and on/off of chair require periodic assistance from another person. The general practitioner provided a comment that "...periodic assistance required for extended periods of time."
- The general practitioner assessed the appellant as being independent with laundry and requiring periodic assistance from another person with basic housekeeping.
- For shopping, the appellant is independent with reading prices and labels and requires periodic assistance with making appropriate choices and continuous assistance with going to and from stores and carrying purchases home. The general practitioner did not provide further comment.
- With meals, the appellant is assessed as independent with safe storage of food and as requiring periodic assistance from another person with meal planning, food preparation, and with cooking. Again, the general practitioner noted "...periodic assistance required for extended periods of time."
- The general practitioner assessed the appellant as independent with banking and requiring continuous assistance with budgeting and no assessment for paying rent and bills but noted "direct pay."
- For managing medications, the appellant is assessed as requiring continuous assistance with filling/ refilling prescriptions and is independent with taking medications as directed and safe handling and storage.
- With transportation, the appellant is assessed as independent with getting in and out of a vehicle and using public transit, and as requiring periodic assistance with using transit schedules and arranging transportation. The general practitioner did not provide further comment.

Need for Help

- The general practitioner reported that the appellant lives in a rooming house and he routinely uses a cane to help compensate for his impairment.
- The general practitioner indicated in the assessor report that the help required for DLA is provided by friends.

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision. The appellant wrote that new information has surfaced and he must take it to the doctor. The appellant wrote that he has been disabled for many years and it has gotten worse over the years. His life is deteriorating to the point where he fears for his life. The specialist would like to amputate his foot. He has Hep C and cancer. He has no pelvis on his right side. The appellant wrote that he is in an extremely depressed state. If it is decided that he is OK, then he does not know how close to death he must get to receive help.

The ministry did not raise an objection to the information in the appellant's Notice of Appeal. The panel admitted the appellant's evidence regarding the impact of conditions referred to in the PWD application, pursuant to Section 22(4) of the Employment and Assistance Act, as being in support of information that was before the ministry when the decision being appealed was made. The panel did not admit the evidence regarding the appellant having cancer as this was not part of the information or records before the ministry at reconsideration.

The ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's determination that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that his daily living activities (DLA) 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, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a 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.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of his right foot/ lower limb injury and chronic pain, his chronic right hip pain and his Hep C diagnosis, as confirmed by the general practitioner in the letter dated June 23, 2013. The appellant argued that his conditions are deteriorating to the point where he fears for his life, that the specialist would like to amputate his foot, he has Hep C and cancer and no pelvis on his right side.

The ministry's position is that there is not sufficient information to establish that the appellant has a severe physical impairment. The ministry argued that the general practitioner indicated that the appellant is able to walk 1 to 2 blocks unaided and climb 5 or more steps unaided, lift up to a maximum of 40 lbs., although this varies, and remain seated less than an hour. The ministry argued that while the appellant's general practitioner reported that the appellant requires periodic assistance with walking indoors and outdoors and with carrying and holding, uses an assistive device for walking in and outdoors and standing, and takes significantly longer in all aspects of mobility and physical abilities, no information is provided on how much longer it takes the appellant. The ministry argued that the letter from the general practitioner indicated that the appellant uses a cane when needed but no information is provided on how often the appellant uses the cane.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. 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 describes this approach well when it defines the word "impairment" in the physician report 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." 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 clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of approximately 8 years, diagnosed the appellant with right foot/ lower limb injury and chronic pain as well as chronic pain in his right hip and Hepatitis C. In the physician report, the general practitioner indicated in the health history that the appellant was in a motorcycle accident, with trauma to his right hip/ pelvis and right lower limb and foot in 1984, or approximately 29 years ago. The general practitioner stated in the June 23, 2013 letter that the accident occurred in 2004 so there is some question about how long ago these injuries were sustained. In terms of the appellant's current functional skills, the general practitioner reported that the appellant can walk 1 to 2 blocks unaided on a flat surface and climb 5 or more steps unaided, his lifting ability varies to a maximum of 40 lbs., and he can remain seated less than 1 hour. In the assessor report, the general practitioner indicated that the appellant requires periodic

assistance from another person, uses an assistive device and takes significantly longer than typical with walking indoors and walking outdoors. The general practitioner indicated in the physician report that the appellant uses a cane "as needed" for an aid to his impairment. The panel finds that the ministry reasonably concluded that, without further description or explanation by the general practitioner, it is not clear how often the appellant uses his cane or requires assistance with his mobility.

The appellant is also assessed as taking significantly longer with climbing stairs and with lifting; however, this is within his functional skill level of 5 or more steps and lifting to a maximum of 40 lbs. The general practitioner reported that the appellant's lifting ability varies with no further explanation of when or how much he is restricted at other times. The appellant is assessed as requiring periodic assistance and taking significantly longer with carrying and holding and uses an assistive device for standing but, again, the general practitioner did not provide further comments to define the frequency of the need for assistance or the use of his cane. While the appellant argued that the evidence of the general practitioner in the June 23, 2013 establishes the severity of his physical impairment, the panel finds that there is no new evidence in the letter that is not already set out in the PWD reports.

In his Notice of Appeal, the appellant wrote that "new information has surfaced," that he has been disabled for many years and it has gotten worse over the years, and that he has Hep C and cancer. The information about the appellant having cancer was not set out in the PWD application by his general practitioner and may be the new information to which the appellant refers; however, the panel found that the evidence of this condition is not admissible on this appeal. Therefore, the panel finds that the ministry reasonably determined that the appellant's level of physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position is that a severe mental impairment is established by the evidence of his extremely depressed state.

The ministry's position is that a severe mental impairment has not been established. The ministry argued that the general practitioner reported deficits to cognitive and emotional functioning in the area of emotional disturbance and the impacts described by the general practitioner are more in keeping with a moderate degree of impairment.

Panel Decision

The general practitioner did not diagnose a mental disorder in the physician report as part of the PWD application. In the health history, the general practitioner noted that the appellant's chronic pain also impacts his mood negatively and the appellant stated in his Notice of Appeal that he is in an extremely depressed state. The general practitioner reported the appellant does not have difficulties with communication and he has a good ability to communicate in most areas, with the exception of writing which is satisfactory to poor. The general practitioner reported a significant deficit with cognitive and emotional function in the area of emotional disturbance (e.g. depression, anxiety), with no further comments provided. In the assessor report, the general practitioner indicated major impacts to cognitive and emotional functioning in the areas of executive and memory, as well as moderate impacts to emotion, attention/ concentration, motivation, and motor activity and a minimal impact to impulse control.

Given that the general practitioner reported that the appellant's chronic pain impacts his mood, the panel finds that there is no explanation provided by the general practitioner for the major impacts identified to the appellant's cognitive and emotional functioning in the areas of executive and memory. The panel finds that the evidence suggests that the appellant's chronic pain varies in its impact on the appellant but the general practitioner has not defined the frequency or duration of exacerbations to his pain. The general practitioner reported that the appellant is independent with making appropriate social decisions but requires periodic

support/ supervision with developing and maintaining relationships, interacting appropriately with others, and dealing appropriately with unexpected demands. Although the general practitioner noted that "...periodic assistance required for extended periods of time," there is no other note provided by the general practitioner to indicate the basis for this conclusion, such as particulars of how often the supervision is required and for how long. The appellant is assessed as having marginal functioning in both his immediate and extended social networks, with no further comments provided by the general practitioner. The panel finds that the ministry reasonably determined that there was insufficient evidence provided to establish a severe mental impairment, thereby not satisfying the criteria in 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 DLA on an ongoing basis as he requires the use of a cane as an assistive device with many tasks of his DLA and he requires assistance with the activities of daily living both on a continuous basis and periodically for extended and frequent periods of time.

The ministry's position is that the ministry does not have enough evidence from a prescribed professional to confirm that the appellant's impairment significantly restricts his ability to perform his DLA continuously or periodically for extended periods. The ministry argued that based on the appellant's medical diagnoses, it is unclear why the appellant requires assistance with many of the tasks of DLA such as carrying purchases home, budgeting, filling/refilling prescriptions, feeding self, regulating diet, and meal planning. The ministry argued that no information is provided by the general practitioner on how often the appellant requires the assistance.

Panel Decision

The prescribed professional, the appellant's general practitioner, indicated that the appellant requires periodic assistance from another person and uses an assistive device with walking indoors and walking outdoors. The general practitioner indicated in the physician report that the appellant uses a cane "as needed" for an aid to his impairment and, as previously discussed, the panel finds that, without further description or explanation by the general practitioner, it is not clear how often the appellant uses his cane or requires assistance with his mobility. The general practitioner also indicated in the physician report that the appellant is able to walk 1 to 2 blocks unaided. With meals, the appellant is assessed as independent with safe storage of food and as requiring periodic assistance from another person with meal planning, food preparation, and with cooking. The general practitioner noted "...periodic assistance required for extended periods of time" and there is no other note provided by the general practitioner to indicate the basis for this conclusion, such as particulars of how often the assistance is required and for how long. The panel finds that the ministry also reasonably concluded that it is unclear, based on his medical diagnoses, why the appellant requires periodic assistance for meal planning.

The general practitioner assessed the appellant as independent with banking and requiring continuous assistance with budgeting and no assessment for paying rent and bills but noted "direct pay." The panel finds that the ministry also reasonably concluded that it is unclear, based on his medical diagnoses, why the appellant requires periodic assistance for budgeting. For shopping, the appellant is independent with reading prices and labels and requires periodic assistance with making appropriate choices and continuous assistance with going to and from stores and carrying purchases home. The general practitioner did not provide further comment and, given that the appellant's lifting ability varies but ranges to a maximum of 40 lbs, the evidence suggests that the appellant's experiences exacerbations of his chronic pain that have not been defined by the general practitioner.

With transportation, the appellant is assessed as independent with getting in and out of a vehicle and using public transit, and as requiring periodic assistance with using transit schedules and arranging transportation. The general practitioner did not provide further comment and it is unclear, based on his medical diagnoses,

why the appellant requires assistance with using transit schedules and arranging transportation . The general practitioner assessed the appellant as being independent with laundry and requiring periodic assistance from another person with basic housekeeping, with no explanation or description of the assistance required. The general practitioner indicated that 4 tasks of the DLA personal care are performed independently while the tasks of feeding self, regulating diet, and transfers in/out of bed and on/off of chair require periodic assistance from another person. The general practitioner again provided a comment that "...periodic assistance required for extended periods of time" and there is no other note by the general practitioner to indicate the basis for this conclusion, such as particulars of how often the assistance is required and for how long. For managing medications, the appellant is assessed as requiring continuous assistance with filling/refilling prescriptions and is independent with taking medications as directed and safe handling and storage.

For those DLA which relate to a mental impairment, the appellant is assessed as independent with making appropriate social decisions and with communicating with others while requiring periodic supervision with interacting appropriately with others. The general practitioner again provided a comment that "...periodic assistance required for extended periods of time" and there is no other note provided by the general practitioner to indicate the basis for this conclusion, such as particulars of how often the assistance is required and for how long. In the letter dated June 23, 2013, the general practitioner set out the impacts the appellant's DLA as being described by the appellant rather than being based on an assessment by the prescribed professional. Without further detail provided by the general practitioner, the panel finds that the ministry reasonably concluded that it is unclear why the appellant requires assistance with many of the tasks of DLA given his medical diagnoses. The panel finds that the ministry reasonably concluded that there is insufficient evidence from the prescribed professional to establish that the appellant's impairment significantly restricts his ability to manage his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that he requires the use of a cane as an assistive device and the significant help or supervision of another person to perform many tasks of DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry acknowledged that a cane is used as an assistive device "as needed" but argued that no information is provided on how often the appellant uses the cane and use of an assistive device does not, in itself, establish a severe impairment.

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. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The evidence of the prescribed professional establishes that the appellant uses a cane to help compensate for his impairment "as needed," that the appellant lives in a rooming house and the help required for DLA is provided by friends. The panel 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, as defined by section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and 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, and therefore confirms the decision.