

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated July 26, 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

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 February 6, 2013, a physician report completed by a psychiatrist and dated February 20, 2013, and an assessor report completed by a nurse practitioner who has known the appellant approximately 2 years and dated March 14, 2013, as well as the following: Request for Reconsideration- Reasons dated July 9, 2013.

Diagnoses

The appellant has been diagnosed by his psychiatrist with anxiety ("severe, chronic") and depression.

Physical Impairment

- In the physician report, the psychiatrist indicated for the appellant's health history that the appellant has physical health problems for which he is being assessed and treated.
- The psychiatrist indicated that the appellant does not require an aid for his impairment.
- Functional skills reported by the psychiatrist in the physician report indicated that it is unknown how far the appellant can walk, that he can climb 5 or more steps unaided, it is unknown how much the appellant can lift and how long he can remain seated.
- In the assessor report, the nurse practitioner indicated that the appellant is independent with walking indoors and outdoors and with standing, takes significantly longer than typical with climbing stairs ("secondary to knee pain"), and requires continuous assistance from another person with lifting and carrying and holding ("...issues with lifting due to pain in back and shoulders and strength").
- In the additional information, the nurse practitioner wrote that the appellant struggles with chronic pain and anxiety and depression and he finds it difficult to acquire and maintain employment due to pain issues and IBS [Irritable Bowel Syndrome] that is not controlled.
- In his self-report, the appellant wrote that he has hypothyroidism which is a chronic condition that has affected him for almost five years and hormone therapy only masks the effects of his illness. The appellant wrote that he suffers from very high blood pressure that is sporadic and medications for this condition "are not compatible for me." The appellant wrote that he has a recent diagnosis of Diabetes II, has a life-long chronic ear problem with hearing loss and will be seeing a neurologist for problems associated with being born with epilepsy.
- In his Request for Reconsideration, the appellant wrote that he was born with epilepsy, he recently saw a neurologist and they discussed his existing symptoms. The appellant wrote that with age it may be that his epilepsy is returning. The appellant wrote that he is developing osteoarthritis in his spine affecting his limbs.

Mental Impairment

- In the physician report, the psychiatrist indicated in the health history that the appellant has "...chronic long term anxiety and depression which have been increasing over the past few years. He is also taking care of a son with Autism Spectrum Disorder who is a challenge and requires constant care. The anxiety and depression interfere with his ability to concentrate, to motivate himself, to undertake actions and to persist with activities once started."
- The psychiatrist reported the appellant has no difficulties with communication.
- The psychiatrist reported significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration. No further comments were provided by the psychiatrist.
- In the additional comments, the psychiatrist noted that the appellant's anxiety and depression "impact his daily functioning profoundly. He is not able to work on a regular basis and this is unlikely to change in the foreseeable future."

- In the assessor report, the nurse practitioner indicated major impacts with cognitive and emotional functioning in the areas of bodily functions (sleep disturbance), emotion (anxiety, depression), and attention/concentration (poor short term memory). Moderate impacts were assessed for consciousness ("goes blank, spaces out"), and executive (abstract, thinking). The nurse practitioner assessed minimal or no impact in the remaining 9 areas of functioning and provided no further comments.
- The nurse practitioner reported that the appellant is independent with making appropriate social decisions, with developing and maintaining relationships, interacting appropriately with others, and securing assistance from others, and requires periodic support/supervision with dealing appropriately with unexpected demands. The nurse practitioner wrote that the appellant has "...difficulty at times feeling comfortable in social setting due to anxiety around IBS [Irritable Bowel Syndrome]." The appellant is assessed with good functioning in both his immediate and extended social networks.
- In the additional information, the nurse practitioner wrote that the appellant "...struggles with high anxiety with panic attacks and managing his autistic son."
- In his self-report, the appellant wrote that he is currently under the care of a psychiatrist in order to "help cope with the incredible task" of caring for his son who has Autistic Spectrum Disorder and severe emotional disability. The appellant wrote that he takes prescription medications to deal with the anxiety which leaves him in a sedated state as a side effect.

Daily Living Activities (DLA)

- In the physician report, the psychiatrist reported that the appellant is continuously restricted with basic housework and that he is not restricted in the other listed DLA, namely personal self care, meal preparation, management of medications, daily shopping, mobility inside and outside the home, use of transportation and management of finances. No assessment was made by the psychiatrist with respect to social functioning, and no further comments were provided.
- For additional comments to the physician report, the psychiatrist added that the appellant's anxiety and depression impact his daily functioning profoundly. He is not able to work on a regular basis and this is unlikely to change in the foreseeable future.
- The psychiatrist reported that the appellant has been prescribed medication for depression that interferes with his ability to perform his DLA as it "...causes some sedation."
- In the assessor report, the nurse practitioner indicated that anxiety and depression significantly restrict the appellant's ability to function and he also has chronic pain. The nurse practitioner indicated that the appellant is independent with walking indoors and outdoors.
- In the assessor report, the nurse practitioner reported that 7 of 8 listed tasks of the DLA personal care are performed independently with no noted restrictions, while transfers on/off of chair require periodic assistance from another person, with the comment "back pain."
- The appellant is assessed as requiring continuous assistance with doing his laundry and basic housekeeping, with the comment that "walking up and down stairs difficult."
- For shopping, the appellant is independent with 3 of 5 tasks and requires continuous assistance from another person with going to and from stores and carrying purchases home. The nurse practitioner wrote that the appellant "...reports driving skills impacted due to changes in eye sight/ memory. Neurology appointment pending."
- All listed tasks for the DLA meals, paying rent and bills and medications are managed independently, with no comments added.
- For managing transportation, the appellant is assessed as requiring periodic assistance from another person with getting in and out of a vehicle ("pain back and legs") and that using public transit and using transit schedules and arranging transportation is not applicable for the appellant.

Need for Help

- In the physician report, the psychiatrist reported that the assistance needed by the appellant for DLA is

"none."

- The nurse practitioner indicated in the assessor report that help required for DLA is provided by the appellant's family, friends, and health authority professionals, that the appellant "lives with mom, sister, and son."

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision. The appellant wrote that he not only has a disabled son to monitor, but he also cares for his elderly mother who is also disabled and lives with him.

At the hearing, the appellant provided the following oral evidence:

- The appellant stated that he is not in agreement with the ministry's reconsideration decision because the ministry knows about his set of problems and had advised him to go this route. He has had these problems for a quite a while, he has chronic conditions, and feels he should be entitled to the benefits that the ministry suggested.
- The appellant stated that his son has severe emotional concerns as well and the appellant's life is difficult.
- The appellant stated that his condition has worsened and has not been fully diagnosed. He has yet to see various specialists to whom he has been referred. He is seeing an internal specialist next week because his IBS is getting worse.
- The appellant stated that he now requires a cane because of the pain in the left side of his body. He has difficulty going up and down stairs. The appellant stated that he has chronic pain in his lower back and knees and feet and it is worse on the left side.
- The appellant pointed to the impacts to his cognitive and emotional functioning as assessed by the nurse practitioner in the assessor report.
- The appellant stated that he is directly and significantly restricted in his daily activities. His general mobility outside the home is restricted. The appellant stated that he needs people helping him with his shopping, with housework, and with any yard work. Sometimes he is not feeling well enough to cook and others in the house help him with cooking.
- The appellant stated that with personal care he sometimes has difficulty putting on his socks and he is unsteady in the bathroom. He does not do laundry.
- The appellant stated that he has developed macular degeneration and he can no longer drive and needs help getting to places and is not as mobile as he used to be. He has to see an eye surgeon again to determine the type of macular degeneration and to see how much it has progressed. It is worse in the right eye.
- The appellant stated that he has had problems with hypothyroidism since 2008 and has Diabetes which is not related to his lifestyle and with so many conditions happening at once he wonders if he may be in the first stages of MS [Multiple Sclerosis]. He will be meeting with a neurologist for further investigations.
- The appellant stated that because he lives in a remote community he has not had access to a family physician and, instead, there are a number of locum who service his community. The appellant stated that he gets tired repeating his health history. The appellant stated that the psychiatrist is located in his community and he has been seeing her for about 2 years. The psychiatrist told the appellant she could not cover his physical conditions in her reports since she is only qualified to detail his mental impairment.

The panel admitted the appellant's oral evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail of the impact of his medical conditions and being in support of information that was before the ministry on reconsideration.

The ministry relied on its reconsideration decision. At the hearing, the ministry pointed out that ability to work is not a criteria for PWD designation as it is with the Persons with Persistent Multiple Barriers to employment (PPMB) status.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, 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 person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

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

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

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

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

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

Definitions for Act

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

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

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of his several serious medical conditions, including hypothyroidism, high blood pressure, Diabetes II, IBS, macular degeneration, chronic ear problem with hearing loss, epilepsy, and osteoarthritis in his spine affecting his limbs.

The ministry's position is that there is not sufficient information to establish that the appellant has a severe physical impairment. The ministry pointed out that the appellant's functional skills are mostly unknown to his psychiatrist and the nurse practitioner reported that the appellant is independently able to walk indoors and outdoors and to stand. The ministry argued that the nurse practitioner assessed the appellant as taking longer to climb stairs due to knee pain and requires continuous assistance with lifting/carrying/holding and no assistive devices are routinely used to help compensate for an impairment. The ministry argued that the appellant's functional skill limitations are not restricted to a significant degree.

Panel Decision

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 medical practitioner or prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's psychiatrist of about 2 years, has diagnosed the appellant with mood and anxiety disorders, being depression and severe, chronic anxiety. The psychiatrist has not diagnosed a physical health condition as the appellant explained that the psychiatrist focused on the mental health conditions for which she is providing treatment. In the physician report, the psychiatrist acknowledged that the appellant has physical health problems for which he is being assessed and treated, but these conditions are not set out in any detail. The psychiatrist indicated the appellant does not require an aid for his impairment. Functional skills are largely unknown to the psychiatrist who reported that it is unknown how far the appellant can walk, that he can climb 5 or more steps unaided, and it is unknown how much the appellant can lift and how long he can remain seated.

The nurse practitioner indicated in the assessor report that the appellant is independent with walking indoors and outdoors and with standing. At the hearing, the appellant stated that he is now required to use a cane for mobility. While the nurse practitioner indicated that the appellant takes significantly longer than typical with climbing stairs ("secondary to knee pain") and requires continuous assistance from another person with lifting and carrying and holding ("...issues with lifting due to pain in back and shoulders and strength"), the cause for the appellant's pain has not been diagnosed by a medical practitioner as likely to continue for at least 2 years, as required by the legislation. The appellant acknowledged that he has appointments pending with various specialists to investigate the cause for his many worsening symptoms which may indicate recurrent epilepsy or possibly MS. The appellant described the challenge of accessing appropriate health services in his remote community as he stated only locum physicians are available and he cannot benefit from continuity and

familiarity with his case. The panel concludes that the ministry reasonably determined that the evidence currently available regarding the appellant's physical condition does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant argues that he has a severe mental impairment as a result of anxiety, described by his psychiatrist as "severe, chronic", and depression.

The ministry's position is that the information provided is not sufficient evidence of a severe mental impairment. The ministry argued that the psychiatrist assessed deficits to cognitive and emotional functioning in the areas of emotional disturbance, motivation and attention/concentration; however there are no impacts on daily functioning in 8 out of 14 aspects and major impact in the 3 areas of bodily functions, emotion and attention/concentration. The ministry argued that the nurse practitioner reported that the appellant is mostly independent with his social functioning, with periodic support/supervision required to deal appropriately with unexpected demands but the narrative describes difficulty at times feeling comfortable in social settings secondary to anxiety around irritable bowel syndrome.

Panel Decision

The appellant's psychiatrist of about 2 years diagnosed anxiety ("severe, chronic") and depression described by the psychiatrist as "... increasing over the past few years. He is also taking care of a son with Autism Spectrum Disorder who is a challenge and requires constant care. The anxiety and depression interfere with his ability to concentrate, to motivate himself, to undertake actions and to persist with activities once started." The psychiatrist reported significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration and no further comments were provided by the psychiatrist who is treating the appellant. In the assessor report, the nurse practitioner indicated major impacts with cognitive and emotional functioning in the areas of bodily functions (sleep disturbance), emotion (anxiety, depression), and attention/concentration (poor short term memory) and moderate impacts for consciousness ("goes blank, spaces out"), and executive (abstract, thinking). The nurse practitioner assessed minimal or no impact in the remaining 9 areas of functioning, including motivation which was an area of significant deficit identified by the psychiatrist. The nurse practitioner wrote in the assessor report that the appellant "...struggles with high anxiety with panic attacks and managing his autistic son." In his self-report, the appellant wrote that he is currently under the care of a psychiatrist in order to "help cope with the incredible task" of caring for his son who has Autistic Spectrum Disorder and severe emotional disability. The appellant wrote that he takes prescription medications to deal with the anxiety which leaves him in a sedated state as a side effect. The psychiatrist noted that the appellant's anxiety and depression "impact his daily functioning profoundly" but continued that he is not able to work on a regular basis. The panel finds that the evidence demonstrates that the appellant's anxiety and depression are related to the situational stress of managing his son and that the major impact identified by the psychiatrist is a restriction of his ability to work on a regular basis which is not a criteria for PWD designation set out in the legislation.

As well, looking at the information respecting the appellant's ability to function in terms of specific daily tasks, the panel finds that it does not reflect a severe impairment of mental functioning. In particular, the psychiatrist did not assess restrictions with social functioning or provide notes about impacts in this area. The nurse practitioner indicates that the appellant has good social functioning with the exception of a need for periodic supervision in the area of dealing appropriately with unexpected demands. The appellant has good functioning with both his immediate and extended social networks, and he independently manages all other listed "mental" tasks of daily living, including making appropriate social decisions and interacting appropriately with others, and managing all tasks of both his finances and his medications. Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform DLA to the point that he requires the use of an assistive device, being a cane, or the assistance of another person in many tasks of his DLA.

The ministry's position is that the evidence of the prescribed professionals is that the appellant performs the majority of his DLA independently and there is no information provided by his psychiatrist on restriction to social functioning. The ministry argues that the majority of DLA are performed independently or require little help from others with physical tasks and the information from the prescribed professionals does not establish that the appellant's impairment related to his medical diagnoses of anxiety and depression significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

The evidence of a prescribed professionals is that the appellant is independent with mobilizing indoors and outdoors. While the appellant stated that his chronic pain in his back, knees and feet has worsened and he is now required to use a cane, a diagnosis of a physical health condition is not provided by a medical practitioner and the increased restrictions have not been confirmed with evidence from a prescribed professional. The psychiatrist reported that the appellant performs all his DLA with no restrictions, with the exception of basic housework which requires continuous assistance from another person. There is no explanation provided by the psychiatrist for the nature of the restrictions as a result of the diagnosed mental disorders, and there is no assessment provided by the psychiatrist for the appellant's social functioning.

In the assessor report, the majority of the listed tasks for all DLA other than housework are managed independently, including all tasks associated with meal preparation, paying rent and bills and managing medications. The restrictions to DLA identified by the nurse practitioner are tied to the appellant's chronic physical pain, such as with transfers on and off a chair as a result of back pain for which the appellant requires periodic assistance from another person, with housekeeping and laundry since walking up and down stairs is difficult and for which he requires continuous assistance, going to and from stores with trouble balancing and fatigue which necessitates continuous assistance and getting in and out of a vehicle due to pain in his back and legs and requiring periodic assistance from another person. As previously discussed, there has not been a diagnosis by a medical practitioner of a physical health condition with an opinion that the condition is likely to continue for at least 2 years, as required by the legislation. The nurse practitioner indicated that the appellant is restricted in one of 5 aspects of social functioning, in the area of dealing appropriately with unexpected demands "secondary to anxiety", for which he requires periodic support/ supervision from another person. The panel finds that the ministry reasonably concluded that and the information from the prescribed professionals does not establish that the appellant's impairment related to his medical diagnoses of anxiety and depression directly and significantly restricts 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 an assistive device and the significant assistance of others to perform many of his 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, and there is no indication that an assistive device is required.

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 panel finds that the evidence of the prescribed professional does not confirm the appellant's evidence that he is now required to use a cane as an assistive device due to chronic pain in the left side of his body. When asked in the physician report to describe the assistance needed by the appellant for DLA, the psychiatrist responded "none." The nurse practitioner indicated in the assessor report that help required for DLA is provided by the appellant's family, friends, and health authority professionals and that the appellant "lives with mom, sister, and son." 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.

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.