

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated 25 September 2013, which held that the appellant did not meet 3 of the 5 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 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or that 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. The ministry was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help 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 appellant was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under s. 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration consisted of:

- A 3 page Mental Health Assessment by a Health Authority dated 20 June 2013 stating the appellant referred himself to mental health for support related to symptoms of depression and anxiety. His mental condition is described as:
 - Affect was mood congruent;
 - Speech clear and articulate;
 - Thoughts well organized and thought content focused on current problems;
 - Depression reported at level 5 on 1-10 scale, with 10 being highest mood;
 - Denied suicidal ideation and no suicide attempts in the past;
 - Mood described as “angry”;
 - Experienced an episode of depression after his first operation a few years ago;
 - Appetite diminished;
 - Sleep pattern disturbances;
 - Perceptual disturbance denied;
 - Does not appear he has symptoms consistent with manic episode.
 - The document indicates the appellant applied for Persons with Persistent Multiple Barriers (PPMB).
 - Plan: Refer for brief individual follow up.
- A 4 page Persons with Disabilities Designation Application self report dated 12 April 2013 completed and signed by the appellant stating the following:
 - He cannot work in his trade as his medical condition prevents him from wearing the appropriate equipment and because he must go regularly to the toilet to empty his ostomy.
 - This situation has made him very depressed, particularly since he has been bumped a number of time for surgery that could greatly improve his medical situation.
 - He has lost 25 lbs since his first operation and his energy level and mental condition are rapidly deteriorating, causing further stress.
 - The difficulties with his family situation have further increased his stress level.
 - He takes medication for anxiety and stress.
 - He indicates he had many days full of suicidal tendencies.
 - He must take care of an elderly family member that makes his situation even more difficult.
- A 5 page Physician Report (PR) dated 15 April 2013 completed and signed by the appellant’s family doctor indicates the following:
 - Diagnostic: Diverticular disease.
 - Health history: Long history of diverticular disease and colic abscesses. Had colostomy [date] and colon resection. Since then awaiting re-connection. He has been prescribed no medication or treatment that interfere with his ability to perform DLA and he does not need any prostheses or aids for his impairment.
 - His impairment is likely to continue for 2 years more.
 - He can walk unaided on a flat surface 4+ blocks.
 - He can climb 5+ steps unaided.
 - His limitations in lifting assessed as 7 to 16 kg.

- No limitation to remain seated.
- No difficulties with communication other than a lack of fluency in English.
- Reports a significant deficit with cognitive and emotional function in terms of emotional disturbance (e.g. depression, anxiety) with physician's comments: "Anxiety / depression secondary to poorly functioning colostomy."
- In terms of DLA, the physician mentions that the impairment directly restricts the appellant's ability to perform them but on the list of the following DLA, he indicates no restriction: Personal self care; meal preparation; management of medications; basic housework; daily shopping; mobility inside the home; mobility outside the home; use of transportation and management of finance. The physician did not indicate anything in terms of social functioning and made no further comment with respect to DLA.
- At the end of the report, the physician indicated that the ostomy interferes with the appellant's trade.
- The physician has been treating the appellant for 23 years and has seen him over 11 times in the preceding 12 months.
- An 8 page Assessor Report (AR) dated 15 April 2013 completed and signed by the same physician as the PR, indicating the following:
 - To the question "What are the [appellant's] mental or physical impairments that impact his ability to manage DLA he indicates "Poorly functioning colostomy".
 - The appellant's ability to communicate in each of speaking, reading, writing and hearing are good.
 - In terms of mobility and physical ability, he is independent in all categories, i.e. walking indoors, walking outdoors, climbing stairs, standing, lifting, carrying and holding.
 - In terms of cognitive and emotional functioning for someone who has an identified mental impairment or brain injury the AR indicates there are no impacts for consciousness, attention/concentration, executive, memory, motivation, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. It indicates a minimal impact on impulse control and insight and judgment. There is a moderate impact on bodily functions and emotions. In the "Comments" section, the physician states that the appellant has "great difficulty managing his colostomy."
 - In terms of assistance required related to impairments that directly restrict the appellant's ability to manage DLA, the assessor indicates that he is independent for all of them (personal care, basic housekeeping, shopping, meals, pay rent and bills, medications and transportation) and did not add any particular comment.
 - However, in terms of social functioning (where an individual has an identified mental impairment, including brain injury), the assessor notes that the appellant needs periodic support / supervision for appropriate social decisions (adding that anxiety / depression lead (?) to poor relationships), ability to develop and maintain relationships, appropriate interaction with others and ability to deal appropriately with unexpected demands but is independent in terms of his abilities to secure assistance from others.
 - A mental impairment is reported to result in marginal functioning with immediate and extended social networks.
 - No assistance is provided for the appellant other than the physician's comment that he really needs surgery.
 - The one assisting device required for the appellant is an ostomy appliance, adding "routine ostomy supplies".

- The appellant does not need assistance provided by assistance animals.
- A 4 page operative report (OR) for a procedure performed on the appellant on 6 June 2013 for sigmoid diverticulitis.

In his Notice of Appeal dated 2 October 2013, the appellant indicates that because of his medical condition he cannot work in his trade and that an ostomy is a disability. He adds that the depression, anxiety and embarrassment should be self-explanatory.

At the hearing, the ministry stated that they verified the appellant's file back to until 2008 and no trace was found of any application for PPMB. The panel determined that the additional oral evidence was admissible under s. 22(4) of the EAA as it was in support of the records before the minister at reconsideration.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met the all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR, which are set out below.

Section 2 of the EAPWDA states:

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;

"health professional" repealed

"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 of the EAPWDR provides further clarification:

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*, if qualifications in psychology are a condition of such employment.

The ministry acknowledges that the appellant meets 2 of the conditions for PWD designation in that he is at least 18 years of age and his impairment is likely to continue for 2 years or more. However, the ministry argues that he does not meet the 3 other criteria.

Severe physical or mental impairment:

The ministry argues the appellant's medical condition does not establish a severe impairment, based on the information provided by a medical practitioner, the appellant's physician, who indicates that the appellant has very minor limitations in terms of his physical abilities and that he is independent in all aspects of mobility and physical functions. Thus his physical impairment, the ministry argues, is not severe.

In terms of mental impairment, the ministry argues that the physician did not diagnose a severe mental impairment and that his mental condition has little impact on his cognitive and emotional functioning. Further, the ministry argues that this condition is secondary to poorly functioning colostomy that can be addressed by an operation and thus is only temporary and not lasting.

The appellant argues that wearing an ostomy pouch is by itself a significant disability and impairment because he has to empty it regularly he could not go on a job as he would constantly have to go to the toilet to empty his pouch. Further, he argues that he cannot work in his trade as he would be unable to wear the required equipment and the pouch would not allow him to perform his work properly.

He argues that his depression and anxiety because of his medical condition is an embarrassment for himself. He states this situation will last at least until he can get an operation but he does not know when as he has already been bumped 3 times. He argues he cannot survive on social assistance as he is now and has to attend the local food bank every week but cannot get the proper nutrition needed to maintain his health. He also argues that his family situation contributes to his stress and anxiety and that he needs medication to control severe anxiety and to help him sleep. Finally he argues that because he has to take care of an elderly family member, he is running out of money and his budget is too tight for both of them.

It is obvious from the record that the diagnosed impairment, diverticular disease, was exacerbated by the July 2012 poorly functioning colostomy and the fact that the re-connection, that would alleviate his condition, is being delayed because the appellant has been bumped by surgeries of a higher priority. Yet, the appellant's physical functional skills are generally not affected by his condition other than some limitations in terms of carrying weight (7 to 16 kg). Aside from this lifting limitation, the only reported disturbance is in fact strictly emotional. The PR reports no specific restriction in terms of DLA even though the physician answered "yes" to the question "Does the impairment directly restrict the person's ability to perform [DLA]?" In the PR, the physician did not indicate anything in terms of "Social functioning" and made no comment in that respect. Additionally, the AR focuses on a "poorly functioning colostomy" but indicates no restriction in terms of ability to communicate (all "good") and mobility and physical abilities (all "independent"). The AR identifies 2 areas of emotional and cognitive functioning that are "moderately impacted": bodily functions" (of course the ostomy) and "emotion". It identifies 2 areas of "minimal impact": impulse control and insight and judgment but there are no comments in respect of those impacts. All the other areas are not impacted and the comment at the bottom of that page refers to his colostomy.

The panel also notes that the Mental Health Assessment indicates in terms of treatment recommendations/intervention/plan that he should be referred "for brief individual follow up", which the panel finds inconsistent with a severe mental impairment. Further, one of the symptoms the appellant mentions in his self evaluation of April 2013 are suicidal tendencies that he experienced "many, many days" while in the Mental Health Assessment that was completed in May and June of the same year as a result of his attendance to that facility and based on information he submitted, it is clearly mentioned in "Mental Status": "Denied suicidal ideation". The panel notes a serious inconsistency between this report based on a statement to a third party and the information he provided to the ministry in support of his application for PWD designation.

For the above reasons, the panel finds that the ministry reasonably determined the information did not establish a severe physical or mental impairment.

Daily Living Activities (DLA):

The ministry submits that the appellant is independent in almost all his DLA and does not need any assistance. While the physician identifies some mental issues resulting from anxiety and depression they do not restrict his ability to manage his DLA significantly.

Third, the ministry argues that since his DLA are not significantly restricted, it cannot determine

whether significant help is required from other persons.

The appellant does not expressly argue respecting his ability to perform DLA but does argue that he is impacted by loss of energy and stress related to his poorly functioning ostomy.

According to the PR the appellant's DLA are not restricted at all and according to the AR, he is independent in all DLA but for the need for periodic support / supervision for appropriate social decisions, ability to develop and maintain relationships, appropriate interaction with others and ability to deal appropriately with unexpected demands, that all relate to a mental impairment. There is also a mention of "marginal functioning" in terms of immediate and extended social networks. The only comment with respect to this issue by the physician is to the effect that anxiety and depression lead to poor relationships. While the panel notes that the prescribed professional has reported that the appellant manages toileting (1 of 7 listed aspects of personal care) without the use of assistive devices, this is not supported by the evidence respecting the use of ostomy supplies. However, the panel finds that the evidence also establishes that the use of ostomy supplies and the impact on social functioning attributable to the poorly functioning ostomy are likely temporary as they relate to the colostomy as confirmed by the physician in the AR where he describes what assistance would be necessary: "Really needs surgery!"

As the PR and the AR indicate the appellant is independent in the vast majority of DLA, the panel finds the ministry reasonably determined that the evidence did not demonstrate a severe mental or physical impairment that in the opinion of a prescribed professional directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Help required to perform DLA:

The ministry argues that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons.

The appellant does not specifically address the need for assistance with DLA.

The only evidence of help required by the appellant to perform his DLA can be found in the AR where the physician states that surgery is really needed and that an ostomy appliance and routine supplies would be of assistance. Since the appellant's DLA are not significantly restricted, as indicated above, the panel finds the ministry reasonably concluded that it could not be determined that significant help from another person or the use of ostomy supplies arose from a direct and significant restriction with DLA.

Conclusion

Therefore, the panel finds the ministry's decision was reasonably supported by the evidence and confirms the decision.