

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision of October 2, 2013, which found that the appellant did not meet three of five statutory requirements of section 2 of the Employment and Assistance for Persons With Disabilities Act (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant's 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; or that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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 ministry was not in attendance at the hearing. After confirming that the ministry was notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

The information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a physician's report (PR) dated April 9, 2013 completed by the appellant's general practitioner of 18 years, an assessor's report (AR) dated April 25, 2013 completed by a Registered Nurse who met with the appellant once for an hour to complete the AR and the appellant's handwritten self-report (SR) signed by the appellant on April 10, 2013.
- A Request for Reconsideration dated September 4, 2013 with a 7 page unsigned typewritten letter prepared for the appellant by an advocacy agency.
- A letter dated August 9, 2013 signed by a community health worker who has known the appellant for 20 years and, since his back injury, has assisted him financially and emotionally as well as with shopping, laundry and driving him to appointments.
- A Medical Report by the appellant's physician (GP) dated May 3, 2013 with a diagnosis of mechanical lumbosacral pain, facet joint arthropathy and disc disease.
- A CT Lumbar Spine non Contrast Exam Report dated March 12, 2013 with an impression that the client has congenitally short pedicles, a disc bulge at the L4-5 level and moderate narrowing of spinal canal at this level.
- An Operative Report dated February 4, 2013 for right sided periarticular injection intraarticular to L4-5 facet, L5S1 and sacroiliac.
- A Fluoroscopy Report dated February 4, 2013.
- An Anaesthetic Consult Assessment dated January 29, 2013 which reported mechanical lumbosacral pain as a result of facet arthropathy, right sided L4-5, L5-S1 and possible sacroiliitis and some diskogenic disease.
- A Bone Scan Report dated November 1, 2012 with an impression that there is a mild increased uptake in the posterior facets throughout the mid and lower lumbar spine.
- A Letter dated October 22, 2012 from a Physical Medicine and Rehabilitation Medical Practitioner who reports mechanical low back pain with degenerative changes and osteoarthritis of the lumbar spine and that there was no significant change when compared to a previous X-ray from January 2007.
- An X-ray Examination Report dated September 19, 2011 which confirms no significant change when compared to earlier examination of January 2007 and no progression evident on current examination.

Physical Impairment

- PR Diagnosis - mechanical low back pain secondary to degenerative disc disease and osteoarthritis lumbar spine with an onset date of 2009. A Medical Report by the same physician dated May 3, 2013 confirmed the diagnosis as mechanical lumbosacral pain, facet joint arthropathy and disc disease.
- Under Health History- the GP wrote that the appellant suffered a significant lower back injury after a fall in 2011, has attended physiotherapy and rehab and returned to work in early 2012, has daily pain and has been assessed at the chronic pain clinic, takes daily NSAIDS, a muscle relaxant and is being trialed on steroid injections.
- The GP indicated that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA, most of the time and occasionally uses cyclobenzaprine which can cause sedation.
- In terms of functional skills, GP noted the appellant can walk 2- 4 blocks unaided on a flat surface, climb 5+ stairs unaided, lift 5 to 15 lbs., and can remain seated for 2 to 3 hours.
- AR under Mobility and Physical Ability noted - the appellant takes significantly longer than typical with walking outdoors, climbing stairs, standing and carrying and holding, requires periodic assistance from another person for lifting as he is unable to bend and uses counters and chairs to stabilize while walking indoors, climbing stairs, standing and carrying and holding.

Mental Impairment

- In the PR, the GP indicated that the appellant has no significant deficits with cognitive and emotional function.
- The two sections in the AR that are to be completed only for applicants with an identified mental impairment or brain injury contained the following:
Under cognitive and emotional functioning, the RN reported a major impact for 4 of 14 items –bodily functions, consciousness, motivation and motor activity, 2 moderate impacts for memory and other emotional and mental problems and 2 minimal impacts under attention/concentration and executive and no impact on the remaining 6 categories.
Under social functioning, the appellant was described as requiring periodic support in being able to deal appropriately with unexpected demands due to chronic pain and as having marginal functioning with his immediate social network and good functioning with extended social networks.
- In his handwritten self-report the appellant indicated that he experiences a lot of anxiety, agitation, stress, depression and confusion because of his disability.

DLA

In the PR, the GP notes that the impairment directly restricts the person's ability to perform DLA.

Activities noted as restricted are as follows: continuous restriction - basic housework, and periodic restriction - daily shopping and, mobility outside the home when prolonged walking is involved.

Degree of restriction is further explained as the ability to lift, bend, kneel or carry objects were secondary to back pain.

Assistance periodically required is noted for transportation and/or with lifting and bending.

In the AR, the RN described the assistance required related to the appellant's impairment under DLA aspects of:

- Personal Care - dressing, grooming, bathing, toileting, transfers (in/out of bed) and transfers (on/off chair) as taking significantly longer than typical while feeding self and regulating diet were independently managed;
- Basic Housekeeping - laundry and basic housekeeping as taking significantly longer than typical;
- Shopping – going to and from stores and carrying purchases home as taking significantly longer than typical while reading prices and labels, making appropriate choices and paying for purchases as independently managed;
- Meals and Paying rent and bills, are independently managed;
- Medications – filling/refilling prescriptions due to requiring transportation takes significantly longer than typical; and
- Transportation, getting in and out of a vehicle and using public transit takes significantly longer than typical while using transit schedules and arranging transportation is independently managed.

In the SR the appellant indicates that since his injury in September 2011 it takes him longer to complete DLA such as: get in and out of the bathtub; stand in the shower, reach up and down to wash, shave, brush teeth, wash face, get ready for bed, get in/out of bed, dress, stand at the sink, counter and stove, chop, peel, mix or stir food, clean floors, clean bathtub and toilet, bathroom sink and floors, vacuum, dust, clean windows; carry, do, fold and put away laundry, walk around stores, take groceries home, use bus, go up/down stairs/ramps, bend, kneel, walk and stand.

Help

- The PR indicated that the appellant does not require aids or prostheses for his impairment.
- The AR indicated that the appellant requires help with transportation for shopping as he is 12 minutes from the bus stop which is located down a long hill and then returns by walking the reverse while carrying items.
- In the AR, it is noted that both physical and emotional help is provided by friends.
- A community health worker, who has known the appellant for 20 years, has assisted him financially and emotionally as well as with shopping, laundry and driving him to appointments since his back injury.

Admissibility of New Information

In his Notice of Appeal dated October 9, 2013, in response to comments made by the ministry in the reconsideration decision with regards to Mobility and Physical Ability as indicated in the PR, the appellant states that the ministry did not consider his physical and emotional consequences of the day after performing DLA nor did the ministry consider that on the appellant's worst day, he suffers from severe impairments due to his physical disability and would need assistance with DLA. It is noted that the day after, the appellant suffers from increased pain and soreness and takes 1 - 1.5 hours in the morning to get up, is only able to walk 0.5 -1 block and is only able to climb 1-2 steps without aid.

At the hearing, the appellant submitted the following documents:

- A Medical Report for Persons with Persistent Multiple Barriers dated October 2013, signed by

the appellant's GP, indicating that the appellant's primary medical condition is Degenerative Disc Disease and Arthritis Lumbar Spine, that his treatment of multiple steroid injections and local anesthesia had no improvement and that the appellant's medication have reduced symptoms. Under prognosis, the GP notes a progressive increase in symptoms and limitation in physical activity and under restrictions, limited [ROM] lumbar spine, and reduced mobility to sit or stand for extended periods and unable to bend and lift.

- An undated Medical Report for Employability for the appellant which under Medical Condition, in response to how would you describe the overall medical condition, mild, moderate or severe, the GP indicated severe and under Restrictions, when asked to describe the nature of any restrictions specific to the noted medical condition (example restricted motion in arms and legs) there was no response.
- A letter of support dated October 21, 2013 from the appellant's friend.
- A letter of support dated October 21, 2013 from another friend of the appellant's.

Oral Testimony

At the hearing, the appellant testified that he had moved about 3 months ago and now lives on a ground floor, is about 3 minutes from the bus stop and can walk to a large mall. He indicates that his new medication helps him sleep better however; the injections that he has received, the last being a month ago have not made any difference. In response to a question by the panel about his typical day; the appellant stated that getting up takes a couple of hours because his back has stiffened overnight, breakfast takes time, he sits in his chair and watches TV most days, if he has appointments he can usually get a ride from friends to the appointment and that he is able to make himself a sandwich and can use a BBQ which is just outside his door.

A witness for the appellant, who has known him for more than 10 years, is his friend and landlady, lives in the suite next to him, and works for community services, testified that the appellant used to do odd jobs around the house, but in the last year has been unable to do those things. She testified that friends help with rides to get groceries, to take him to appointments and with housework. She stated that some days she knows that he can't put on his shoes. The witness indicated that the appellant's medical situation has gotten worse with time.

The panel has admitted the 2 new medical reports, as well as the testimony from the appellant and his witness as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the Employment and Assistance Act. The panel, however, did not find that the support letters from the appellant's friends contained any relevant information that would support the information and records that were before the ministry at the time of reconsideration, and therefore did not admit them in accordance with s. 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

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.

EAPWDR:

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Severe Physical Impairment

The appellant described his physical impairment as having chronic lower back pain and discomfort while performing daily living activities and that his degenerative disc disease and osteoarthritis are sufficiently severe as to leave him unable to function in the same way he had before his injury in 2011. The appellant also testified that his GP has reported that his overall medical condition is severe and that medical treatment has not resulted in any improvement.

The ministry's position is that the physician reports that the appellant has mechanical low back pain secondary to degenerative disc disease and osteoarthritis lumbar spine. In terms of the appellant's physical functioning, the physician indicates that the appellant can walk 2- 4 blocks unaided on a flat surface, climb 5+ stairs unaided, lift 5 to 15 lbs., and can remain seated for 2 to 3 hours. The AR indicates that the appellant is independently able to do most aspects of mobility and physical abilities

with periodic help to lift. The ministry has determined that the functional skill limitations are not significantly restricted and more in keeping with a moderate degree of impairment. Also as no assistive devices are routinely used to help compensate for impairment, the ministry was not satisfied that the information provided demonstrates a severe physical impairment.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. Accordingly, 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 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.

In the appellant's case, the GP has confirmed the diagnosis as mechanical lumbosacral pain, facet joint arthropathy and disc disease and has noted under Functional Skills that the appellant can walk 2- 4 blocks unaided on a flat surface, climb 5+ stairs unaided, lift 5 to 15 lbs., and can remain seated for 2 to 3 hours. The RN has noted under Mobility and Physical Ability that the appellant takes significantly longer than typical with walking outdoors, climbing stairs, standing and carrying and holding, and requires periodic assistance from another person for lifting. He is unable to bend and uses counters and chairs to stabilize while walking indoors, climbing stairs, standing and carrying and holding. The GP also reports that the appellant's ability to lift, bend, kneel or carry objects is secondary to back pain.

The panel finds that while the GP indicates that the appellant's overall medical condition is severe, the information provided by the GP respecting physical functional skills and the appellant's ability to manage DLA is not reflective of a severe impairment of daily functioning. The appellant stated that it takes him about 2 hours to get up in the morning but that he is then, at a slow pace, able to manage to walk to the bus or to a nearby mall and that he is able to manage preparation of simple meals. The panel places greater weight on the evidence of the GP than that of the RN given the longstanding relationship of 18 years between the GP and the appellant and given the GP's knowledge of the appellant's medical history.

Additionally, although, the AR notes that the appellant's impairment has an impact on his daily functioning, 'takes significantly longer than typical', the RN does not explain how much longer than usual the daily living activities take the appellant or describe the type or amount of assistance that is required by the appellant.

Based on the 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 he experiences a lot of anxiety, agitation, stress, depression and confusion because of his disability.

The ministry's position is that the GP provides no mental health diagnosis and states that there are no deficits to cognitive and emotional functioning and no restriction to social functioning. Communication is good. The RN reports several impacts on daily functioning that are mostly related to chronic pain. The ministry also notes that this category is meant to be completed for an applicant with an identified mental impairment or a brain injury which is not the case at issue. The ministry has determined that the narrative is not supportive of a severe mental health condition that limits the appellant's ability to function either continuously or periodically for extended periods. Therefore, the ministry is not satisfied that the information provided is evidence that the appellant has a severe mental impairment.

Panel Decision

The panel finds that the prescribed professional reported that there were no deficits to cognitive and emotional functioning, no restriction to social functioning and that the appellant did not have a mental impairment or brain injury and that the appellant has not been prescribed any medications and/or treatments that interfere with his ability to perform daily living activities.

Therefore, the panel finds that the ministry reasonably determined that the evidence does not establish that the appellant has a severe mental impairment.

Restrictions to DLA

The appellant's position is that since his injury in September 2011, it takes him longer to complete DLA such as: get in and out of the bathtub; stand in the shower, reach up and down to wash, shave, brush teeth, wash face, get ready for bed, get in/out of bed, dress, stand at the sink, counter and stove, chop, peel, mix or stir food, clean floors, clean bathtub and toilet, bathroom sink and floors, vacuum, dust, clean windows; carry, do, fold and put away laundry, walk around stores, take groceries home, use bus, go up/down stairs/ramps, bend, kneel, walk and stand. It is noted that the day after he performs DLA, the appellant suffers from increased pain and soreness and takes 1 - 1.5 hours in the morning to get up, is only able to walk 0.5 - 1 block and is only able to climb 1-2 steps without aid.

The ministry's position is that the GP reports no restriction to 7 of 10 DLA. Basic housework is continuously restricted; daily shopping and mobility outside the home are periodically restricted - the latter is described as "requires assistance with aspects of shopping-carrying groceries, assistance if prolonged walking involved (issues with mobility)". The ministry states that the appellant is 12 minutes from a bus stop and can walk 2- 4 blocks and that help with mobility is assumed for longer distances. While the ministry notes that carrying groceries would be problematic for the appellant, a personal grocery cart would enable independent transportation of purchases. As the RN reports that all daily activities are performed independently but many take longer than typical to do, how much longer is not described and the narrative is not supportive of a significant restriction in the appellant's ability to perform the task. Also, the appellant is independently able to perform 4 out of 5 aspects of social functioning with periodic support/supervision to deal appropriately with unexpected demands. As the majority of DLA are performed independently with little restriction, the ministry has determined that the information from the prescribed professionals does not establish that the impairment significantly

restricts DLA either continuously or periodically for extended periods.

Panel Decision

The panel notes that according to the PR, the appellant requires periodic assistance with daily shopping and mobility outside the home and continuous assistance with basic housework while the AR indicates that the appellant performs nearly all DLA independently albeit taking significantly longer than typical. Only being able to deal appropriately with unexpected demands is noted for the appellant as requiring periodic support due to chronic pain. The panel finds that both the GP and the RN agree that the appellant has mobility issues when prolonged walking is involved. The appellant has testified that he moved about 3 months ago and now lives on the ground floor, is about 3 minutes from the bus stop and can walk to a large mall. While the panel notes that the appellant has limitations and does experience pain with mobility issues and lifting; the panel finds that the evidence demonstrates that he has the ability to manage all DLA except for basic housework.

The legislation requires that the minister be satisfied that in the opinion of a prescribed professional, as a result of a severe physical or mental impairment, the appellant is directly and significantly restricted in his ability to perform DLA either continuously or periodically for extended periods. Based on the evidence of the prescribed professionals, the panel finds the ministry was reasonable in not being satisfied that in the opinion of a prescribed professional the appellant is directly and significantly restricted in his ability to perform DLA either continuously or periodically for extended periods under section 2(2) (b) (i) of the EAPWDA.

Help with DLA

The appellant's position is that he relies on friends as a last resort because he is trying to maintain his independence. The appellant has indicated that he would benefit from an electric scooter, bus pass or handi dart application and a gym membership to start low impact rehabilitation.

The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry noted that no assistive devices are routinely used.

Panel Decision

Regarding the need for help with DLA, section 2(2) of the EAPWDA requires that the minister be satisfied that, in the opinion of a prescribed professional, a person needs help with DLA as a result of direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. Pursuant to section 2 of the EAPWDR, help is defined as a person requiring an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

Accordingly, 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 help is required to perform DLA as a result of direct and significant restrictions as is required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant is suffering from medical conditions that affect his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.