

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 8, 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; and 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 information before the ministry at the time of reconsideration included the following:

- A physician's report ("PR") and assessor's report ("AR") both completed by the appellant's physician in May, 2013.
- The appellant's handwritten self-report dated May 22, 2013.
- The appellant's request for reconsideration, including a note from the appellant's physician dated September 24, 2013.

Admissibility of New Information

In his Notice of Appeal and oral testimony the appellant provided new information regarding his impairment and the nature and frequency of the assistance he receives with his DLA. This information provides additional detail with respect to issues addressed in the original PWD application forms. Accordingly, the panel has admitted this new information 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 ministry relied on its reconsideration decision and submitted no new information.

Physical Impairment

- In the PR the physician – who has known the appellant for 8 years - diagnosed the appellant with spinal stenosis (cervical and lumbar), diabetes (on insulin), ischaemic heart disease, and congestive heart failure.
- The physician noted that the appellant's spinal stenosis is not correctable with surgery, and that he is not a surgical candidate for his heart disease. He is receiving "maximum medical therapy" for his heart.
- In terms of functional skills, the physician reported that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds, and can remain seated for 1 to 2 hours.
- The physician noted that the appellant's mobility is significantly limited by extensive degenerative heart disease with secondary spinal stenosis resulting in pain. He wrote that the appellant "has significant, permanent and progressive disease of 2 major systems: heart and musculoskeletal" and that he "is on maximum medical therapy as per consultant's opinions and remains symptomatic."
- In the AR, the physician commented that the appellant's main disabilities are recurrent severe chest pain, persistent moderate to severe back ache, severe leg pain after walking 1-2 blocks at a slow pace.
- Also in the AR the physician noted that the appellant is independent with respect to walking indoors and standing, but that he needs periodic assistance with walking outdoors, climbing stairs, lifting, and carrying/holding.
- In his self-report the appellant wrote that he has severe angina pain, that all his discs are herniated from the neck down, and that he has uncontrollable diabetes. He also wrote that his legs give out on him after walking a couple of blocks and that the pain is getting worse.

- In his oral testimony the appellant explained that his blood sugar tends to have rapid, unexpected highs and lows, which frequently put him in hospital.

Mental Impairment

- In the PR the physician diagnosed the appellant with depression secondary to medical conditions.
- In terms of functional skills, the physician reported the appellant has no difficulties with communication, and that he has a significant deficit in cognitive and emotional function in terms of emotional disturbance (depression).
- In the AR, which provides an opportunity to provide more detail with respect to cognitive and emotional functioning, the physician noted that the appellant suffers a major impact in 1 of 14 aspects – emotion. He also noted moderate impacts in 2 aspects – motivation and other emotional/mental problems. The physician noted minimal or no impacts in the remaining 11 aspects.
- The physician noted that the appellant's medical conditions have directly contributed to major depressive disorder requiring therapy.
- In his oral testimony the appellant said that his is not a mental impairment.

DLA

- In the PR the physician reported that the appellant's impairments do not directly restrict his ability to perform 6 of the 10 prescribed DLA: *personal self care, meal preparation, management of medications, basic housekeeping, use of transportation, and management of finances*. He indicated the appellant is continuously restricted with respect to 2 DLA: *daily shopping* and the outdoor mobility aspect of *mobility indoors and outdoors*. The physician did not indicate whether or not the appellant suffered restrictions of the remaining 2 DLA: *social functioning and decision making*.
- In the AR the physician indicated that the appellant independently manages all aspects of 6 of the 10 prescribed DLA: *personal self care, meal preparation, management of medications, basic housekeeping, management of finances, and daily shopping*. The physician also indicated the appellant needs periodic assistance with some aspects of 2 other DLA: *mobility indoors and outdoors, and use of transportation*. Regarding social functioning, the physician noted the appellant is independent with respect to making appropriate social decisions and interacting appropriately with others, but identified the appellant as having very disrupted functioning with respect to his immediate social network and marginal functioning with respect to his extended social networks.
- In the physician's note of September 24, 2013 he wrote that the appellant's spinal stenosis "severely limits his mobility in that he will require help with shopping, housekeeping (laundry, cleaning, meal preparation). Condition is permanent and inoperable and will probably worsen."
- In his self-report the appellant stated that he can no longer stand long enough to do his dishes, cook for himself, do his laundry or vacuum. He also wrote that he cannot drive for long as he is finding it difficult to operate the clutch.
- In his Notice of Appeal the appellant wrote that he is rapidly losing mobility in his legs due to pain.
- In his oral evidence the appellant said that he is able to avoid cooking by buying take-out food.

Help

- In both the PR and the AR the physician indicated that the appellant requires no aids or prostheses for his impairment, and that he does not have an assistance animal. The physician indicated that the appellant is provided with help from family and friends.
- In his Notice of Appeal the appellant wrote that he doesn't use a cane but he uses crutches to get around. He also wrote that family members help him only to get out of the house for "the daily drug activity."
- In his oral testimony the appellant said that he needs help to get up from his chair.
- The appellant also said that he recently moved from a relative's house to live on his own as he had a dispute with aspects of the relative's personal conduct.
- In response to a question from the panel, the appellant said that he has been using crutches for about a week and a half, but that they cause him pain so he would be looking for a cane instead.

PART F – Reasons for Panel Decision

The issue under 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 section 2(1):

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's position is that his spinal stenosis, heart condition, and diabetes along with frequent intense pain constitute severe physical impairment.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish that the appellant has a severe physical impairment.

Panel Decision

The determination of severity of impairment is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its

determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, the professional evidence has to be weighed and assessed like any other evidence. The ministry cannot simply defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion.

The evidence of the medical practitioner is that that the appellant's main disabilities are recurrent severe chest pain, persistent moderate to severe back ache, and severe leg pain after walking 1-2 blocks at a slow pace. He has indicated that the spinal stenosis is inoperable and it is likely to deteriorate further. In the circumstances, where the appellant is suffering from "significant, permanent and progressive disease of 2 major systems", even though (as discussed below under the heading Significant Restrictions to DLA) these impairments do not seem to have yet had significant impacts on the appellant's ability to perform DLA independently, the panel concludes that the ministry was not reasonable in finding that the appellant does not have a severe physical impairment.

Severe Mental Impairment

The appellant advanced no argument with respect to mental impairment.

The ministry position, as expressed in its reconsideration decision, is that the evidence does not establish a severe mental impairment.

Panel Decision

The physician has indicated that the appellant's depression is secondary to the physical medical conditions. The physician noted only one major impact – emotion (depression) – to the appellant's cognitive and emotional functioning. The appellant did not mention depression in his self-report, and stated at the appeal hearing that his case is not one of mental impairment. The physician made no reference to mental impairment in his note of September 24, 2013. In the AR the physician indicated that the appellant is independent with respect to making decisions about managing his finances, managing his medications, making appropriate social decisions, and making appropriate choices when shopping.

Based on the foregoing evidence, the panel concludes that the ministry reasonably determined that the evidence does not establish that the appellant has a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that he is significantly restricted in his DLA. He says that any physical DLA cause him pain, and that he can no longer stand long enough to perform most housekeeping activities.

The ministry's position, as set out in the reconsideration decision, is simply that the appellant does not have a severe impairment that, in the opinion of a prescribed professional, directly and

significantly restricts the appellant's ability to perform the prescribed DLA.

Panel Decision

The evidence provided by the physician is consistent in both the PR and the AR that the appellant is completely independent with respect to all aspects of 5 of the 10 prescribed DLA: *personal self care, meal preparation, management of medications, basic housekeeping, and management of finances*. The physician's comments in his note of September 24, 2013 indicated that the appellant will need help with *basic housekeeping* at some undetermined point in time.

The evidence provided by the physician also indicates that the appellant independently manages the DLA of *decision making*.

The physician's evidence was inconsistent with respect to whether the appellant manages his own *daily shopping and use of transportation*. In the PR the physician indicated the appellant requires continuous help with daily shopping, but in the AR he indicated the appellant is independent in all respects. In the PR the physician indicated the appellant is not restricted with respect to *use of transportation*, but in the AR indicated the appellant requires periodic assistance with some aspects. There is no evidence before the panel with respect to whether anyone actually assists the appellant with either DLA or to what extent or how frequently the appellant receives assistance.

Regarding *mobility indoors and outdoors*, the evidence indicates that the appellant has recently used crutches to help with mobility outdoors, but that otherwise he manages to independently get where he needs to go. He has some impacts to his *use of transportation*, but still is able to use his own vehicle.

Finally, with respect to *social functioning*, the physician has indicated the appellant is marginally functional with respect to extended social networks, but has very disrupted functioning with his immediate family. The appellant's oral evidence indicates that that disruption is based on elements of the other family members' conduct rather than the appellant's mental impairment.

Based on the foregoing analysis of the evidence, the panel concludes that the appellant does have some restrictions with respect to some aspects of some DLA, and that given the progressive nature of his impairments the degree and frequency of restriction is likely to increase in the future. However, the evidence does not establish that the appellant's impairments currently directly and significantly restrict his DLA either continuously or periodically for extended periods. Accordingly, the ministry was reasonable in its determination that this statutory criterion was not satisfied.

Help with DLA

The appellant's position is that he is restricted in a number of DLA and that he requires assistance with them.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

In the panel's view, other than the appellant's testimony that he often requires help to get up out of a chair, and the physician's brief indication that the appellant receives help from friends and family, there is no evidence before the panel as to what sort of assistance the appellant receives, who he receives it from, or how frequently it is required.

The panel notes that there may be situations in which a person may "require" help but not be receiving it. In the panel's view the word "require" indicates a degree of necessity so that it is something that a person cannot reasonably do without. If the person does not get the help he requires, the DLA goes undone either continuously or periodically for extended periods. In the panel's view there is simply insufficient evidence to show that the appellant's DLA go undone for lack of assistance, that it takes him an inordinate amount of time to perform DLA, or that he relies upon "the significant help or supervision of another person" as required by EAPWDA section 2(3)(b)(ii). The evidence shows that the appellant performs virtually all of his DLA independently.

The appellant's recent use of crutches for walking outside the home is not sufficient to fulfill this legislative criterion.

The appellant does not use an assistance animal.

For these reasons, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions 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. The panel therefore confirms the ministry's decision.