

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 19, 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:

- The appellant's PWD application form consisting of the appellant's self-report [dated September 4, 2013], a physician's report ("PR") signed by the appellant's general practitioner of 11 years [dated October 13, 2013], and an assessor's report ("AR") signed by a nurse practitioner who has known the appellant for 4 years [dated September 12, 2013].
- The appellant's Request for Reconsideration, including a handwritten reconsideration submission [dated November 5, 2013].
- An undated handwritten letter from the appellant.
- Various medical reports including a patient discharge sheet following a bowel resection. This document is undated, but from the circumstances the panel infers it was prepared during the first week of March, 2013.

Physical Impairment

- In the PR the appellant's physician diagnosed him with degenerative disc disease (C spine), colorectal cancer, and hearing impairment. The physician also referred to osteoarthritis of the C-spine and the knees, as well as possibly other joints including the shoulder.
- In terms of functional skills, the physician indicated the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds, and has no limitation on being able to remain seated.
- The physician noted "hearing loss affects communication. Can't hear voices when in crowded room."
- In the AR the nurse practitioner indicated the appellant is independent with respect to walking indoors (but sometimes loses balance and wall-walks) and outdoors, climbing stairs, standing, lifting, carrying, and holding. She indicated he takes significantly longer than typical with walking outdoors and climbing stairs, and that lifting/carrying/holding is awkward because pain is causing him to do more with his left hand even though he is right-handed.
- In his self-report the appellant wrote that he had surgery for the colorectal cancer on February 25, 2013 and that he was undergoing chemotherapy. He noted that the chemotherapy is causing diarrhea, bloating, gas and severe stomach pain. He also wrote that he's had chronic arthritis in his right shoulder, neck, right ankle and left knee for 20 years.
- The appellant reported that he wears hearing aids and that he has a hard time understanding people with high voices or heavy accents, or in situations where there is background noise. He wrote that he is also under treatment for high blood pressure and has been suffering from shortness of breath.
- In his undated letter the appellant stated that he has a diminished immune system.
- In his oral testimony the appellant stated that he cannot walk the 2 to 4 blocks unassisted that the physician indicated.
- He also said that he has been getting bumps on his body which his physician has told him may be related to the chemotherapy. He said that he has also been getting tingling and numbness in both hands, for which he is scheduled to see a neurologist in January.

Mental Impairment

- The physician did not provide a diagnosis of a mental impairment, but noted the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance, language, and motivation. The physician noted the appellant worries about the prognosis for his colon cancer, which affects his motivation.
- The physician also noted that the appellant is a well-motivated individual but is finding it extremely difficult to continue working at this time.
- In the AR the nurse practitioner noted the appellant's ability to communicate is good in terms of speaking and reading, but that he has poor hand writing and his hearing is poor.
- Part B.4 of the AR deals with cognitive and emotional functioning, and includes the instruction that this section is to be completed "for an Applicant with an identified mental impairment or brain injury." In this section the nurse practitioner noted that the appellant has major impacts to 2 of 14 categories of cognitive and emotional functioning: bodily functions and language.
- She noted moderate impacts to two other categories: motivation and "other neuropsychological problems" with the notation "due to hearing loss." The nurse practitioner commented that uncertainty over his prognosis causes the appellant worry and anxiety.
- The remaining 10 categories were marked as no impact or minimal impact.
- Instructions for the Social Functioning section of the AR state "Only complete this if the Applicant has an identified mental impairment, including brain injury." The nurse practitioner drew a line through this section and otherwise left it uncompleted.

DLA

- In the PR the physician indicated the appellant has no restrictions with respect to 5 of the prescribed DLA: *meal preparation, management of medications, use of transportation, management of finances, and social functioning.*
- The physician indicated the appellant is periodically restricted with the DLA *personal self-care*, with the note "trouble dressing due to Rt. Shoulder + neck pain". It was also indicated that the appellant is periodically restricted with the DLA *move about indoors and outdoors* with the comments "loses balance, wall walks" and "can't mow lawn or do yard work."
- The physician reported the appellant is periodically restricted with *daily shopping*, with the note "hip + knee pain limits walking ability around shop. Has to rest frequently."
- The physician noted that the appellant is continuously restricted with *basic housework* because of difficulty reaching over his head.
- In the AR the nurse practitioner reported the appellant as being fully independent in all aspects of the 5 DLA of *meal preparation* (has modified kitchen so doesn't have to reach above shoulder height), *management of finances, management of medications, personal self-care* (takes significantly longer than typical with bathing and toileting because of frequency of diarrhea), and *use of transportation* (takes significantly longer than typical getting in/out of a vehicle due to knee pain, and tends to avoid bus because vibration increases neck pain).
- The nurse practitioner indicated the appellant requires periodic assistance with aspects of 2 DLA: *basic housework* (pain + weakness with activities involving reaching overhead) and *daily shopping* (going to and from stores and carrying purchases home).
- She noted that he is experiencing impairment from the combined effect of colon cancer, chemotherapy and pain/weakness from arthritis.

- In his oral testimony the appellant said that he lives with his mother and that they need help with housework and yard work. He said he drives his mother's vehicle to deliver newspapers. He has cut back on the newspaper delivery because it is getting too difficult, and may have to quit it altogether. He also said that simply cutting some kindling causes him to practically collapse with shortness of breath.
- In response to a question from the ministry, the appellant said that the shortness of breath has developed in the past year since the cancer diagnosis. He said he can't explain the shortness of breath. The appellant also stated that in a recent follow up medical appointment he was declared "cancer free".

Help

- The physician noted the appellant's chemotherapy interferes with his ability to perform DLA, but that the chemotherapy was due to complete in October, 2013. He noted the appellant does not require any prostheses or aids for his impairments.
- The physician noted the appellant requires help from others in doing housework and yard work.
- In the AR, in response to a question regarding equipment that is required but not being used, the nurse practitioner noted the appellant requires a knee brace and possibly a neck brace. She indicated the appellant does not have an assistance animal.
- She indicated the appellant receives assistance from family and friends.

Admissibility of New Information

In oral testimony the appellant provided new information regarding his impairment. This information provides additional detail with respect to issues addressed in the original PWD application. 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.

Preliminary Procedural Matter

With the consent of the appellant, the ministry had an observer attend the appeal hearing.

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 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

(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.

Severe Physical Impairment

The appellant's position is his arthritis, degenerative disc disease, and hearing impairment constitute a severe physical impairment. He noted that he is also now developing numbness and tingling in his hands, and has been experiencing debilitating shortness of breath.

The ministry's position, as set out in its reconsideration decision, is that the appellant's functional skills limitations are more in keeping with a moderate degree of physical impairment rather than a severe impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician and the nurse practitioner.

In the panel's view, the evidence regarding the appellant's physical functional skills indicates the appellant is in the mid-range of functional ability. The panel notes the appellant's evidence that he cannot walk the 2 to 4 blocks indicated by the physician, but this appears to be related to his shortness of breath which has not been confirmed by a medical practitioner. Much of the other physical difficulty noted by the professionals was in relation to the effect of the appellant's chemotherapy, which is now completed.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the functional skills limitations resulting from his impairment do not appear to have translated into significant restrictions in the appellant's ability to manage his DLA independently.

The panel acknowledges that the appellant has some serious medical conditions. However, in total, the evidence does not demonstrate a severe physical impairment. This may change with the results of further medical examination of the appellant's shortness of breath and neurological issues. However, the panel must rely on the evidence that it currently has before it. Accordingly, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant advanced no argument with respect to severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is simply that the information submitted does not establish a severe mental impairment.

Panel Decision

The legislation requires that a severe impairment must be identified by a medical practitioner and be

confirmed as being likely to continue for at least 2 years. The appellant's physician has provided no diagnosis of a mental health condition. While both prescribed professionals noted some deficits to aspects of cognitive and emotional functioning, it is clear that these impacts are related to his physical circumstances – there is no diagnosis of a mental impairment. In terms of mental functional skills, the evidence indicates that the appellant's communications skills are good except for the extent to which they are limited by hearing loss and poor handwriting. The panel notes that the appellant's handwritten submissions – the self-report, the reconsideration submission, and the undated letter – are legible and well-reasoned.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*). The evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that he independently manages his finances (pay rent and bills) and his medications. Based on the nurse practitioner's evidence in the AR, he also independently manages the decision-making components of the DLA of *daily shopping* (making appropriate choices), and *meal preparation* (meal planning and food storage). There is no evidence of any disruption of the appellant's *social functioning*. The panel notes that the nurse practitioner drew a line through the section of the AR dealing with *social functioning*, indicating her opinion that the appellant does not have a severe mental impairment.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his impairments cause significant restrictions to his ability to manage his DLA. He argued that he requires help with housework, yard work, and daily shopping, and that his mobility is not good.

The ministry's position (as set out in its reconsideration decision) is that while it acknowledges the appellant has serious medical conditions, there is not enough evidence to confirm that his impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant – it must be more than trifling. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

Because (as determined above under the heading Severe Mental Impairment) the appellant does not have a severe mental impairment, the 8 DLA prescribed in section 2(1)(a) of the EAPWDR are applicable.

The evidence is consistent that the appellant is not significantly restricted with respect to the 4 DLA of *meal preparation, management of medications, use of transportation, and management of finances*. Both of the prescribed professionals indicated the appellant has some restrictions with respect to *personal self-care*, but there is no evidence as to how often the restriction arises or that the appellant receives any assistance in order to perform this DLA.

Regarding the 3 remaining DLA:

- The evidence indicates the appellant experiences some pain and instability in the DLA *moving about indoors and outdoors*, but there is no evidence that the appellant receives any assistance in performing this DLA.
- The evidence indicates the appellant could use some assistance with *basic housework* that involves reaching overhead.
- With respect to *daily shopping*, the evidence indicates the appellant has trouble walking in stores, going to and from stores (though he drives a vehicle), and needs help carrying groceries. The panel infers that any help the appellant requires for carrying groceries would be for weight in excess of his 5 to 15 pound lifting capacity. The panel notes that the appellant is able to work delivering newspapers, which requires a degree of mobility and lifting ability.

The evidence, considered as a whole, demonstrates that the appellant does experience direct restrictions in his ability to perform some DLA. However, he is mostly able to perform his DLA independently. In the panel's view, the evidence does not present a compelling picture of an individual whose ability to manage his DLA is significantly restricted as contemplated by the legislative scheme. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage his DLA independently is not significantly restricted either continuously or periodically for extended periods.

Help

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, or the DLA takes an unreasonably long time to complete.

In the appellant's case, the physician indicated the appellant requires help from others in doing housework and yard work. The nurse practitioner noted the appellant receives help from friends and family. There is no evidence as to the specific nature of the help, the frequency of the help, or that DLA remain undone without such help.

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 panel finds that there is no evidence to indicate that the appellant uses assistive devices or that he has an assistance animal.

Accordingly, the panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, 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 finding 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.