

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of September 30, 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

With the consent of the parties the appeal proceeded as a written hearing, in accordance with section 22(3)(b) of the *Employment and Assistance Act*.

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 of more than 5 years (a medical practitioner and prescribed professional) in May, 2013.
- The appellant's self-report dated May 14, 2013.
- The appellant's request for reconsideration, including a hand-written submission, dated September 19th, 2013.
- A "To Whom It May Concern" letter from the appellant's physician dated September 17, 2013.
- A hand-written note from the appellant's physician dated September 30, 2013.

Admissibility of New Information

In his written appeal submission the appellant provided additional information regarding his impairment. 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 diagnosed the appellant with pulmonary fibrosis, left sciatica secondary to L4/5 disc herniation, left rotator cuff tear, coronary artery disease, and gastritis.
- The physician described the pulmonary fibrosis as causing significant shortness of breath on exertion which is going to progress. She noted that the appellant's illness is incurable, and that she expects him to get more short of breath and weak with time. The physician wrote that idiopathic pulmonary fibrosis is a progressive disease with a 50% survival rate in 5 years.
- The physician commented that the appellant's heart disease is currently stable, and that his chronic shoulder pain and sciatica limit his ability to work with pain that is severe with prolonged sitting (more than 30 minutes) or lifting.
- In terms of functional skills, the physician reported the appellant as being able to walk 1-2 blocks unaided on a flat surface, climb 5+ steps unaided, lift 5 to 15 pounds, and to remain seated for 1 to 2 hours.
- In the AR, the physician noted that the appellant uses a cane when walking outdoors, and that he needs periodic assistance with lifting since he cannot lift more than 10 pounds. She also noted that he takes significantly longer than normal climbing stairs.

- In her letter of September 17, 2013 the physician wrote that over the past month the appellant's shortness of breath had progressed to the point where he is significantly short of breath with minimal exertion such as getting out of bed. She stated that his condition was progressing rapidly, and that he was going to be assessed for a lung transplant in the near future. The physician expressed her support for the appellant's reconsideration for PWD designation.
- In his written submission the appellant wrote that he does have a severe impairment which is incurable and which will eventually lead to his death.

Mental Impairment

- The physician did not diagnose a mental impairment.
- In terms of functional skills, the physician reported that the appellant has no significant deficits with cognitive and emotional function. She also indicated that the appellant has no difficulties with communications other than that English is his second language.

DLA

- In the PR the physician indicated that the appellant's impairment does not directly restrict his ability to perform DLA.
- In the AR, in response to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage [DLA]?" the physician wrote "No limitations in managing daily activities."
- In his written submission the appellant wrote that his physical state affects everything he does, all day. He noted that "So far I don't need other people's help except with snow removal."

Help

- In the AR the physician wrote that the appellant "currently lives + functions independently."
- The physician noted that the appellant uses a cane when he walks uphill, and that he does not have an assistance animal.
- In her note of September 30, 2013 (which she provided in response to an enquiry from the ministry on the same day as to whether there had been any changes to the appellant's DLA related to his shortness of breath), the physician wrote "He remains independent with [DLA], despite worsening dyspnea [shortness of breath]."
- In his reconsideration submission, the appellant wrote that "I do need help at this point of time of my life."
- In his written submission the appellant wrote that he will need assistive devices in the future such as oxygen equipment and probably a wheelchair, and that he will become more and more dependent on other persons. The appellant wrote that currently "I can manage my daily activities by myself for now."
- He also wrote that "I could use some dependable help with snow removal. Otherwise I try to be as independent as possible."

PART F – Reasons for Panel Decision

The issue on 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 pulmonary fibrosis, shortness of breath, constant pain, and limitations in walking constitute a severe physical impairment.

The ministry's position, as set out in its reconsideration decision, is that the appellant's functional skill limitations are more in keeping with a moderate degree of physical impairment, and that the evidence does not establish that the appellant has a severe physical impairment.

Panel Decision

The evidence of the medical practitioner is that that the appellant suffers from a rapidly progressing

disease which is causing him extreme shortness of breath, and which in 50% of cases causes death within 5 years. In these circumstances, 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 diagnosed no mental medical condition, and has noted no significant restrictions to the appellant's cognitive and emotional function. The appellant has not referred to mental impairment in his submissions. There is no evidence of any restrictions to the appellant's ability to manage the prescribed DLA that are specific to mental impairment.

Based on the foregoing, 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 stated that while he tries to be as independent as possible, he will eventually become more dependent on other people for his DLA. He argued that since his physicians both support his application for PWD designation "the ministry should follow suit."

The ministry's position, as set out in its reconsideration decision, is that since the physician indicated that the appellant's DLA remain independent despite worsening shortness of breath, the information did not demonstrate a severe impairment that in the opinion of a prescribed professional significantly restricts his ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The determination of degree of restriction of DLA 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 for PWD designation are met as that approach would amount to an improper fettering of discretion.

In this case the evidence of the physician indicates clearly that the appellant currently manages his DLA independently. The restrictions she noted to DLA were that his mobility is affected by needing to use a cane outdoors while walking uphill and by taking longer than typical climbing stairs. She has noted no significant restrictions with respect to any aspect of any other DLA. The appellant's evidence, also, is that while his DLA are restricted due to his shortness of breath and constant pain, he currently manages them independently. He notes that he could use some help with snow removal, though snow removal is not a prescribed DLA.

Based on the evidence as a whole, it is likely that the appellant's impairment will at some point progress to the point where his DLA are significantly restricted. 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 panel finds that 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 his DLA by shortness of breath and by pain and that while he is currently independent, he will eventually have to rely on other persons.

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. The ministry argued that use of a cane does not in itself establish a severe impairment.

Panel Decision

There is no evidence before the panel as to the appellant receiving any assistance with DLA.

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 use of a cane for walking uphill 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.