

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of October 22, 2013, which found that the appellant satisfied all but two of the 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 meets the age requirement; that the appellant has a severe impairment; and that the appellant's impairment is likely to continue for at least two years.

The ministry was not, however, satisfied that - in the opinion of a prescribed professional:

- the appellant's severe impairment directly and significantly restricts his ability to perform daily living activities ("DLA") either continuously, or periodically for extended periods, and
- as a result of those restrictions, 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 did not attend the hearing, but had a representative attend on his behalf. Having confirmed that the appellant was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the *Employment and Assistance Regulation*.

The information before the ministry at the time of reconsideration included the appellant's application for PWD designation, including:

- a self-report signed by the appellant on April 1, 2013;
- a physician's report ("PR") and assessor's report ("AR"), both signed by the appellant's general practitioner ("GP") of approximately 1 year on April 26, 2013.

Also before the ministry were:

- the appellant's Request for Reconsideration dated October 15, 2013;
- a letter from the GP dated October 15, 2013 (the "GP's Letter").

Admissibility of New Information

Prior to the appeal hearing the appellant submitted additional evidence in the form of a letter, dated October 24, 2013, in which the appellant's cardiac surgeon reported the results of an assessment for aortic insufficiency and subaortic stenosis (the "Surgeon's Letter").

The Surgeon's Letter and the oral testimony of the appellant's representative provided new information regarding his impairments and the nature of the assistance he receives with his DLA. 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.

DLA

- In the PR the GP provided diagnoses of congenital stenosis (narrowing) of the aortic valve and heart disease of the aortic valve. She commented that the appellant's condition "...can be treated surgically to help him do [DLA]".
- The GP also noted that the appellant has underlying depression and anxiety that are exacerbated by his physical medical condition.
- In the PR the physician indicated that the appellant does not have any significant deficits with cognitive and emotional function. The GP noted in the AR that the appellant's depression/anxiety have moderate impacts on some aspects of cognitive and emotional functioning, and minimal impact on his motivation. She commented that "His physically (*sic*) disability makes it difficult for him to carry out [DLA]"
- In the PR, the GP described the appellant as being able to walk 4+ blocks unaided on a flat

surface, to climb 5+ steps (with SOB – shortness of breath), to lift 5 to 15 pounds, and to be able to remain seated with no limitation.

- In the AR the GP described the appellant as being fully independent with respect to walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding. She commented that his walking outdoors and stair climbing were limited by SOB, and his lifting/carrying/holding are limited to 5 kg on the advice of his cardiologist.
- In the PR the GP indicated the appellant's impairment directly restricts his ability to perform DLA. She reported him as being independent with respect to *personal self-care, meal preparation, management of medications, use of transportation, management of finances, and social functioning*.
- The GP indicated the appellant requires periodic assistance with *basic housework and daily shopping*. She explained the term "periodic" as meaning he has to take breaks as he get SOB and tired very easily.
- In the PR she indicated the appellant requires continuous assistance with mobility outside the home.
- In the AR the GP reported the appellant as being independent with respect to all aspects of all DLA, except to indicate that he requires periodic assistance with one aspect of *daily shopping* in that his parents help him to carry purchases home due to his 5 kg lifting limit. The GP also noted that the appellant takes a longer time than typical in going to and from stores while performing *daily shopping*, that he needs frequent breaks while performing *basic housework*, and that he asks his family for help for using transit schedules and arranging transportation – occasionally borrowing the family vehicle.
- The GP described the appellant as having good functioning with respect to his immediate social network, but as having very disrupted functioning with his extended social network. She commented that he is "not aggressive".
- In the GP's Letter, the GP wrote that the specialist had given strict instructions for the appellant not to do any strenuous work or lifting of any sort and to not otherwise overload his heart.
- In his self-report the appellant wrote that he experiences chest pain, slight dizziness, and SOB on a daily basis. He stated that the only thing he feels comfortable doing is short walks. He indicated that his weakness has been affecting his mental state.
- In his Request for Reconsideration, the appellant wrote that he has been told not to lift more than 5 pounds. He stated that in the past year he has been diagnosed with anxiety and severe depression. The appellant wrote that "My mental health does have an effect on my [DLA], in ways that I have trouble coping outside of my home. My severity has worsened mentally and physically."
- In the Surgeon's Letter, the surgeon indicated that the appellant is on medications for his anxiety/depression and blood pressure.
- In her oral testimony, the appellant's representative said that she lives with the appellant and is the mother of his child, so she knows him very well. She said that the appellant was unable to attend the hearing as he had undergone heart surgery the day before. She said that the surgery had gone well and that his prognosis is good for a two to six month recovery, subject to any complications arising.
- The appellant's representative said that not enough emphasis had been placed on the significant effects of the appellant's mental condition (anxiety/depression) on his ability to manage DLA. She said that because of his depression he has not wanted to get out of bed, to eat, or to take his medications.

- The representative described the appellant's anxiety as being "huge". She said that he had met with a mental health professional on November 7, and that he is scheduled to participate in group therapy after he recovers from surgery.
- In response to a question from the panel regarding the appellant's functioning with his extended social network, the appellant's representative said that he really only has one friend who lives out of town. She said that they do not know many people in their current community and that the appellant can be moody and often prefers to be alone.

Help

- In the PR the physician indicated that the appellant requires a prosthesis in the form of a heart valve replacement.
- In the AR the GP indicated that the appellant's family helps him by driving him and lifting things such as groceries.
- The appellant's representative said that she manages his medications, and that he will require tremendous help for the next few weeks post-surgery.

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 - 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.

Restrictions to DLA

The appellant's position is that his DLA are directly and significantly restricted. He argued, through his representative, that insufficient consideration was given to the restrictions that his mental impairments impose on his ability to perform DLA.

The ministry's position, as set out in its reconsideration decision, is that it is not satisfied that the appellant's impairment will directly and significantly restrict his DLA post-surgery.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This doesn't mean that other evidence shouldn't be considered as well, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

In the appellant's case, the evidence from the GP is that the appellant is substantially independent with respect to his DLA. The GP has indicated that the appellant requires assistance with any DLA that involve heavy lifting, but that otherwise he can get through his DLA by taking extra time and breaks when he gets SOB. She notes that he is currently not able to work, however employability is not a DLA and is not a legislated criterion with respect to PWD designation.

The appellant, through his representative, argues that the GP and the ministry did not put enough emphasis on the effects of the appellant's mental impairment on his ability to perform DLA. However, the GP's evidence indicates that while the appellant's mental condition has been exacerbated by the recent deterioration of his physical condition, it is his physical condition which most directly affects his DLA. The GP indicated that while some aspects of the appellant's cognitive and emotional function are impacted, his motivation is only minimally impacted.

In the appellant's circumstances, where the medical evidence indicates that the restrictions to DLA at the time of application were not significant, no new information has been provided which changes that assessment, and where the appellant has undergone a medical procedure with a good prognosis for substantially resolving the appellant's impairment after a recovery period of two to six months, the panel concludes that the ministry reasonably determined that this legislative criterion was not satisfied.

Help with DLA

The appellant's position is that while he does not expect to be disabled permanently, he currently needs help to perform DLA and will continue to do so for a significant period of time post-surgery.

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.

Panel Decision

A finding that the appellant's impairment directly and significantly restricts his abilities to perform DLA (either continuously or periodically for an extended period) is a pre-condition for determining that he requires help as defined in EAPWDA section 2(3)(b).

Based on the panel's findings with respect to restrictions to DLA, 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.

Conclusion

The panel acknowledges that the appellant is enduring 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. The panel therefore confirms the ministry's decision.