

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 28, 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 May 30, 2013], and a physician's report ("PR") and assessor's report ("AR") signed by the appellant's physician of 15 years [both dated May 13, 2013].
- The appellant's Request for Reconsideration dated November 25, 2013.
- The appellant's type-written reconsideration submission dated November 25, 2013.

Physical Impairment

- In the PR the appellant's physician diagnosed him with CAD (ischemic heart disease) and COPD/emphysema. The physician described the COPD (chronic obstructive pulmonary disorder) as "moderate dyspnea [shortness of breath], activities limited." He described the heart disease as resulting in a heart attack in April, 2013. The physician wrote that two stents were inserted, commenting "still some chest pain? angina".
- The physician wrote "COPD will continue to deteriorate. CAD is stable at present."
- With respect to functional skills the physician indicated the appellant can walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs., and has no limitations on remaining seated.
- In the AR the physician reported the appellant as being able to independently walk indoors and outdoors (takes significantly longer than typical walking outdoors), climb stairs (takes significantly longer), and stand. He commented "CAD + COPD results in difficulty on stairs or walking up inclines."
- The physician indicated the appellant requires periodic assistance with lifting/carrying/holding. He commented "Very limited in carrying groceries or any weight over 5 lbs."
- In his self-report the appellant wrote that emphysema was diagnosed in 2008, then the COPD around 2010. He stated that the heart attack in 2013 resulted in damage to his lower heart. He explained that he is short of breath when he walks, and that he can't carry more than the weight of 2 litres of milk up the stairs.
- In his reconsideration submission the appellant wrote that he always has a friend with him for support when he walks, and that after 1 block he feels dizzy and has to stop for 5 to 10 minutes to catch his breath. He stated that when it gets cold he can't walk outside because the cold air stops his breath, so he walks inside instead. He indicated that when climbing stairs he has to sit down 1/3 of the way up, and that carrying 5 to 15 lbs. puts so much stress on his lungs and heart that he doesn't do it much.
- The appellant also reported having sciatic nerve problems since 2008, keeping him from being able to sit for more than 15 to 20 minutes.
- In his oral testimony the appellant said that the COPD is his real problem, and that he can't be outside in the cold air at all. He said that he can walk 1 or 2 blocks in the summer, but in the cold air he is "really in trouble." He said he can stand on his own, but he can't walk around to look for work.

Mental Impairment

- The PR provides no diagnosis of a mental impairment.
- The physician indicated the appellant has no difficulties with communication, and no significant deficits with cognitive and emotional function.
- In the AR the physician reported the appellant's ability to communicate as being good in all respects.
- Section B.4 of the AR form, which is meant to provide detail of impacts to cognitive and emotional functioning, starts with the instruction "Complete item #4 for an Applicant with an identified mental impairment or brain injury." The physician left section B.4 blank. The section of the AR form dealing with social functioning, which also is to be completed only if the applicant has an identified mental impairment, was left blank by the physician.
- In his self-report the appellant wrote that his shortness of breath causes him to become stressed, that he is very confused and forgetful, and that he can't recall information when prompted.

DLA

- In the PR the physician reported the appellant has not been prescribed any medications that interfere with his ability to perform DLA.
- In the AR the physician indicated the appellant independently manages all aspects of the 7 DLA of *personal self-care, basic housekeeping, daily shopping, meal preparation, managing personal finances (pay rent and bills), manage personal medications, and use of transportation.*
- As mentioned above, the physician left the section of the AR dealing with the DLA of *social functioning* blank.
- In his self-report the appellant said that he needs help with cleaning house because the smell of cleaning products affects his breathing. He wrote that he can make meals but finds it difficult to bring his groceries up the stairs. He indicated that despite his confusion he is able to take his medication as prescribed by writing down his daily medication schedule.
- In his oral testimony the appellant said that a neighbour helps him by cleaning his bathroom and vacuuming because cleaning products and dust make him feel sick.
- The appellant confirmed that he manages his own finances.

Help

- The physician indicated the appellant does not require any prostheses or aids for his impairment, and that he does not have an assistance animal. The physician indicated that help required for DLA is provided by friends.
- In his oral testimony the appellant said that he tries to do the best he can to look after himself on his own by pacing himself. He said he can't afford to hire anyone to help him with DLA, and that he manages his DLA because he has to.

Admissibility of New Information

In oral testimony the appellant provided limited 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*.

APPEAL #

The ministry relied on its reconsideration decision and submitted no new information.

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 that his COPD, heart condition, and sciatica constitute a severe physical impairment. He emphasized COPD as being "the real problem", and said that he truly is disabled.

The ministry's position, as set out in its reconsideration decision, is that the impacts to the appellant's

functional skills as described by the appellant's physician are more in keeping with a moderate degree of 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, taking into account all of the 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.

In the appellant's case, the information provided by his physician is insufficient to demonstrate that the appellant suffers from a severe impairment. He described the appellant's COPD as causing "moderate" shortness of breath, and the CAD as presently being "stable".

The panel notes that while the evidence indicates the appellant's impairments leave him unable to work at his former occupations, employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

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 impairments do not appear to have translated into significant restrictions in the appellant's ability to manage his DLA independently. 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 there is not enough evidence to 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 general practitioner has provided no diagnosis of a mental health condition. In terms of mental functional skills, the evidence indicates that the appellant's communications skills are good in all respects. There is no evidence of any significant impacts to the appellant's cognitive and emotional functioning. The appellant indicated that he experiences confusion, stress, and forgetfulness, but these effects are not confirmed by the physician.

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 evidence in the AR, he also independently manages the decision-making components of the DLA of *daily shopping*, and *meal preparation* (meal planning and food storage). There is no evidence of any disruption of the appellant's *social functioning*.

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 DLA are significantly restricted. He stated that he requires help from others to perform DLA (particularly housekeeping), though he does the best he can to manage on his own.

The ministry's position is simply that it does not have enough evidence to establish that the appellant's impairments significantly restrict DLA either continuously or periodically for extended periods.

Panel Decision

The legislation – section 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 physician. This doesn't mean that other evidence shouldn't be factored in, 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 physician has supplied little in the way of narrative to provide detail to the degree of restriction to DLA.

Because (as determined above) the appellant does not have a mental impairment, the 8 DLA prescribed in section 2(1)(a) of the EAPWDR are relevant. Of those 8 DLA, the physician indicated the appellant independently manages all aspects of 7 DLA: *personal self-care*, *basic housekeeping*, *daily shopping*, *meal preparation*, *managing personal finances* (pay rent and bills), *manage personal medications*, and *use of transportation*. In the AR the physician indicated the appellant periodically requires the assistance of another person with lifting/carrying/holding, which presumably affects aspects of some DLA, but there is no evidence as to how often such assistance is required other than that it can be inferred it is needed for weights in excess of 5 to 15 lbs. The evidence indicates that the appellant receives help with respect to the DLA of *basic housekeeping*, but otherwise the evidence of both the physician and the appellant point to the appellant substantially managing these 7 DLA on his own.

Regarding the 8th DLA (*moving about indoors and outdoors*), the physician's uncontroverted evidence is that the appellant is independently mobile indoors. Outdoors he does take significantly longer than typical to walk and he is rather limited in the distance he can walk.

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 with DLA

The appellant's position is that he relies on help from his neighbour to perform the DLA of *basic housework*, and that he needs support when walking outdoors. He argued that he could use help for other DLA but that he cannot afford it, and that he does as much as he can on his own because he has to.

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

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.

In the panel's view, on the evidence it would be difficult to conclude that the help provided to the appellant with respect to aspects of housework and walking outdoors constitutes "the significant help or supervision of another person" that is required by section 2(3)(b)(ii) of the EAPWDA.

There is no evidence that the appellant requires an assistive device or that he has 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 section 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions affect his ability to function, and that the effects of his impairment may progress over time. 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.