

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 20 January 2014 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 23 July 2013. The Application contained:
 - A Physician Report (PR) dated 23 July 2013, completed by the appellant's general practitioner (GP), who has known the appellant since May 2013 and has seen him 2 – 10 times in that time.
 - An Assessor Report (AR) dated 29 July 2013 completed by appellant's physical therapist (PT), who has known him for 2 months and seen him 2 – 10 times in that period.
 - A Self Report (SR) completed by the appellant.
2. The appellant's Request for Reconsideration, dated 05 January 2014, with an attached statement by the appellant and an advocate-prepared questionnaire completed by his GP; also attached were several information sheets regarding his prescription medications, treatment referrals and numerous prescription drug receipts.

In the PR, the GP diagnoses the appellant's impairment as degenerative disc disease, lumbar spine (onset 1980) and COPD (chronic obstructive pulmonary disease), chronic bronchitis (onset 2001).

The panel will first summarize the evidence from the PR and the AR it relates to the PWD criteria at issue.

Severity of impairment

Physical impairment

PR:

Under Health History, the GP writes that the appellant has had degenerative disc disease of lumbar spine for quite some time. He is unable to perform his daily activities and other kinds of physical work on a job or at home. The pain is only controlled with analgesics.

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. The GP also indicates that the appellant does not require any prostheses or aids for his impairment.

The GP reports that the appellant can walk unaided on a flat surface 2 to 4 blocks, climb 5+ steps, is limited to lifting under 5 lbs. and can remain seated 2 to 3 hours.

The GP comments that the appellant has an issue with lifting heavy things and exertion/work. He is unable to work for more than 2 – 3 hours. He is able to take care of himself like grooming, cooking, cleaning and washing, etc.

AR:

The PT describes the appellant's impairment that impacts his ability to manage DLA as degenerative disc disease in lumbar spine plus left rotator cuff tendinitis.

Mental impairment

PR:

The GP indicates that the appellant has no difficulties with communication

The GP assesses the appellant with a significant deficit with cognitive and emotional function in the area of emotional disturbance, commenting that chronic pain can lead to depression or anxiety.

AR:

The PT assesses as good the appellant's ability in speaking, reading, writing and hearing.

The PT provides the following assessments of the impact of the appellant's mental impairment on daily functioning: moderate impact in the areas of emotion and attention/concentration; minimal impact in the areas of bodily functions and impulse control. The PT notes that he started to fill out this impact table based on how physical ailment affects mental function – but then read that the section was for mental impairment or brain injury.

Ability to perform DLA

PR:

The GP indicates that the appellant's impairments do not directly restrict the appellant's ability to perform DLA.

The GP assesses the appellant independent for all listed DLA, including social functioning, and in answer to the question as to what assistance the appellant needs with DLA answers "None."

AR:

The PT reports that the appellant lives alone.

Regarding mobility and physical ability, the PT assesses the appellant independent for walking indoors, walking outdoors, climbing stairs, standing, lifting and carrying and holding, noting the latter 2 activities are restricted to < 5 lbs. The PT comments that the appellant is able to be independent with lifting/carrying if he stays within guidelines.

The GP assesses the appellant as independent for all aspects of all other DLA applicable to a person with a mental or physical pair: personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation

With respect to social functioning, the PT provides no assessment with respect to support/supervision required or impacts on social functioning with immediate and extended social networks.

Help provided/required

PR:

The GP indicates that the appellant does not require any prostheses or aids for his impairment.

AR:

The PT does not indicate that the appellant is provided assistance by other people, commenting "not

at that level. No help required.”

In terms of assistance provided through the use of an assistive device, the PT puts a tick mark beside “breathing device,” commenting this is required for COPD.

Self report

In his SR the appellant writes that his degenerative disc disease started in the mid-1980s and has gotten progressively worse with more areas affected. It is gotten to the point where he has to take pain medication just to get out of bed in the morning. He cannot work continuously for more than a couple of hours before he needs to rest, lie down, change positions or in most cases have more medication after a respite of an hour or two. He has seen a doctor in his home city who has diagnosed arthritic symptoms along with his disc disabilities.

He writes that he used to be able to work all day and has always had only physically demanding work. This has really taken its toll over the last recent years. In the last two years it seems that he cannot stay at anything very long before being affected by intense lower back and sciatic pain, forcing him to be in a hunched over, uncoordinated and painful posture.

He concludes by writing that he still has the ability to cook and clean for himself.

In the Request for Reconsideration the appellant writes that he found the Application form very confusing, as did his GP who had recently arrived from another country. The original application was completed on the premise of what would be the maximum of his functional skills on his best day, or lowest threshold the pain. However as everyone knows, pain levels can vary from day-to-day or even hour to hour. Therefore he is submitting a supplemental form provided to his GP by his advocate. He notes that his GP has diagnosed a deficit with cognitive and emotional functioning in the area of depression and anxiety – this is also a genetic trait his family as well as being brought on by his chronic pain. He questions the qualifications of the PT to contradict or diminish the GP's diagnoses in this respect. He also notes that he is currently attending a pain clinic in another city, though it is still too early in the treatment to know if it will be effective in any degree. However there is an unfortunate side effect of very stiff, sore muscles and treated areas, accompanied by extreme lethargy for approximately 24 -36 hours. This affects his ability to tend for himself and he has to rely on others for help. He concludes by providing a history of medications he has recently trialed.

In the advocate prepared questionnaire, completed, signed and stamped by the GP on 13 December 2013, the GP indicates with a tick mark that he agrees with the appellant's statements that:

- he is able to walk up to only 1 block on flat surface.
- he has to use a handrail at all times when climbing stairs.
- he is only able to lift up to 4 pounds at a time.
- he is only able to sit for 30 – 45 minutes at the time.
- he needs to hold onto something for support at all times when standing.

The GP also indicates agreement with the appellant's statement that for dressing, he needs periodic assistance from family at least 3 -4 days per week with putting on pants, shoes and socks and for transfers in/out of bed and that he needs to be pulled out of bed by nephew at least 4 -5 days per week.

The GP also indicates agreement with the appellant's statement that he is in need of continuous



assistance or is unable to do the following DLA due to his health conditions:

- laundry – has to rely on nephew to do his laundry as he is unable to do all the bending required to complete this task.
- carrying purchases home – unable over 4 pounds maximum.
- budgeting – has gotten himself and financial difficulties.
- pay rent and bills – currently behind on rent.

The panel notes that, while space is provided in the advocate-prepared questionnaire form specifically for comments, none is provided by the GP.

In his Notice of Appeal, dated 04 February 2014 2014, the appellant writes that he does not agree with the decision and will submit further medical information from specialists and doctors if required

At the hearing, in his opening presentation and in answer to questions, the appellant provided the following information:

- In the time since his original application was completed in July 2013 his condition due to his degenerative disc disease has deteriorated significantly – he estimates that he now has only 1 day/week as a “good day.”
- He has gone downhill since Christmas and his condition is more in line with the answers provided by the GP in the questionnaire submitted at reconsideration.
- He lives in the bottom part of the house, with the upper part occupied by his nephew and family. His nephew will drive him for shopping and appointments 2 – 4 /week and help him get up in the mornings and get dressed 4 - 5 times/week. He estimates that he is 60 to 70% dependent on other people for his DLA.
- Due to the short period of time between being advised of the reconsideration decision and the appeal hearing, he was not able to get appointments to obtain up-to-date information from the specialists he is seeing. In particular, he is seeing a specialist at a pain clinic and at a COPD clinic.

The balance of the appellant's remarks went to argument (see Part F, Reasons for Panel Decision, below).

The panel finds that the information provided by the appellant in his oral testimony is in support of the evidence before the ministry when it made the decision under appeal, explaining the answers provided in the GP-completed questionnaire submitted at reconsideration. The panel therefore admits the information provided the appellant under section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2 of the EAPWDA. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The ministry determined that he met the 2 other criteria in *EAPWDA* section 2(2) set out below.

The following section of the *EAPWDA* applies to this appeal:

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.

The following section of the *EAPWDR* applies to this appeal:

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;

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- (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.

The panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

Severity of impairment

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the applicant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's GP) identify the impairment and confirm that impairment will continue for at least two years.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it appropriately describes the legislative intent. The cause is usually set out as a disease, condition, syndrome, injury or even a symptom (e.g. pain or shortness of breath). A severe impairment requires the identified cause to have a significant impact on daily functioning.

The panel also notes that the legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

Physical impairment

In the reconsideration decision the ministry reviews and compares the information provided in the PR and AR and the information provided by the GP in the advocate-prepared questionnaire submitted at reconsideration. The ministry also noted the appellant's statement in his request for reconsideration that his medications and treatments have changed. The ministry notes that no other medical reports are included with his application to help determine the severity of his impairments (e.g. X-ray, MRI). The ministry states that the appellant's original application was assessed by both the physician and the physical therapist, who both agreed that all of his DLA are performed independently. Although the GP indicates that a few of his DLA are now restricted, he does not provide adequate information to confirm a severe physical impairment. The position of the ministry is that, while the new information has been considered in conjunction with that presented with the original application, the ministry is not satisfied that the information provided is evidence of a severe physical impairment.

The appellant's position is that his condition has deteriorated significantly since the original

application was submitted in July 2013 and that the new information provided by his GP clearly demonstrates that his medical conditions significantly restrict his ability to perform DLA, thereby establishing that he has a severe physical impairment.

Panel findings

The GP has diagnosed the appellant's impairments as degenerative disc disease, lumbar spine, and COPD with chronic bronchitis. The PT has added a diagnosis of left rotator cuff tendinitis, although this is not been confirmed by the GP as an impairment that will continue for at least 2 years. The panel notes that the diagnosis of chronic medical conditions is not in itself sufficient to establish a severe impairment. At issue is impact of these conditions on daily functioning and in particular on the ability to perform DLA. One impact reported is a restriction in the appellant's ability to lift, limited to less than 5 pounds. It is not clear to the panel whether this restriction results from his degenerative disc disease or the left rotator cuff tendinitis. The panel also notes some inconsistency in the statements made by the GP. Under Health History the GP commented that the appellant is unable to perform his daily activities and other kinds of physical work on a job or at home, while later commenting that he is able to take care of himself like grooming, cooking, cleaning and washing, etc. As the ministry has noted, both the GP and the PT have assessed the appellant independent in all aspects of all DLA. The GP has provided revised assessments in the advocate-prepared questionnaire submitted at reconsideration and at the hearing the appellant explained that these revised assessments reflected his abilities on "bad days," now more frequent because of his deteriorating physical condition and the side effects of his pain medication. However, and as ministry has noted, the GP did not take the opportunity provided in completing the questionnaire to provide any explanation for the revised assessments or any confirmation of the deteriorating physical condition. Given the consistent evidence in the PR and AR, and the lack of any explanation for the changes in assessments provided by the GP in the questionnaire, the panel finds that the ministry was reasonable in determining that a severe physical impairment had not been established.

Mental impairment.

In the reconsideration decision the ministry notes that no mental impairments are diagnosed. The ministry also notes that the GP has indicated that the appellant has one significant deficit with cognitive and emotional functioning, with the comment that chronic pain "can" lead to depression or anxiety. The PT has indicated that the appellant's cognitive and emotional functioning has no major impacts on his daily functioning. No referrals to mental health specialists (i.e. the psychiatrist) are mentioned. The position of the ministry is that for the above reasons it is not satisfied that the information provided is evidence of a severe mental impairment.

The position of the appellant, as explained in his statement accompanying his Request for Reconsideration, is that GP has diagnosed him with a significant deficit in cognitive and emotional functioning, with his pain levels causing depression and anxiety. The PT in the AR did not have the expertise or training to diminish the severity of the GP's diagnosis. The appellant submits that there is sufficient evidence to establish a severe mental impairment.

Panel findings

The panel notes that the GP has not diagnosed a mental health condition as an impairment. The GP

has diagnosed a significant cognitive and emotional deficit in the area of emotional disturbance, but the panel does not consider this the same as a diagnosis of a mental health condition giving rise to a mental impairment. While the PT has assessed a couple moderate impacts on daily functioning in the AR, it would seem to the panel that she retracted these impact assessments once she realized that the impact table she was filling out related only to a person diagnosed with a mental impairment or brain injury. The panel notes that neither the GP nor the PT assessed any difficulties with communications or social functioning, areas that would be expected to be impacted by mental impairment. In the questionnaire completed by the GP at reconsideration, difficulties with budgeting and paying rent and bills are noted but not explained, leaving it unclear as to whether these difficulties arise from a mental health issue or the appellant's financial circumstances. Accordingly the panel finds that the ministry was reasonable in determining that a severe mental impairment had not been established.

Significant restrictions in the ability to perform DLA.

In the reconsideration decision the ministry notes that the appellant's original application was assessed by both his GP and PT, and both agreed that all of his DLA are performed independently. Although new information was submitted indicating that he is periodically restricted in some areas and continuously restricted in others, the GP simply provides a check mark indicating he agrees, but does not provide an explanation as to why his abilities have changed since the original application or provide any other supporting narrative. Regardless, the ministry notes that the large majority of his DLA are still reported as independent. Moreover the GP writes that the appellant's pain is controlled through medications, and it is difficult to determine the appellant's level of capability being on medications versus being off. The ministry also noted that the GP has indicated that the appellant does not require any assistive device. Overall, the ministry found that the information provided does not establish that an impairment significantly restricts the appellant's DLA either continuously or periodically for extended periods.

The position of the appellant is that his medical conditions significantly restrict his ability to manage his DLA and that the extent of these restrictions is clearly documented in the questionnaire completed by his GP at reconsideration. This evidence demonstrates that this criterion has been met.

Panel findings

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion which has not been established in this appeal. This DLA criterion must also be considered in terms of the preceding legislative language of section 2 of the *EAPWDA*, which provides that the minister may designate a person as a person with disabilities "if the minister is satisfied that" all the criteria are met. In exercising the discretion conferred by the legislation, it is reasonable that the minister would expect that the opinion of a prescribed professional be substantiated by information from the prescribed professional that would satisfy the minister that there are direct and significant restrictions in the ability to perform DLA, either continuously or periodically for extended periods, by presenting a clear and complete picture of the nature and extent of these restrictions.

As the ministry has noted, in the original application the appellant's prescribed professionals – both

the GP and the PT – assessed the appellant independent in all aspects of all DLA. And while the appellant provided new information at reconsideration, the panel finds that it is reasonable for the ministry to expect an explanation from the GP for the changes in the assessments that differ from those in the PR and AR. The new assessments describe restrictions in the appellant's ability to manage the DLA of moving about indoors and outdoors (able to walk only up to 1 block, needs support at all times when standing), periodic assistance required for personal self care (the aspects of dressing and transfers in/out of bed), and continuous assistance required for basic housekeeping (the aspect of doing laundry) and shopping (the aspect of carrying purchases home – 4 pounds maximum). Difficulties with budgeting and paying rent and bills are also mentioned, but it is unclear whether this is a result of a mental health condition or his financial circumstances.

The panel considers reasonable the ministry's assessment that, even if it were to give full weight to these new assessments, the appellant is able to manage most of his DLA independently. While the appellant may be significantly restricted in the DLA of moving about indoors and outdoors, the new information indicates that he is restricted in 2 of 8 aspects of personal self care, 1 of 2 aspects of basic housekeeping and 1 of 5 aspects of shopping. Given the lack of explanation as to the changed assessments and the assessments of independent functioning in all other aspects of DLA in the PR and AR, the panel finds that the ministry was reasonable in determining that this criterion had not been met.

Help with DLA

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.

The appellant's position is that the evidence provided in the questionnaire completed by the GP and submitted at reconsideration clearly shows that he requires ongoing daily help from his nephew.

Panel findings

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.