

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated January 8, 2014 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal 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

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated August 9, 2013, a physician report (PR) and an assessor report (AR) both dated August 2, 2013 and completed by a physician who noted that he has known the appellant for approximately 6 months as he has seen him in the absence of the appellant's family physician. In describing the approach and information sources used to complete the AR, the physician indicated only an office interview with the appellant and no review of his file or chart information or any other secondary source. The evidence also included the following:

- 1) Revised page from the AR (page 16 of 23) regarding impacts to cognitive and emotional functioning; and,
- 2) Request for Reconsideration dated December 20, 2013.

Diagnoses

In the PR, the appellant was diagnosed by the medical practitioner with Diabetes with date of onset about 8 years ago, diabetic neuropathy with onset 18-24 months, and COPD, shortness of breath with onset of 6 months. In the Request for Reconsideration, the medical practitioner reported that the appellant has a severe incontinence problem. There was no diagnosis indicated in the PR or the Request for Reconsideration for a mental disorder.

Physical Impairment

In the PR, the appellant's physician reported that:

- In terms of health history, the appellant has "moderate to severe diabetes mellitus; he also has diabetic neuropathy, with weakness and disability."
- The appellant does not require any prosthesis or aid for his impairment.
- With respect to degree and course of impairment, the physician wrote that diabetic neuropathy is usually progressive and the appellant "is likely to get worse" and that "COPD is also ongoing."
- In terms of functional skills, there is no assessment regarding how far the appellant can walk but the physician noted "may walk but very slowly, short of breath", he can climb 2 to 5 steps unaided, lift under 2 kg. (under 5 lbs.), with no assessment of how long the appellant can remain seated but the physician wrote "needs to lie down often; tired and short of breath."
- In the additional comments, the physician wrote: "he moves very slowly. Takes a long time to do anything. Weak, often short of breath."

In the AR, the appellant's physician indicated that:

- The appellant is assessed as independent with walking indoors and outdoors, with no assessment for climbing stairs but the note: "rarely, is difficult", and the need for periodic assistance from another person with standing, lifting, and carrying and holding. No further comments were added by the physician.
- The section of the AR relating to assistance provided through the use of assistive devices is not completed.
- In the additional comments, the physician wrote that the appellant "is very weak and slow."

In the Request for Reconsideration, the physician wrote:

- He saw the appellant on December 20, 2013 and the appellant revealed a major problem with toileting. He has a severe incontinence problem, so much so that he can hardly go out or even do anything at home because of this problem.
- He said that he felt embarrassed by the problem and he did not tell the physician about it. On page 16 of 23 of the PWD application, the response has been changed for bodily functions from no impact to major impact.

Mental Impairment

In the PR, the appellant's physician reported that:

- It is unknown whether the appellant has any significant deficits with cognitive and emotional functioning.
- The appellant is restricted with social functioning, although not defined in terms of continuous or periodic, it is noted: "rarely able to socialize."

In the AR, the physician indicated that:

- The appellant has a poor ability to communicate in all areas, including speaking, reading, writing and hearing.
- The section of the AR describing impacts to cognitive and emotional functioning and social functioning was not completed.
- The appellant is independent in 4 of 5 aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, and dealing appropriately with unexpected demands, while requiring periodic support/supervision with securing assistance from others.
- The appellant has good functioning in his immediate social networks, with the note added by the physician "few friends", and very disrupted functioning in his extended social networks.

In the Revised page from the AR, the physician reported that:

- There is a major impact to the appellant's cognitive and emotional functioning in the area of bodily functions (e.g. toileting problems), a moderate impact to other emotional or mental problems, minimal impacts to emotion, impulse control, attention/concentration, memory, motivation, motor activity, language, psychotic symptoms, and other neuropsychological problems, and no impact in the remaining 3 areas of functioning.

Daily Living Activities (DLA)

In the PR, the physician indicated that:

- The appellant has not been prescribed any medication and/or treatment that interfere with his daily living activities.
- The appellant is continuously restricted in performing several DLA, including personal self care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, and use of transportation.
- The appellant has undefined restrictions with social functioning and is not restricted in the DLA management of medications and management of finances.
- There are no comments regarding the restrictions to social functioning or the degree of restriction to the other DLA.

In the AR, the physician reported that:

- The appellant is independent with moving about indoors and outdoors.
- The appellant is independent in 6 of 8 tasks of the DLA personal care, including dressing, grooming, toileting, feeding self, transfers in/out of bed (note: "with support") and transfers on/off chair. There is no assessment for regulating diet and the appellant requires periodic assistance with bathing.
- The appellant requires periodic assistance from another person with basic housekeeping, with no assessment for laundry but the comment added: "barely possible."
- The appellant is independent in performing all tasks of the DLA shopping, including going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home.
- The appellant is independent with all 4 tasks of the DLA meals, including meal planning, food preparation, cooking and safe storage of food.
- The appellant is independent with all 3 tasks of the DLA paying rent and bills, including banking, budgeting, and paying rent and bills.
- The appellant is independent in performing all 3 tasks of managing his medications, including filling/refilling prescriptions, taking as directed and safe handling and storage.
- The appellant is independent with all 3 tasks of managing transportation, including getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.
- Additional comments are that the appellant "is very weak and slow; often needs help with home work and socializing."

Need for Help

The physician reported in the AR that the help required for DLA is provided by the appellant's friends. The section of the report indicating assistance provided through the use of assistive devices is not completed.

In his Notice of Appeal dated January 17, 2014, the appellant wrote that he suffers from diabetes that is exacerbated and he is in dire straits. He has incontinence and spinal sciatica. He has cramps when he walks or sleeps. He needs to use a wheelchair or a cane.

The ministry relied on its reconsideration decision.

The ministry did not raise an objection to the admissibility of the information in the appellant's Notice of Appeal. The panel reviewed the Notice and admitted the information regarding diabetes and incontinence, as relating to the appellant's previously diagnosed medical conditions and being in support of information before the ministry on reconsideration, pursuant to Section 22(4) of the *Employment and Assistance Act*. The panel did not admit the reference to spinal sciatica as this information is not in support of information that was before the ministry on reconsideration.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that his daily living activities (DLA) are not, 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, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of his weakness and shortness of breath due to diabetes, diabetic neuropathy, and COPD. The appellant wrote that he suffers from diabetes that is exacerbated and he is in dire straits, that he has incontinence and he needs to use a wheelchair or a cane.

The ministry's position is that there is not enough information from the general practitioner to confirm that the appellant has a severe physical impairment. The ministry stated that, in terms mobility, the general practitioner indicated that the appellant is independent in mobilizing inside and outside of his home but he is "slow, needs support" and also that he does not use any assistive devices. The ministry stated that it is difficult to determine which of the appellant's medical conditions affect his ability to move at a normal pace as the general practitioner did not include any medical reports, such as chest x-rays or test results, nor does he indicate any referrals to appropriate specialists (endocrinologist, pulmonologist, etc.). The ministry stated that there is a lack of written explanation and elaboration in regards to the severity of the appellant's conditions throughout the application.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. To assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage his DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach when it defines the word "impairment" in the physician report as being "a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

The legislation clearly provides that the determination of severity of impairment 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 respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, a physician who has known the appellant for a period of 6 months, diagnosed the appellant with diabetes, diabetic neuropathy, COPD, and incontinence. The physician noted in the PR that the appellant has "moderate to severe diabetes mellitus; he also has diabetic

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neuropathy with weakness and disability.” The appellant wrote in his Notice of Appeal dated January 17, 2014, that he suffers from diabetes that is exacerbated and he is in “dire straits.” The physician provided further information in the Request for Reconsideration and did not report that the appellant’s diabetes had worsened since the time of the PWD application.

In the additional comments to the PR, the physician wrote that the appellant “...moves very slowly. Takes a long time to do anything. Weak, often short of breath.” The functional skills reported in the PR indicated that the appellant “may walk but very slowly, short of breath”, he can climb 2 to 5 steps unaided, lift under 5 lbs. and he “needs to lie down often; tired and short of breath.” The physician indicated in the PR that the appellant is continuously restricted with his mobility inside and outside the home, but no comments are included regarding the degree of restriction. In the AR, on the other hand, the appellant is assessed as independent with walking indoors and outdoors, he “rarely” climbs stairs as it is “difficult”, and he needs periodic assistance from another person with standing, lifting, and carrying and holding, although how often and for how long the periodic assistance is required has not been further defined.

In his Notice of Appeal, the appellant wrote that he also has incontinence and the physician confirmed in the Request for Reconsideration that he saw the appellant on December 20, 2013 and the appellant revealed a major problem with toileting. The physician wrote that the appellant has a severe incontinence problem, so much so that he can hardly go out or even do anything at home because of this problem. In terms of the impact to the appellant’s functioning, however, the physician reported a major impact to cognitive and emotional functioning in the area of bodily functions, but did not describe specific impacts to the appellant’s physical functioning or whether any toileting aids are being used. The appellant indicated a need for a wheelchair or a cane in his Notice of Appeal, but the physician reported in the PR that the appellant does not require an aid for his impairment and the section of the AR relating to assistance provided through the use of assistive devices has not been completed.

The panel finds that the ministry reasonably concluded that it is difficult to obtain an accurate picture of the appellant’s present physical limitations due to the inconsistencies and lack of detail in the evidence. While the physician wrote that diabetic neuropathy is usually progressive and the appellant “is likely to get worse,” he also described the appellant’s diabetes as “moderate to severe” and did not refer to an exacerbation in the appellant’s condition in the Request for Reconsideration. The physician described the appellant’s COPD as “ongoing” and although references are made to shortness of breath, there is no indication of the degree of progression of this disease and any remedial measures taken to ameliorate the symptoms. In the absence of further detail, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant did not maintain a position that he has a severe mental impairment.

The ministry’s position is that there is insufficient evidence to establish that the appellant has a severe mental impairment, particularly since the appellant’s physician did not diagnose a mental health condition. The ministry stated that the physician indicated that he did not know if the appellant has any significant deficits with his cognitive and emotional functioning. The ministry stated that while the physician wrote in the Request for Reconsideration that a toileting issue has a major impact on

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the appellant's mental health, the large majority of the rest of the appellant's cognitive and emotional functioning are reported to have a minimal impact on daily functioning. The ministry stated that the physician made some comments in the PWD application regarding issues which may affect the appellant's mental health but he did not diagnose the appellant with a mental health issue, nor does he provide elaborate detail to the disruption of the appellant's emotional functioning or indicate any referrals to mental health specialists.

Panel Decision

The general practitioner did not diagnose a mental disorder in the PR or in the Request for Reconsideration. The physician reported in the PR that it is "unknown" whether there are any significant deficits to the appellant's cognitive and emotional functioning and the section of the AR describing impacts to cognitive and emotional functioning was not completed. In the Revised page from the AR, the physician reported that there is a major impact to the appellant's cognitive and emotional functioning in the area of bodily functions (e.g. toileting problems), a moderate impact to other emotional or mental problems which are not further described by the physician, and minimal or no impact to in the remaining 12 areas of functioning. In the Request for Reconsideration, the physician wrote that the appellant did not tell him about severe incontinence earlier because the appellant said he felt embarrassed by the problem and he can hardly go out or even do anything at home because of this problem.

The physician indicated in the PR that the appellant is restricted with social functioning, described as "rarely able to socialize;" however, the appellant is assessed as independent in 4 of 5 aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, and dealing appropriately with unexpected demands, while requiring periodic support/supervision with securing assistance from others. In the AR, the physician indicated that the appellant has a poor ability to communicate in all areas, including speaking, reading, writing and hearing, but there are no comments provided explaining the cause of these difficulties. The physician reported that the appellant performs all "mental" tasks of DLA independently, including making appropriate choices when shopping, bank, budgeting and paying rent and bills as well as taking medications as directed. Given the absence of a mental disorder diagnosis and a lack of detail regarding impacts to mental and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical impairment directly and significantly restricts his ability to perform DLA on an ongoing basis to the point that he requires the significant assistance of another person, as well as assistive devices such as a wheelchair or a cane.

The ministry's position is that the appellant can independently manage the majority of his DLA independently and, for those tasks where periodic assistance is required, the physician has not explained the extent of the periodic assistance required to indicate restrictions for extended periods of time.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his DLA, continuously or periodically

for extended periods. In this case, the appellant's physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the appellant's circumstances, his physician reported in the PR that the appellant is continuously restricted in performing several DLA, including personal self care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, and use of transportation, with no further comments provided regarding the degree of restriction. In the AR, the physician reported that the appellant is completely independent with performing many of these same DLA, including moving about indoors and outdoors, shopping, meals, paying rent and bills, and managing his medications and transportation. The appellant is also assessed as independent in 6 of 8 tasks of the DLA personal care, while requiring periodic assistance with bathing. The physician also assessed the appellant as requiring periodic assistance from another person with basic housekeeping, with no assessment for laundry but the comment added: "barely possible." In the additional comments to the AR, the physician wrote that the appellant "often needs help with home work and socializing;" however, there is no further detail provided.

In the absence of narrative or notes to further explain how often or for how long the appellant requires assistance with these tasks of DLA, or to explain the inconsistencies between the restrictions to DLA reported in the PR and the AR, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant is restricted periodically for extended periods of time. Overall, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts his ability to manage his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that he requires the significant assistance of another person or an assistive device to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry stated that the appellant does not require an assistive device.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The evidence of the physician, as a prescribed professional, is that the help required with DLA is provided by the appellant's friends. Although the appellant stated in his Notice of Appeal that he requires the use of a wheelchair or a cane, this has not been confirmed by the physician who reported that the appellant requires no aids for his impairment. The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform

DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the EAPWDA.

Conclusion

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