

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of January 22, 2014, 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 July 24, 2013], and a physician's report ("PR") and assessor's report ("AR") signed by the appellant's physician [both dated July 29, 2013].
- The appellant's Request for Reconsideration dated December 11, 2013.

Physical Impairment

- In the PR the physician diagnosed the appellant with a previous compound comminuted fracture of the left elbow, with ongoing left elbow pain. The physician referred to constant pain and throbbing in the left elbow that wakes the appellant up at night.
- With respect to functional skills, the physician reported the appellant can walk 4+ blocks, climb 5+ stairs unaided, lift 5 to 15 pounds (left arm), and remain seated without limitation.
- In the AR the physician indicated that the appellant independently manages walking indoors and outdoors, climbing stairs, and standing. He also indicated that the appellant takes significantly longer than typical and needs periodic assistance with lifting/carrying/holding anything 10 pounds or over.
- In his self-report the appellant said that his left elbow is currently held together with metal pins and causes constant underlying pain. He wrote that after 5 minutes of use his left arm causes pain, and prevents him from working physically and mentally.
- In his oral testimony the appellant said that he was in a car accident in August, 2013, shortly after he submitted his PWD application. He stated that he now has significant lower back pain and requires physiotherapy but can't afford it. He said that the accident also caused severe neck pain which has since resolved itself. He was going to have his physician complete a new application form for him, but the physician advised him to await the outcome of this appeal process first.

Mental Impairment

- In the PR the physician did not diagnose a mental impairment, but indicated deficits with cognitive and emotional function in the areas of emotional disturbance, attention/concentration, and other (reduced sleep).
- In the AR the physician indicated minimal impacts to 4 of 14 categories of cognitive and emotional function (sleep disturbance, emotion, attention/concentration, and memory). He indicated no impact to the remaining 10 categories.
- The physician reported the appellant's ability to communicate as being good in all respects.
- The physician noted that aspects of the appellant's social functioning (develop/maintain relationships, appropriate interaction with others, dealing appropriately with unexpected demands) get worse with decreased sleep or increased anxiety.
- In his self-report the appellant indicated that constant pain from his left elbow causes anxiety, sleep deprivation, and depression.
- The appellant said that he seldom goes out anymore because of pain from his back and elbow, so loneliness is exacerbating his anxiety and depression.

DLA

- The physician noted in the PR that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA.
- In the AR the physician reported that the appellant independently manages all aspects of the 6 DLA of *personal self-care, basic housekeeping, meal preparation, managing personal finances* (pay rent and bills), *managing personal medications*, and *use of transportation*.
- With respect to the DLA of *daily shopping*, the physician indicated the appellant is independent in all respects except that he requires periodic assistance carrying purchases home as he is unable to lift more than 10 pounds with his left arm.
- Regarding the DLA of *social functioning* (relate to, communicate or interact with others effectively) the physician indicated that the appellant independently manages to make appropriate social decisions and to secure assistance from others. He reported the appellant as requiring periodic assistance with the aspects of developing/maintaining relationships, interacting appropriately with others, and dealing appropriately with unexpected demands. The physician described the appellant as functioning marginally with respect to his immediate and extended social networks.
- In his oral testimony the appellant said that the medications (primarily pain killers) he is currently using interfere with his ability to work and to perform DLA, particularly in the morning.
- In response to questions from the panel, the appellant stated that:
 - He is naturally right-handed.
 - He relies on his roommate for DLA. He can't stand for long to do dishes. He puts his laundry in with his roommate's and the roommate does the laundry.
 - He doesn't go to the grocery store – he leaves it up to his roommate.
 - He doesn't clean around the house or take out the garbage – he leaves these to his roommate.
 - He tries to minimize the use of his left arm.
 - He does not understand why his physician indicated that he is independent with his DLA.
- When asked what the physician was referring to when he indicated the appellant requires periodic support/supervision for *social functioning*, the appellant responded that he wasn't sure. He said that he feels more anxiety regarding social activity.

Help

- The physician indicated that 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 the appellant receives assistance with DLA from his roommate.
- The appellant indicated in his oral testimony that he relies substantially on his roommate to perform DLA.

Admissibility of New Information

In oral testimony the appellant provided 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*. The ministry relied on its reconsideration decision and submitted no new information.

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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 constant severe pain from his left elbow and his back constitutes a severe physical impairment. He argued that he is unable to work and that he is taking pain killers "24/7".

The ministry's position is that the physician's evidence with respect to the appellant's physical functional skills is not sufficient to demonstrate a severe physical 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. 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.

The physician's evidence from the PR is that the appellant is unrestricted in terms of walking, climbing stairs, standing, and sitting. His evidence in the AR is consistent with this. The physician indicated the appellant is limited to lifting up to 10 pounds with left arm, but there is no indication of any limitations with respect to his right arm.

The panel notes that the appellant reports that he is substantially impaired by back pain resulting from an auto accident which occurred after completion of the PR and AR by the physician. However, the panel must base its decision on impairments that have been identified or confirmed by a medical practitioner.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, any functional skills limitations resulting from the appellant's impairments do not appear to have translated into significant restrictions in his ability to manage his DLA independently. For the foregoing reasons, the panel has concluded that while the appellant does have some physical health issues, the ministry reasonably determined that the evidence falls short of establishing that he has a severe physical impairment as contemplated by the legislation.

Severe Mental Impairment

The appellant didn't expressly advance an argument with respect to severe mental impairment, but stated that his physical condition contributes to his depression and anxiety.

The ministry's position, as set out in its reconsideration decision, is that the physician has not provided a diagnosis of a mental impairment, and that the deficits to cognitive and emotional functioning are minimal.

Panel Decision

Though the physician identified some minimal deficits to cognitive and emotional functioning, he did not diagnose a specific mental impairment. In terms of mental functional skills, the evidence

indicates that the appellant's communications skills are good in all respects.

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* (making appropriate choices), *meal preparation* (meal planning and food storage); and *social functioning* (making appropriate social decisions).

With respect to *social functioning*, there is evidence to indicate that the appellant is isolating himself to some extent, and that some aspects of social functioning are impacted by lack of sleep or anxiety. However, there is no evidence before the panel as to what sort of support or supervision the appellant may require, and the physician's evidence indicates that the appellant remains functional (albeit marginally) in respect of his immediate and extended social networks.

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 is limited by pain and that he relies on his roommate to perform many of his DLA.

The ministry's position is that the majority of the appellant's DLA are performed independently or require little help from others, and that the physician has provided no evidence as to the type, frequency, or duration of any assistance required by the appellant. The ministry argued that the information from the appellant's prescribed professional (his physician) does not establish that his impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

There are significant discrepancies in the evidence of restrictions to DLA between the physician's evidence and the appellant's oral testimony. The appellant explains most of the discrepancy as resulting from the back injury sustained in the car accident which occurred after the physician completed the PR and AR, however even taking this into account the appellant felt that the physician's evidence did not accurately reflect his level of restrictions even prior to the auto accident. As mentioned above, the legislation requires that physical impairments must be confirmed by a medical practitioner. There is no such confirmation with respect to a back injury before the panel. Accordingly, the panel has given more weight to the physician's evidence regarding the degree of restrictions.

In the panel's view, the professional evidence is consistent in indicating that the appellant is not significantly restricted with respect to the following 8 of the 10 prescribed DLA – *personal self-care, meal preparation, management of medications, management of finances, use of transportation, basic*

housekeeping, moving about indoors and outdoors, and decision-making.

With respect to *social functioning*, based on the analysis provided above under the discussion of severe mental impairment, the panel concludes that the evidence does not demonstrate a significant restriction.

Regarding the DLA of *daily shopping*, the physician's evidence indicates that the appellant's only limitation is that he requires periodic assistance carrying purchases home because he is unable to lift more than 10 pounds with his left arm. The appellant stated that he leaves it up to his roommate to do all the household shopping, but the panel is not convinced by the evidence that this arrangement results from restrictions imposed by the appellant's impairments.

In the panel's view, the evidence does not establish on the balance of probabilities that the appellant's 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 roommate to perform his DLA.

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

On the evidence, the panel cannot conclude that the help provided to the appellant by his roommate constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA.

There is no evidence to indicate 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 s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions have some impact on his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel concludes 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.