

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of December 13, 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 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

With the consent of the parties, the hearing was conducted in writing in accordance with Section 22(3)(b) of the Employment and Assistance Act.

The information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD dated July 4, 2013 which included the appellant's handwritten self-report (SR).
- A physician's report (PR) dated July 4, 2013.
- An assessor's report (AR) dated July 3, 2013.
- The appellant's handwritten self-report dated May 22, 2013.
- A note from the appellant to the ministry dated August 21, 2013.
- A 2-page CTU Discharge Instructions document dated December 27, 2012.
- The appellant's request for reconsideration, dated December 3, 2013.

Admissibility of New Information

In his Notice of Appeal, the appellant provided new information regarding his impairment and the nature and frequency of the assistance he receives with his DLA. This information provides additional detail with respect to issues addressed in the original PWD application forms. 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 Section 22(4) of the Employment and Assistance Act.

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

Diagnosis

In the PR the physician – who has seen the appellant twice - diagnosed the appellant with diabetes (on insulin), diabetic neuropathy, chronic sinusitis, esophagitis, gastroparesis, diarrhea and dental caries. The physician noted that the appellant is unable to stand for longer than 4 hours, is light headed, frequently weak and fatigued, vomits daily, and has irregular diarrhea and decreased appetite. The appellant's diabetic control is worsened by poor diet and his teeth are worsened by frequent vomiting and inability to access dental care.

In response to the question; Has the applicant been prescribed any medication and/or treatments that interfere with her ability to perform DLA? The physician indicated no.

In the AR, the social worker noted that the appellant's main disabilities are poorly controlled diabetes, reflux esophagitis, diarrhea, episodic vomiting and diabetic autonomic neuropathy.

Physical Impairment

- In terms of Functional Skills, the physician reported that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 15 to 35 pounds, and has no limitation to remain seated.
- The physician noted that the appellant's mobility outside the home is periodically restricted due to fatigue and vomiting which come and go and that his daily shopping is continuously restricted.
- In the PR, it was indicated the appellant does not require aids or prostheses for his impairment, and in the AR it was indicated that appellant does not have an assistance animal.
- In the AR, under Mobility and Physical Ability, the assessor noted that the appellant is independent with respect to walking indoors and standing, but that he needs periodic assistance with walking outdoors, climbing stairs, lifting, and carrying/holding due to fatigue and reduced strength, taking 3 to 4 times

longer than normal.

- In his SR, the appellant wrote that he wakes up every morning with chest pain and nausea, has no energy, strength or appetite, rests quite often when walking, has occasional black outs, has constant diarrhea, nasal congestion and is malnourished and underweight.
- In his request for reconsideration, the appellant wrote that he was recently hospitalized due to pain and high heart rate, is losing feeling and mobility in his right foot and toes, and has only left his home twice in the last 2 months due to pain and fatigue. He stated that he had to taxi home 2 blocks, one time, due to pain.
- On appeal, the appellant wrote that he wakes up in pain and vomiting nearly every morning, cannot eat most days due to pain, is unable to make doctors and dentist appointments due to severe weakness and pain, is lucky to sleep for 4-6 hours at night due to discomfort and bladder/bowel issues and does not have energy to provide for himself. Also, the appellant indicated that his neuropathy causes random pain and occasional lack of mobility which when combined leaves him bed ridden.

Mental Impairment

- In the PR, the physician indicated that the appellant has no significant deficits with cognitive and emotional function.
- The two sections in the AR that are to be completed only for applicants with an identified mental impairment or brain injury contained the following:
 - Under Cognitive and Emotional Functioning, the social worker reported a major impact for 1 of 14 items - bodily functions, 5 moderate impacts - consciousness, emotion, attention/concentration, motivation and other emotional and mental problems and 2 minimal impacts - executive and memory, with no impact on the remaining 6 categories.
 - The assessor commented that; the appellant reports difficulty accomplishing daily living activities when feeling sick, reports isolative behaviors due to physical illness, avoids close relationships, and concentration, follow-up, memory and mood significantly affect his emotions.
- Under Social Functioning; the appellant was described as requiring periodic support to be able to develop and maintain relationships and with being able to deal appropriately with unexpected demands due to isolating himself, when feeling physically unwell, and independent with making appropriate social decisions, interacting appropriately with others and being able to secure assistance from others. He was also reported as having marginal functioning with both his immediate social network and extended social networks.
- In his handwritten self-report, the appellant indicated that he needs to live with someone in case of seizures.
- On appeal, the appellant wrote that feeling like death everyday doesn't help him mentally.

Daily Living Activities

- In the PR, the physician reported that the appellant's impairments do not directly restrict his ability to perform 7 of the 10 listed DLA: Personal self-care, Meal preparation, Management of medications, Basic housework, Mobility inside the home, Use of transportation, and Management of finances. The PR indicated the appellant is continuously restricted with respect to 1 DLA: Daily shopping and periodically restricted with Mobility outside the home due to fatigue and vomiting. The physician did not indicate whether or not the appellant suffered restrictions for the remaining DLA - Social functioning. Added is that the appellant needs assistance with nutrition.
- The physician noted that the appellant's mobility outside the home is periodically restricted due to fatigue and vomiting which come and go and that his daily shopping is continuously restricted.
- In the AR, the social worker indicated that the appellant independently manages all aspects of 4 of the

7 listed DLA; Personal Care, Pay Rent and Bills, Medications and Transportation. The assessor also indicated that the appellant needs periodic assistance from another person under Basic Housekeeping; for 1 of 2 aspects, specifically, basic housekeeping whereas he is independent for laundry; under Shopping for 2 of 5 aspects specifically; going to and from stores and paying for purchases whereas he is independent in reading prices and labels, making appropriate choices and paying for purchases; and under Meals for all aspects; meal planning, food preparation, cooking and safe storage of food. Added is that roommates assist with tasks as needed.

- In his Notice of Appeal, the appellant wrote that his roommate cooks, shops, get his prescriptions, cleans and basically takes care of him.
- On appeal, the appellant indicated his roommate grocery shops for him, picks up his paperwork, cleans the house and walks his dog. The appellant states that he can't shower without crouching or sitting to avoid blacking out and that he doesn't have the energy to do anything for himself.

Help Required with DLA

- In the PR, it is noted that the appellant requires nutrition whereas in the AR it is noted that he requires subsidized housing, some form of case management, some form of community involvement for emotional support and that he may need a walker for outdoor use when ill.
- In the PR the prescribed professional indicated the appellant does not require aids or prostheses for his impairment, and in the AR, the prescribed professional indicated that appellant does not have an assistance animal.

PART F – Reasons for Panel Decision

The issue under 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 authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

(e) physical therapist,

(f) social worker,

(g) chiropractor, or
(h) nurse practitioner.

Severe Physical Impairment

The appellant's position is that his diabetes and gastroparesis are so severe that he wakes up almost every morning throwing up which causes pain and weakness that continues throughout the day. The appellant states that his neuropathy causes random pain daily as well as lack of mobility which combined keeps him bedridden.

The ministry's position, as set out in its reconsideration decision, is that it is difficult to develop a clear and coherent picture of the appellant's physical and mobility abilities as the physician reported that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided and can lift 15 to 35 pounds and the assessor noted that the appellant is independent with respect to walking indoors and standing, but that he needs periodic assistance with walking outdoors, climbing stairs, lifting, and carrying/holding, taking 3 to 4 times longer than normal. The ministry concludes that the evidence does not establish that the appellant has a severe physical impairment.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. Accordingly, 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 determination of severity of impairment is at the discretion of the minister – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, the professional evidence has to be weighed and assessed like any other evidence.

In the appellant's case, the physician has confirmed the diagnosis as diabetes, diabetic neuropathy, chronic sinusitis, esophagitis, gastroparesis, diarrhea and dental caries. Under Functional Skills, the physician indicated that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 15 to 35 pounds, and has no limitation to remain seated. The PR indicated the appellant is continuously restricted with respect to 1 DLA: Daily shopping and periodically restricted with Mobility outside the home due to fatigue and vomiting. The assessor noted under Mobility and Physical Ability that the appellant is independent with respect to walking indoors and standing, but that he needs periodic assistance with walking outdoors, climbing stairs, lifting, and carrying/holding due to fatigue and reduced strength, taking 3 to 4 times longer than normal. The appellant indicated that his neuropathy causes random pain and occasional lack of mobility which when combined leaves him bed ridden.

The panel finds that the appellant's diagnosis with diabetes, diabetic neuropathy, chronic sinusitis, esophagitis, gastroparesis and diarrhea reflect internal medical problems and his ability to function is limited by related symptoms; unable to stand for longer than 4 hours, is light headed, frequently weak and fatigued, vomits daily, and has irregular diarrhea and decreased appetite. However this information does not provide a clear understanding of how the symptoms restrict the appellant's ability to function independently, effectively, appropriately or for a reasonable duration. The information provided by the physician respecting physical Functional Skills and the appellant's ability to manage DLA as well as assessor's description of the appellant's Mobility and Physical Ability are not reflective of a severe impairment of daily functioning.

Based on the evidence, the panel finds that the ministry reasonably determined that the information provided did not establish a severe physical impairment.

Severe Mental Impairment

The appellant's position is that he needs to live with someone in case of seizures yet reports isolative behaviors due to his physical illness and indicates that feeling like death everyday doesn't help him mentally.

The ministry position, as explained in its reconsideration decision, is that it is difficult to develop a clear and coherent picture of the appellant's cognitive and emotional functioning as the physician indicates that the appellant does not have any deficits with cognitive and emotional functions while the assessor reports a major impact to bodily functions, moderate impacts to consciousness, emotion, attention/concentration, motivation and other emotional and mental problems and minimal impacts to executive and memory. The ministry concludes that the evidence does not establish that the appellant has a severe mental impairment.

Panel Decision

The physician has not reported that the appellant suffers from a mental health condition; that he has any significant deficits with Cognitive and Emotional Function or that he has difficulties with communication. In terms of the Cognitive and Emotional Functioning, the assessor commented that; the appellant reports difficulty accomplishing daily living activities when feeling sick, reports isolative behaviors due to physical illness, avoids close relationships, and concentration, follow-up, memory and mood significantly affect his emotions. Under Social Functioning, the appellant was described as requiring periodic support to be able to develop and maintain relationships and with being able to deal appropriately with unexpected demands due to isolating himself when feeling physically unwell and as having marginal functioning with both his immediate social network and extended social networks.

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).

In the AR, it was indicated that the appellant is independent with respect to making decisions about managing his finances, managing his medications, making appropriate social decisions, interacting appropriately with others and being able to secure assistance from others. Considering the evidence as a whole, the panel finds that the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his roommate cooks, grocery shops, get his prescriptions, cleans the house, picks up his paperwork, walks his dog and basically takes care of him. The appellant states that he can't shower without crouching or sitting to avoid blacking out and that he doesn't have the energy to do anything for himself.

The ministry's position, as set out in the reconsideration decision, is that the appellant does not have a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform the prescribed daily living activities continuously or periodically for extended periods.

Panel Decision

The evidence provided in the PR indicated the appellant is continuously restricted with respect to 1 DLA: daily shopping and periodically restricted with mobility outside the home due to fatigue and vomiting. The social worker indicated that the appellant independently manages all aspects of 4 of the 7 prescribed DLA; Personal

Care, Pay Rent and Bills, Medications and Transportation. The assessor also indicated that the appellant needs periodic assistance from another person under Basic Housekeeping; for 1 of 2 aspects specifically basic housekeeping whereas he is independent for laundry; under Shopping for 2 of 5 aspects specifically; going to and from stores and paying for purchases whereas he is independent in reading prices and labels, making appropriate choices and paying for purchases; and under Meals for all aspects; meal planning, food preparation, cooking and safe storage of food. The PR indicates that the appellant is not restricted for meal preparation while the AR indicates that the appellant requires help in all aspects under meals. This inconsistency is noted by the panel but the panel also recognizes that the physician reports that the appellant requires assistance with nutrition and that appellant's diabetic control is worsened by poor diet.

While, the social worker further reports that roommates assist with tasks as needed, the appellant specifically indicated his roommate grocery shops for him, picks up his paperwork, cleans the house and walks his dog. The appellant also states that he can't shower without crouching or sitting to avoid blacking out and that he doesn't have the energy to do anything for himself. However, there is no evidence before the panel from a prescribed professional to substantiate the extent of such restrictions or dependence on his roommate as described by the appellant.

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. This doesn't mean that other evidence – such as that from the appellant - shouldn't be factored in as required to provide clarification of the professional evidence, 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 prescribed professionals have supplied little in the way of narrative to provide detail of the degree of restriction to DLA.

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. There is also a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. In circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The onus is on the appellant to prove on the balance of probabilities that he satisfies the legislative criteria with respect to direct and severe restrictions to his ability to manage his DLA independently. In the panel's view, while the evidence indicates that the appellant has some difficulty with his DLA, it does not establish that in the opinion of a prescribed professional his impairments directly and significantly restrict his ability to manage his DLA either continuously or periodically for extended periods. Accordingly, the panel finds that the ministry reasonably found that this legislative criterion is not satisfied.

Help with DLA

The appellant's position is that he doesn't have the energy to do anything for himself.

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

Findings that a severe impairment directly and significantly restricts a person's ability to manage his DLA either

continuously or periodically for an extended period are a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA.

In the PR, it is noted that the appellant requires nutrition whereas in the AR it is noted that he requires subsidized housing, some form of case management, some form of community involvement for emotional support and that he may need a walker for outdoor use when ill. Also in the PR, the prescribed professional indicated the appellant does not require aids or prostheses for his impairment, and in the AR, the prescribed professional indicated that appellant does not have an assistance animal. Therefore, the panel finds that the ministry reasonably concluded that since it has not been established that the appellant's DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by the legislation.

Conclusion

The panel acknowledges that the appellant's medical conditions affect his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonably supported by the evidence. The panel therefore confirms the ministry's decision.