

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of December 20, 2013, which found that the appellant did not meet four 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. However, the ministry was not satisfied that:

- in the opinion of a medical practitioner, the appellant’s impairment is likely to continue for at least 2 years;
- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (“EAPWDA”), section 2
Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

PART E – Summary of Facts

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

- The appellant's PWD application form consisting of the appellant's self-report [dated May 30, 2013], a physician's report ("PR") signed by the appellant's general medical practitioner ("GP") of 13 years [dated July 15, 2013], and an assessor's report ("AR") signed by an occupational therapist ("OT") who had known the appellant for approximately 1 month at the time the AR was completed [dated July 4, 2013].
- A progress note from the OT dated July 17, 2013.
- A letter from the appellant's clinical neuropsychologist ("CNP") dated July 23, 2013.
- An assessment of the appellant by the CNP dated November 21, 2013.
- A letter from the OT dated November 26, 2013.

Admissibility of New Information

At the appeal hearing the appellant, through his advocate, submitted the following documents for consideration by the panel:

1. A printout of an e-mail from the appellant's GP, dated January 27, 2014.
2. A letter from the CNP dated January 23, 2014.
3. A report from the OT seeking to update the information she had provided in the AR.

The ministry was invited to make submissions of the admissibility of these documents. The ministry took the position that the above-noted documents provide new information that was not before the ministry at the time of reconsideration.

The panel accepted document 1 as providing clarification of the GP's opinion with respect to the expected duration of the appellant's impairment. Document 2 provides clarification of a previous statement made by the CNP which had been before the ministry, and document 3 updates the OT's assessment of the appellant's current limitations. The panel admitted all 3 documents as information 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*.

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.

Duration of Impairment

- In the PR the GP responded "No" to the question "Is the impairment likely to continue for two years or more from today?" He then commented "unknown".
- In his e-mail of January 27, 2014 the GP wrote "Regarding [the appellant's] aneurysm of March 2013, it is disappointing that he has not recovered as expected...it is clear that he is currently unemployable and is unlikely to make many further gains."

Physical Impairment

- In the PR the GP diagnosed the appellant with "subarachnoid bleed from ruptured cerebral aneurysm." He commented "successful surgery and BP control".
- In terms of functional skills, the GP indicated the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ stairs unaided, and has no limitations with respect to lifting or remaining seated.
- In the AR the OT noted the appellant independently manages walking indoors and outdoors, climbing stairs, and standing. She noted he needs periodic assistance lifting/carrying/holding noting "weights he can carry are limited before he experiences symptoms" of blurred vision, headaches, and a tingling/numbness in his scalp, and that "his questionable insight has caused him to overdo it several times to date."
- In his SR, the appellant wrote that if he over exerts he experiences headaches, blurry vision, tingling in the skull, pressure in his eyes and skull, and light headedness. He noted that because of his brain injury he was not able to work or to drive.
- In the July 17, 2013 progress note the OT described the appellant as experiencing increased blood pressure and feeling generally unwell after minimal exertion.
- In his e-mail of January 27, 2014 the GP wrote "Physically, [the appellant] is doing well."
- In her letter of November 26, 2013 the OT noted that the appellant is currently using weights of up to 30 pounds for upper body exercises, but stated that his physical performance in rehab "...is in no way comparable to the level of exertion required to resume work."
- In his oral testimony, the appellant said that he used to walk for up to an hour a day, but that lately he is not active at all.

Mental Impairment

- In the PR the GP made no diagnosis of a mental impairment, but noted that the appellant repeatedly reported "forgetfulness, poor concentration". The GP also noted "ongoing subtle cognitive impairment".
- The GP indicated the appellant has no difficulties with communication, but reported significant deficits with cognitive and emotional function in the areas of consciousness, executive, memory, and attention/sustained concentration.
- In the AR the OT noted the appellant has impaired short term memory, that he experiences overstimulation and has difficulty planning and problem solving. She noted that his ability to communicate is good or satisfactory in all respects.
- The OT reported the appellant as experiencing moderate impacts in 7 of 14 categories of cognitive and emotional functioning and minimal or no impacts in the remaining categories. She commented that the appellant reports significant sleep disturbance. She observed him to have anxiety related to his injury, and "slowed speed of processing, moderately to severely impaired verbal learning and perseveration."
- The OT noted "[The appellant] is experiencing cognitive changes...that impact his day to day

function...he would not currently be in a position to return to work given the nature of his work and the need to manage his small business. Anxiety and overstimulation are significant, particularly when [the appellant] faces a more complex task.”

- In his SR the appellant noted symptoms of forgetfulness, confusion, and difficulty sleeping. He noted that he'd missed his medication "a few times", and that he'd forgotten about a small claims conference date.
- In her letter of November 26, 2013 the OT wrote that "It would be foolhardy for [the appellant] to attempt to manage the details of his previous work/business at this time given the nature and significance of his deficits."
- In his e-mail of January 27, 2014 the GP wrote that "[The appellant] gets easily overwhelmed with even slightly stressful situations, and often becomes quite non functional...at these points he requires periodic assistance to redirect negative thoughts, to help him focus, etc. ... These events occur at least once or twice a week, but are somewhat unpredictable. This is likely to persist into the future."
- In his assessment of November 21, 2013 the CNP noted the appellant appeared "well motivated...alert and oriented to person, place and time. Simple attention was normal...Visual learning and memory were severely impaired...Basic problem solving and reasoning were within normal limits. More complex problem solving/reasoning was moderately impaired..."
- In her report of January 23, 2014, the OT indicated that the impacts the appellant experiences in virtually every area of cognitive and emotional function had worsened since July 2013 when she completed the AR. She reported he experiences major or moderate to major impacts in 8 categories of cognitive and emotional function.
- In response to questions from the panel, the appellant said that a) He believes the OT's January 23, 2014 report is a more accurate reflection of his condition. He said that his ability to manage his medications is "a little bit better now" since his medications come in a blister pack and it is easier for him to keep track. Otherwise, he said he would "have no idea." b) He does his own cooking and doesn't get any help with meal planning. He said that he was getting weekly assistance from a dietician regarding his diabetes but that he hasn't seen her in about a month. c) He does his own shopping. He used to walk to the stores but now he's driving his own vehicle again. d) He pays his rent and manages his bank account. About 3 months ago he made a mistake and bounced a cheque.

DLA

- In the PR the GP indicated the appellant is not restricted in his ability to perform the DLA of *personal self-care, meal preparation, basic housework, daily shopping, moving about indoors or outdoors, and use of transportation*. He indicated the appellant requires periodic assistance with *management of medications*, and continuous assistance with *management of finances*. He explained "periodic" as meaning "periodic forgetfulness", and commented "lifelong difficulty management of \$". With respect to *social functioning*, the GP wrote "worse social function since brain surgery."
- In the AR the OT reported the appellant independently manages all aspects of the DLA of *personal self-care, basic housekeeping, meal preparation, and management of medications* (commenting "has missed occasionally").
- With respect to *daily shopping* the OT noted the appellant requires periodic assistance going to and from the stores because he wasn't currently driving, but that otherwise he managed independently though taking longer than typical with some aspects.
- With respect to *use of transportation* the OT noted the appellant is independent but there is no

- public transportation available in his community and that he has difficulty using the schedule.
- The OT indicated the appellant requires periodic assistance with *manage personal finances* (pay rent and bills), noting that “takes longer than previously...guidance is needed...finances of small business are more than he can handle.”
 - Regarding *social functioning*, the OT noted the appellant is independent in all respects except for needing period support to deal appropriately with unexpected demands. She reported him as being good functioning with his immediate social network and marginal functioning with extended social networks.
 - In her letter of November 26, 2013 the OT wrote that “Though [the appellant] is ambulatory and able to complete his self-care tasks, he requires regular assistance and guidance from the team of clinicians involved in his rehabilitation in order to make more complex decision (*sic*) and manage his affairs.”
 - In his letter of July 23, 2013 the CNP noted “it was recommended [the appellant] have support in his home to assist...with day-to-day management...It was clearly recommended that the patient have assistance, guidance, and supervision, if he was to participate in tasks involving finances, more complex decisions, etc.”
 - In his assessment of November 21, 2013 the CNP indicated “The appellant is now able to live independently and does not have any supports in the home.”
 - In his letter of January 23, 2014 the CNP explained that the above-noted statement about the appellant’s independence came from the clinical interview, but that “...after the neuropsychological evaluation, it became strikingly evident that the nature and severity of neuropsychological dysfunction argues for the patient to have supports...with managing [DLA] that will be challenging due to cognitive and emotional issues stemming from his brain injury...While he lives on his own, he is definitely compromised, and increased support will undoubtedly facilitate his ability to have a higher quality of life, and as well, reduce the risk of deterioration.”
 - In her report of January 23, 2014 the OT indicated that the appellant's ability to manage four DLA is worse than had previously been reported – *meal preparation, management of personal finances, management of medications, and social functioning*. With respect to *meal preparation*, the OT indicated that the appellant now needs periodic assistance to plan for a diabetic diet since he does not have the motivation to do so. Regarding *management of personal finances*, the OT wrote that the appellant has significant financial issues to be sorted out, and that he has made mistakes with rent and bill payments. She noted his ability to manage financial concerns is a daily issue and that he needs continuous help from his rehab team and “other professionals”. Regarding *management of medications*, she indicated the appellant requires periodic to continuous assistance. Regarding *social functioning*, the OT reported the appellant requires periodic to continuous support in all aspects.

Help

- In response to a question in the PR regarding the assistance needed by the appellant, the GP commented “needs help with form completion” and “needs help with follow up with [illegible] work.” He noted the appellant requires no prostheses or aids for his impairment.
- In the AR the OT commented that “Guidance is required for more complex [DLA] in order to ensure proper completion and to [decrease] anxiety.” She reported that assistance is provided by friends, health authority professionals, and volunteers (driving). She indicated the appellant uses no assistive devices and does not have an assistance animal.

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

- in the opinion of a medical practitioner, the appellant's impairment is not likely to continue for at least 2 years;
- the evidence does not establish that the appellant has a severe physical or mental impairment;
- the appellant's 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, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal?

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.

Duration of Impairment

The appellant's position is that since the GP commented "unknown" with respect to duration in the PR, his "No" response should be interpreted as a "maybe". He argued that the new information makes it clear the impairment is likely permanent.

The ministry's position is that in the information before the ministry at the time of reconsideration the GP clearly indicated that in his opinion the appellant's impairment was not likely to continue the requisite 2 years.

Panel Decision

In the panel's view, with his comment "unknown", the GP was indicating that while in his opinion the impairment wasn't likely to continue for 2 years, it was not improbable that it could continue for longer. His e-mail of January 27, 2014 makes it clear that the GP is disappointed with the appellant's recovery and that in his opinion the impairment is likely to persist into the future, and that the appellant is not likely to make many further gains. This indicates to the panel that the GP is now of the opinion that the impairment is likely to continue for at least 2 years. The panel acknowledges that the ministry did not have the benefit of this information at the time of reconsideration. However, when considered as a whole, the evidence does not reasonably support the ministry's finding on this criterion.

Severe Physical Impairment

The appellant's position is that the overstimulation he experiences when he engages in physical activity demonstrates a severe physical impairment. He emphasized the OT's evidence with respect to his lightheadedness and the need to lie down after minimal exertion.

The ministry's position, as set out in its reconsideration decision, is that the appellant's functional skills do not 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. The legislation makes it clear that the determination of severity is at the discretion of the minister. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional.

In the panel's view, the evidence regarding the appellant's physical functional skills indicates that the appellant is at the higher end of functional ability, with virtually no limitations to his mobility, and a lifting capacity in the range of 30 pounds. Despite the OT's observations regarding overstimulation and high blood pressure in her progress note of July 17, 2013, the GP noted in the PR that the appellant's blood pressure is controlled. The panel notes the GP's statement in his January 27, 2014 e-mail that "Physically, [the appellant] is doing well." The panel also notes that much of the professional commentary regarding the appellant's physical condition relates to his inability to return to his previous employment. As referenced above, employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the appellant's physical condition does not appear to have translated into significant restrictions in his ability to manage his DLA independently.

Accordingly, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant's position is that even without the new information, the ministry had enough information before it at the time of reconsideration to determine that the appellant has a severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is simply that the information submitted does not establish a severe mental impairment.

Panel Decision

In terms of mental functional skills, the evidence of the GP in the PR and the OT in the AR indicates that the appellant's communications skills are good. The GP noted significant deficits in 4 areas of cognitive and emotional function, but he also described the degree of cognitive impairment as being "subtle". In the AR the OT described these as being at most moderate impacts. In her report of January 23, 2014 the OT now says that these assessments were previously done too early in the appellant's recovery, and that it has become apparent that the ratings require adjustment. Accordingly, she has adjusted virtually all of the impacts upwards in terms of severity. This upwards adjustment does not appear to be supported by the most recent evidence of the GP or the CNP.

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 medications (albeit with the use of bubble-pack technology to help him keep track). He also independently manages the decision-making components of the DLA of *daily shopping* (making appropriate choices), and *meal preparation* (meal planning and food storage). The OT points out that the appellant is not managing his diabetic diet as well as he should. There is no evidence, however, that this shortcoming is of sufficient significance to affect the appellant's health. The GP, the OT, and

the CNP all indicate that the appellant has difficulties with respect to managing his personal finances, but the GP indicated in the PR that the appellant has had "lifelong" difficulty managing his finances. The OT and the CNP also referred to the appellant's "complex" issues related to his former small business finances and legal issues arising from his previous business. The appellant's evidence on appeal was that he manages his own bank account and pays his own rent and bills. In the panel's view, the evidence indicates that while the appellant does experience difficulties in managing his budget, and gets advice with respect to the more complex aspects of his finances from others, he substantially manages his own personal finances. In the panel's view, the evidence on balance indicates that while the appellant has some restrictions with respect to *decision making*, these restrictions are not significant.

Regarding the appellant's *social functioning*, the GP noted in the PR that the appellant's social functioning was worse than it was before surgery. The OT indicated in the AR that the appellant was functioning well with his immediate social network and marginally with his extended social networks. She now notes in her report of January 23, 2014 that the appellant has been withdrawing socially and that he now needs either continuous or periodic support with all aspects of *social functioning*. In the panel's view, the GP's e-mail on January 27, 2014 indicates that rather than suffering deterioration in his condition overall, the appellant has reached a plateau in his recovery and has not progressed as far as the GP had anticipated. Given the lack of corroborating medical evidence with respect to the appellant's *social functioning*, and the very significant change in the OT's opinion on this issue, the panel has given little weight to the OT's January 23, 2014 opinion on *social functioning*.

Considering the evidence as a whole, the panel concludes that while the appellant clearly does experience impacts with respect to his mental health, the ministry reasonably determined that it does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his impairments cause significant restrictions to his ability to manage his DLA. He argued that he is significantly restricted in terms of *managing medications, managing personal finances, and social functioning*.

The ministry's position (as set out in its reconsideration decision) is that the evidence shows that the appellant manages the majority of his DLA independently, and that there is not enough evidence to establish that his impairment directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

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. The direct restriction must also be significant.

The evidence is consistent that the appellant's physical condition does not restrict his ability to perform DLA. In the AR the OT indicated that the appellant's *daily shopping* is limited by the amount he can carry. However, now that the appellant is driving his own vehicle that should not be a

significant restriction.

The DLA of *decision making* and *social functioning* were discussed above and found not to be significantly restricted. The DLA of *managing medications* also does not appear to be significantly restricted, since the appellant is managing on his own with the help of bubble pack technology to keep him on track.

Regarding the remaining DLA of *managing personal finances*, the evidence indicates that while the appellant relies on counselling from professionals with respect to legal issues and the "significant financial issues" referenced by the OT, the appellant manages his own bank account and pays his own bills. It is not necessarily a sign of a significant restriction for a person to have to rely on outside assistance in dealing with "significant financial issues". Accordingly, the panel concludes that he is not significantly restricted in this DLA.

In the panel's view, the evidence does not present a compelling picture of an individual whose ability to manage his DLA is significantly restricted as contemplated by the legislative scheme. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage his DLA independently is not significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he relies on help from friends, volunteers, and his rehab team and other professionals to perform various 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

The panel notes that there may be situations in which a person may "require" help but not be receiving it. In the panel's view the word "require" indicates a degree of necessity so that it is something that a person cannot reasonably do without. If the person does not get the help he requires, the DLA goes undone either continuously or periodically for extended periods, or the DLA takes an unreasonably long time to complete.

In the panel's view there is simply insufficient evidence to show that the appellant's DLA go undone for lack of assistance, that it takes him an inordinate amount of time to perform DLA, or that he relies upon "the significant help or supervision of another person" as required by EAPWDA section 2(3)(b)(ii).

The panel finds that there is no evidence to indicate that the appellant uses assistive devices or that he has an assistance animal.

Accordingly, the panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, 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 condition affects his ability to function as he once did. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.