

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 24, 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 reconsideration consisted of copies of the following:

1. The Appellant's Person With Disabilities (PWD) Application which includes the appellant's undated self-report ("SR") as well as the undated physician report ("PR") and undated assessor report ("AR") both prepared by the appellant's general practitioner ("GP") of 6 years;
2. A copy of the PR upon which are handwritten notes made by the Appellant's medical specialist ("the Amended PR") and marked as being received by the ministry on March 10, 2014;
3. A copy of the AR upon which are handwritten notes made by the Appellant's specialist ("the Amended AR") and marked as being received by the ministry on March 10, 2014; and
4. The Appellant's Request for Reconsideration dated March 9, 2014 ("RFR").

Diagnoses

In the PR, the GP has diagnosed the appellant as suffering from kidney stones with date of onset being 2006.

Duration

In the PR, the GP checks the "Yes" box in response to the question as to whether the appellant's impairment is likely to continue for two years or more. No further comment was provided by the GP with respect to the duration of the appellant's impairment although in the Amended PR, the medical specialist comments "longstanding."

Physical Impairment

- In the SR, the appellant states that he has been suffering from kidney stones for 12 years and that he has kidney and bladder infections which render him unable to urinate for up to 24 hours. The appellant further states that his kidney stones cause him to experience back pain which impacts his sleep.
- The appellant continues in the PR stating that his back becomes sore while walking up stairs and that bending over and picking things up is hard as is lying down.
- The appellant states that when his kidneys flare up he has outbreaks of psoriasis which impacts his face, chest, back and left foot. He also notes that when he last passed a kidney stone he suffered damage to his urinary tract.
- In the PR, the GP indicates in the health history, "History of recurrent kidney stones with associated abd. pain increasing over past 6 years. Has had many (10+) lithotripsy procedures. Keeps making new stones."
- In the Amended PR, the medical specialist notes 9 dates from August 26, 2006 through October 16, 2013 with the additional note "ESWL" [Extracorporeal Shock Wave Lithotripsy].
- The GP reports in the PR that the appellant does not require any prostheses or aids for his impairment.
- Functional skills reported in the PR by the GP indicate that the appellant can walk 4+ blocks and climb 5 or more steps unaided, he can lift 2 – 7 kg and remain seated for 1 -2 hours.
- In the Amended PR, the medical specialist reports that the appellant is only able to walk 1-2 blocks, climb 2-5 steps and that he is unable to lift due to "pain from back."
- In the Amended PR, the medical specialist adds additional comments stating "++ significant kidney stone issues and back pain and muscle problems. Recommend physio and chiropractor."
- In the AR, the GP summarizes the appellant's impairments that impact his ability to manage daily living activities as "Recurrent [abdominal] and back pain."
- The GP indicates that the appellant's ability to communicate through speaking, reading, writing and hearing is good in each respect.

- The GP indicates that the appellant is independent walking indoors, walking outdoors, climbing stairs standing, carrying and holding but requires periodic assistance from another person with lifting and adds the comment “Back and [abdominal] pain [ineligible] with exercise.”
- In the Amended AR, the medical specialist adds the comment that the appellant continues to make “++ small stones which cause pain and require treatment.”

Mental Impairment

- In the SR, the appellant states that he has been depressed in the two months prior and that he has become depressed because of his pain.
- In the PR, the GP does not diagnose the appellant with a mental impairment. The GP reported no difficulties with communication but significant deficits with cognitive and emotional function in the area of emotional disturbance commenting further “secondary to chronic back and [abdominal] pain.
- In the AR, the GP assesses the appellant’s speaking, reading, writing and hearing as good and notes minimal impact to daily functioning in the area of emotion and motivation and no impact on the remaining 12 items.

Daily Living Activities (DLA)

- The GP reports in the PR that the appellant has not been prescribed medications or treatments that interfere with his ability to perform his DLA.
- In the AR, the GP indicates that the appellant is independent with all tasks of personal care, basic housekeeping and shopping. The GP further indicates that the appellant is independent with all tasks of paying rent and bills, all tasks in relation to medications and all tasks in relation to transportation.
- The GP notes that while the appellant is independent planning meals and with safe storage of food, he requires periodic assistance from another person with food preparation and cooking and adds the comment that his roommate cooks for him.
- With respect to social functioning, the appellant is assessed as independent in making appropriate social decisions and securing assistance from others but requires periodic support or supervision developing and maintaining relationships (“Moody”), interacting appropriately with others and dealing appropriately with unexpected demands. The appellant is further described by the GP as functioning marginally with his immediate and extended social networks.
- No further comments are provided by the GP or the medical specialist regarding the noted requirement of periodic assistance with any of the DLA.

Need for Help

- In the PR, the GP indicated that the appellant does not require any prostheses or aids for his impairment. In the Amended PR, the medical specialist adds that the appellant requires physiotherapy and chiropractic treatment.
- The GP reported in the AR that the assistance provided by other people for DLA includes friends and comments that the appellant’s roommate cooks for him. The GP noted that the appellant does not use any equipment or devices to help compensate for his impairment.

In the RFR the appellant states that he is unable to work due to the medication he is taking and that he is “legally impaired.” He continues that he cannot lift anything anymore due to his lower back and kidney problems and cannot perform manual labour due to back pain. The appellant states that he has many lithotripsy treatments each year which are very painful and result in his being bedridden for days afterwards. The appellant states that he will be having another treatment for kidney stones and is taking medication for another medical condition.

The ministry relied on the reconsideration decision and did not seek to introduce any additional evidence.

PART F – Reasons for Panel Decision

The issue on the 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?
- That the appellant's DLA's 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, to perform DLA?

The criteria for being designated as a 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.

In his Notice of Appeal dated April 4, 2014, the appellant states that the reconsideration decision is wrong because he will suffer with his impairments for the rest of his life. He says that he lives on pain medication for his back pain and that he is suffering from extreme back and kidney pain and organ damage due to having multiple lithotripsy procedures which have severely affected his back. The appellant states that his pain is "full time" due to kidney problems. Attached to his Notice of Appeal was a copy of the original blank Request for Reconsideration to which the appellant had added further submissions. He states that his kidney stone problems are getting worse and that he was recently hospitalized on two occasions. The appellant notes that he cannot do his own laundry as it is too heavy and he experiences pain in his back and kidneys which has left him unable to work.

In the Reconsideration Decision, the ministry has found that there is evidence to support a finding that the appellant is at least 18 years of age and that he has an impairment that will continue for two years or more.

Severity of mental impairment

The appellant states that he suffers from depression due to the pain he experiences.

The ministry takes the position that the evidence does not establish that the appellant suffers from a severe mental impairment.

Panel Decision

Section 2(2)(a) of the *EAPWDA* is clear that when addressing the issue of a severe mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

The panel finds in the present case that while the appellant states in the SR that he suffers from depression, neither the appellant's GP nor the medical specialist have diagnosed him with depression or any other mental impairment and there is no reference to any medication or treatment being prescribed to the appellant for a mental impairment. The panel further finds that the only significant deficit with cognitive and emotional function noted by the GP in the PR is emotion but that is secondary to the appellant's back and abdominal pain as opposed to a diagnosed mental impairment.

Similarly, in the AR the appellant's GP has noted that for 12 of the 14 listed items of cognitive and emotional functioning, the appellant's mental impairment has no impact and for emotion and motivation there is only minimal impact.

Given the evidence as a whole and the lack of a diagnosis by a medical practitioner that the appellant suffers

from a mental impairment, the panel concludes that the ministry was reasonable in determining that the evidence did not establish that the appellant has a severe mental impairment under section 2(2) of the *EAPWDA*.

Severity of physical impairment

The appellant takes the position that he has a severe physical impairment which includes kidney stones and associated back and abdominal pain.

The ministry takes the position in the Reconsideration Decision that there is not enough evidence to establish that the appellant suffers from a severe physical impairment.

Panel Decision

The appellant argues that his kidney condition and associated back and abdominal pain constitute a severe physical impairment.

The panel notes that the appellant's GP, who has treated the appellant for the previous 6 years and more than 11 times in the 12 months prior to completing the PR, has diagnosed the appellant as suffering from kidney stones over the previous 6 years with associated back and abdominal pain. Functionally, the appellant is described by the GP as being able to walk more than 4 blocks and climb more than 5 steps unaided while lifting between 2 and 7kg and remaining seated for 1-2 hours.

The panel notes that in the Amended PR, the medical specialist, who does not indicate how long or frequently he has treated the appellant and who has not dated his comments, has indicated that the appellant is less functionally capable than described by the GP. The medical specialist has described the appellant as being able to walk only 1-2 blocks and climb 2-5 steps unaided and that he is unable to lift due to back pain. However, the panel notes that the medical specialist has not provided any further comments to explain the inconsistency between the appellant's functional capacity as noted on the Amended PR and the original PR.

In the AR, the GP comments that the appellant is independent in all aspects of mobility and physical ability but requires periodic assistance with lifting. The panel notes that the medical specialist has not commented on this aspect of the appellant's physical ability despite his assertion in the PR that the appellant is unable to lift due to his back pain.

The evidence of the GP describes the appellant as independent in all aspects of DLA which require physical mobility such as personal care, basic housekeeping and shopping while requiring periodic assistance with food preparation and cooking.

In considering the evidence of the GP in light of that provided by the medical specialist, given the unknown nature of the history and frequency of treatment provided by the medical specialist as compared to the GP, the panel places greater weight on the evidence in the PR and AR as opposed to that in the Amended PR and Amended AR.

The panel notes the appellant's argument that his back and abdominal pain have left him unable to continue his previous line of work and unable to work in manual labour jobs. As for the ability to work, the panel finds that the ministry reasonably determined that employability is not a criterion in section 2(2) of the *EAPWDA* nor is it listed among the prescribed daily living activities in section 2 of the *EAPWDR*.

While the panel finds that the evidence establishes that the appellant suffers from kidney stones and associated back, kidney and abdominal pain, the evidence of the appellant's functional abilities as set out in the PR and the AR lead the panel to conclude that the ministry was reasonable in determining that the

evidence did not establish that the appellant has a severe physical impairment under section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

The appellant's position is that he is directly and significantly restricted in his ability to perform DLA.

The ministry's position is that it has not been established by the evidence that the appellant's impairments directly and significantly restrict his ability to perform DLA.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that there must be evidence of a prescribed professional that a person's DLA are directly and significantly restricted by their severe impairment either continuously or periodically for extended periods.

In the AR the GP reports the appellant to be independent in all aspects of personal care, all basic housekeeping activities, all shopping activities, all aspects of paying rent and bills, all medication tasks and all transportation activities. The only DLA that the appellant is described as being other than independent is food preparation and cooking for which the GP describes him as requiring periodic assistance from another person, identified in the AR as his roommate.

The appellant's GP describes his mental impairments, which are not diagnosed in either the PR or the AR, as impacting on the appellants immediate and extended social networks with resulting marginal functioning for both and the GP notes further that the appellant is independent in making appropriate social decisions and securing assistance from others while requiring periodic support or supervision developing and maintaining relationships, interacting appropriately with others and dealing appropriately with unexpected demands.

In the present case, the evidence of a prescribed professional, the appellant's GP, is that the appellant is able to perform the majority of his DLA independently and for those tasks that require periodic assistance, there is insufficient evidence to establish that the assistance is required for extended periods of time. While the appellant's GP provides that he requires periodic support and supervision in three aspects of social functioning, no comments are provided as to the extent of the supervision and the panel notes again that the appellant is not diagnosed by either the GP or medical specialist with a mental impairment.

Based on the evidence, the panel concludes that the ministry was reasonable in finding that the appellant's impairment does not directly and significantly restrict his ability to perform DLA, either continuously or periodically for extended periods under section 2(2)(b) of the *EAPWDA*.

Help with DLA

The appellant's position is that he requires assistance to perform DLA.

The ministry's position as set out in the Reconsideration Decision is that as it has not been established that the appellant's DLA are directly and significantly restricted, it cannot be determined that significant help is required from other persons.

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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the

significant help or supervision of another person, or the services of an assistance animal.

As noted above, the panel has found the ministry's conclusion that the evidence of the prescribed professional does not establish that the appellant requires assistance with his DLA either continuously or periodically for extended periods of time to be reasonable.

The panel therefore finds that as 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 in 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 which determined that the appellant was not eligible for PWD designation was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.