

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of May 28, 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 dated December, 2013 consisting of the appellant's self-report, and a physician's report ("PR") and assessor's report signed by the appellant's physician.
- A reconsideration submission signed by the appellant and the physician on April 25, 2014.

Additional Information Submitted

Prior to the appeal hearing, the appellant submitted the following documents to the offices of the Employment and Assistance Tribunal (the "Tribunal"):

1. A diagnostic imaging report dated March 21, 2013. The report stated that an examination of the appellant's lumbar spine noted no progression of disease since the previous examination in June 2006. It reported degenerative changes in the sacroiliac joint, and noted "No erosive changes or significant osteophytes are however seen."
2. A diagnostic imaging report dated July 17, 2013. The report summary stated "Moderate degenerative disc disease at L5-S1, but no spinal or foraminal stenosis."
3. A note from the appellant's nurse practitioner dated June 11, 2014 stating that "[The appellant] is unable to work in any capacity due to severe depression and chronic back pain caused by moderate/severe osteoarthritis and moderate degenerative disc disease. Improvement is unlikely."
4. A prescription form for pain relief medication for the appellant, dated June 11, 2014.
5. A letter from the ministry, dated May 23, 2014, noting that the appellant had been approved for designation as a PWD.

At the appeal hearing, the appellant submitted the following documents:

6. A letter from the nurse practitioner, dated June 25, 2014.
7. A letter from a case manager of the appellant's regional health authority, dated June 26, 2014.

Diagnoses

- In the PR, the Physician diagnosed the appellant with depression, anxiety, personality-disorder, and chronic back pain – all of which the Physician described as "long standing".
- In the reconsideration submission the Physician commented that "[the appellant] does have generalized osteoarthritis which is disabling as he describes" and "all his conditions are chronic and will gradually get worse over time."

Physical Impairment

- In terms of physical functioning the physician reported in the PR that the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 5+ steps unaided, lift 15 to 35 pounds, and can sit for less than 1 hour.

- In the AR the physician indicated that the appellant independently manages walking indoors and outdoors, climbing stairs, standing, and lifting/carrying/holding. He commented “uses a cane to walk sometimes.”
- In his self-report the appellant wrote that his walking is cut down to about 2 to 3 blocks at a slow pace, and that walking uphill is very difficult. He stated that driving can be painful. The appellant wrote that he can lift 15 to 35 pounds.
- In response to a question from the panel as to the medication prescribed on June 11, 2014, the appellant said that he doesn’t like to take medication and that this is a recent prescription for pain relief. He said he’s been taking it for about a week but “It doesn’t do much.”

Mental Impairment

- With respect to his ability to communicate, the physician reported in the AR that the appellant’s speaking and hearing are good, reading is satisfactory, and writing is poor.
- The physician indicated that the appellant’s mental impairment has major impacts in 2 of 14 categories of cognitive and emotional functioning: emotion and motivation. He noted moderate impacts in the areas of insight/judgment, attention/concentration, executive, and other (learning disability).
- In the reconsideration submission, the appellant wrote that he minimizes his interactions with anyone beyond family members and one good friend, and that he avoids crowds.
- In his letter of June 25, 2014 the nurse practitioner wrote that the appellant has features of an avoidant personality. He stated that the appellant has been medically avoidant throughout his life so that his conditions have remained untreated and have gradually worsened. He summarized by writing “[the appellant] suffers from a moderate-severe mood disorder and personality disorder.”
- In his self-report, the appellant wrote that he has been very depressed for many years, and linked it to his father’s alcoholism.

DLA

- In the PR the physician indicated that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA.
- In the AR the physician reported the appellant independently manages all tasks related to the DLA of *personal self-care, basic housekeeping, and daily shopping* (though noting with respect to paying for purchases that the appellant “needs \$”).
- The physician reported the appellant as independently managing most tasks related to the DLA of *use of transportation*, in that the appellant drives his own vehicle and independently gets in and out of his vehicle, but that he may need help using transit schedules and arranging transportation. He also reported the appellant independently managing most aspects of *managing personal finances*, but that the appellant’s sister pays his rent and bills.
- In the advocate-prepared reconsideration submission, the appellant wrote a number of observations related to his ability to perform DLA. The physician endorsed the document which had a prepared statement to the effect that “I am [the appellant’s] physician. He has asked me to look at the above statement. I have done so. Given what I know of [the appellant’s] condition, I would expect him to have the limitations he describes on a daily basis. I find his description of the limitations he faces on a daily basis to be credible.”
 - In the reconsideration submission, the appellant wrote that:
 - his knees give out on a daily basis;
 - he cannot stand for long periods of time;

- he is basically bed-ridden about ten days out of the month and he regularly uses a cane;
- he has limited strength in his hands and can lift maybe 25 pounds;
- he has to be slow and careful getting dressed, and has to hold onto the walls in the shower to steady himself.
- In his letter of June 25, 2014 the nurse practitioner wrote that he had not been available when the appellant submitted his PWD application, and that the physician who had completed the AR was not as familiar with the appellant as was the nurse practitioner. The nurse practitioner wrote that the appellant had relied on a stipend from his mother for many years, but that when his mother passed away he was left without financial means to get by, as well as being left without the social functioning required to engage with the public or to pursue wage-based employment. He wrote “[The appellant’s] ability to care for himself is very borderline and he requires constant assistance from his sister with tasks of shopping, budgeting, and housekeeping. He needs constant reminding to maintain his personal care.”
- In the letter of June 26, 2014 the regional health authority case manager reported that the appellant has been receiving counselling for depression since November 25, 2013. He wrote “Co-morbid depression and chronic pain are conditions which often act to aggravate and worsen the severity of each. While he reports a desire to work, he is unable to exert himself for more than a few hours before becoming debilitated by severe pain and exhaustion. While his depression in and of itself is possibly not sufficient to prevent work, his combined conditions certainly make him unable to engage in gainful employment at this time.”
- In response to a question from the panel, the appellant said that he lives alone in the family home about 12 kilometres outside of town. The appellant’s sister said that she prepares 99% of his meals because it is easier for him, and that she does the housekeeping.
- In response to a question from the panel as to what help the appellant requires with paying his rent and bills, the appellant and his sister said that the appellant does his own banking in terms of depositing his income assistance cheques. The appellant said that he doesn’t like paying bills. The appellant’s sister said that since he is living in his mother’s former home (now owned by the family) he “has no bills to pay” - his sister pays the hydro bills etc.

Help

- In the PR the physician indicated that the appellant requires no prostheses or aids for his impairment.
- In the AR the physician indicated the appellant uses a cane, and that the appellant does not have an assistance animal. He indicated that assistance is provided to the appellant by “family”.
- In response to a question in the AR as to what help the appellant requires that is not available, the physician wrote “\$ management, [increased] socialization.”

Admissibility of Additional Information

In their oral testimony the appellant and his sister provided additional information regarding his impairment. This information generally provides additional detail with respect to matters raised 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*.

In response to a question from the panel as to why documents 6 and 7 had not been submitted prior

to the hearing, the appellant said that the nurse practitioner and the case manager had not been available earlier. The ministry had no objection to admitting these documents. The panel admitted documents 1 through 7 (except for document 5) as being in support of the information and records that were before the ministry at the time of reconsideration.

With respect to document 5, the ministry stated that it had been generated by clerical error, and had mistakenly been sent to the appellant. The appellant, through his sister, acknowledged that the letter had been an error but wanted the panel to understand the confusion and frustration it had caused. The panel assessed document 5 as going to argument.

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

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 his osteoarthritis and back pain constitute a severe physical impairment, which is exacerbated by his depression. He argued that the physician who had completed the PWD application forms didn't know his limitations as well as the nurse practitioner, and that the nurse practitioner's evidence demonstrated the severity of his impairments.

The ministry's position, as set out in its reconsideration decision, is that the appellant's level of functional skills is more in keeping with a moderate degree of impairment. The ministry argued that no medication or treatment information had been given, and that remedial measures in the form of analgesics would be expected to ameliorate the back and arthritis pain and allow for more physical functionality.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is the resulting restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment 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 are key considerations. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. In making its determination the ministry must 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, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In terms of physical functional skills, the evidence in the PR, and that of the appellant, indicate that the appellant is in the mid-range of functionality. The medical imaging reports tend to support this conclusion as they report moderate degenerative disc disease with "no progression" compared to previous imaging dated June 2006. The panel notes that the appellant has only just started treatment with pain-relief medication and, despite the appellant's observation that "It doesn't do much" there is no medical evidence to that effect.

There are frequent references in the evidence to the impact the appellant's medical conditions have on his ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

The regional health authority case manager expressed the view that the appellant's mental and physical impairments may "aggravate and worsen the severity of each." However, as discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, any 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 clearly has 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's position is that his chronic depression constitutes a severe mental impairment which is exacerbated by chronic pain.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish a severe mental impairment. The ministry argued that DLA that involve the ability to make decisions about daily activities are only somewhat restricted, and that the assessment of mental functioning provided in the reconsideration submission did not differ significantly from that provided in the original application.

Panel Decision

The physician indicated that the appellant's mental impairment has major impacts in 2 of 14 areas of cognitive and emotional function, and moderate impacts in 4 of 14 areas. The remaining areas show minimal or no impact. The panel notes that the appellant's counselling therapy had only started a few days before the physician completed the PWD application forms so there was limited time in which the counselling therapy to have any effect. In his letter of June 25, 2014 the nurse practitioner expressed the view that the appellant's functional disability will deteriorate over time, but neither he nor the regional health authority case manager provided any prognosis for the counselling therapy that the appellant is now undergoing after years of avoidance.

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 personal finances (other than his sister taking care of the finances relating to the family-owned home). Based on the evidence in the AR, he also independently manages the decision-making components of the DLA of *daily shopping* (making appropriate choices) and *social functioning* (making appropriate social decisions).

With respect to the DLA of *social functioning*, there is evidence to demonstrate that the appellant is isolating himself to an extent. However, the evidence of the physician and the appellant indicates that the appellant remains functional (albeit marginally) in respect of his immediate and extended social networks sufficiently to meet his basic needs.

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 mobility issues, pain, and depression, and that he relies on his family for help with DLA.

The ministry's position is that the evidence is insufficient to establish that a severe impairment significantly restricts the appellant's 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. Finally, there is 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. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is 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.

In the AR the physician indicated that the appellant independently manages most tasks related to most of the 10 prescribed DLA. He reported that the appellant requires continuous assistance from his sister with respect to "pay rent and bills", but the oral testimony of the appellant and his sister demonstrated that this assistance is in the form of the sister paying the bills for the family-owned home. The physician also reported that the appellant requires periodic assistance with the DLA of *meal preparation* and that his sister is "helpful at times". This contrasts with the sister's oral evidence in which she stated that she prepares 99% of the appellant's meals because it is "easier" for him. The panel notes that in the reconsideration decision, the appellant provided additional information with respect to many DLA, but did not contradict the physician's observations with respect to *meal preparation* or *management of personal finances*.

The letters of the nurse practitioner and the regional health authority case manager (documents 6 and 7) provide additional detail with respect to the restrictions experienced by the appellant, but that of the case manager in particular views the appellant's employment through the lens of employability rather than DLA.

Considering the evidence as a whole, while it demonstrates that the appellant's impairments do cause some limitations, it 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 almost entirely on his sister and other family to perform the majority of 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

Findings of a severe impairment and significant restrictions in the ability to perform DLA are preconditions to a finding that an appellant requires help with DLA.

For the reasons provided above, 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 which found 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.