

PART C – Decision under Appeal

The decision being appealed is the reconsideration decision of the Ministry of Social Development and Social Innovation (the “Ministry”) dated May 23, 2014 in which the Ministry determined that the Appellant was not eligible for Persons with Disabilities (“PWD”) designation because he did not meet all the requirements for PWD designation in section 2(2) of the *Employment and Assistance for Persons with Disabilities Act*. Based on the information provided, the Ministry was not satisfied that the Appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The Ministry was satisfied that the Appellant has reached 18 years of age and in the opinion of a medical practitioner his impairment is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (“EAPWDA”) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) Section 2.

PART E – Summary of Facts

For its reconsideration decision, the Ministry had the following evidence:

1. Appellant's PWD application consisting of the following three parts:
 - The Appellant's self report ("SR") signed by him on May 27, 2013;
 - A physician's report ("PR") dated December 14, 2013 completed by the Appellant's family physician who indicated that the Appellant had been a patient of his for 10 years and he'd seen the Appellant 11 or more times in the 12 months preceding the report; and
 - An assessor's report ("AR") dated December 14, 2013, also completed by the Appellant's family physician.
2. Appellant's request for reconsideration dated April 7, 2014.
3. A handwritten letter from the Appellant's daughter dated April 6, 2014. In this letter, the daughter writes that she shares a house with her father and her three children and her father has his bedroom on the main level of the house. She writes that she is the person who does all of the house cleaning and cooking. She also does the laundry as her father "has problems going up and down stairs." She writes that her father has a hard time with peeling vegetables "as he complains that his wrists hurt."
4. A 4-page document "Daily Living Activities Checklist" with the Appellant's name on it but no date, showing a series of check marks beside lists of tasks set out under headings for each daily living activity after the words "my disability makes it difficult for me to do the following activities." At the hearing, the Appellant's representative confirmed that an advocate completed this document with the Appellant, based on the Appellant's answers, in preparation for the reconsideration.
5. A 2-page document, Supplemental Medical Opinion, signed by the Appellant's family physician and dated May 15, 2014. The Supplemental Medical Opinion sets out a series of questions and the physician has handwritten his answers on the form.

The Appellant's daughter testified as a witness at the hearing on his behalf, speaking to the information set out in her letter of April 6, 2014. The panel admits her evidence under section 22(4)(b) of the *Employment and Assistance Act* as it is oral testimony in support of information that was before the Ministry when the decision being appealed was made.

The following is a summary of the relevant evidence from the PWD application, as well as the information before the Ministry at reconsideration, and the evidence provided at the hearing.

Diagnoses

In the PR, the Appellant's physician diagnosed the Appellant with low back pain/degenerative disc disease, COPD (chronic obstructive pulmonary disease), ischemic heart disease, "recent AAA [abdominal aortic aneurysm] repair and "limited education/learning disorder?" The physician did not indicate the date of onset of any of the Appellant's medical conditions. The Appellant told the panel that he believes he has a learning disability, caused by being born prematurely, but that he has never

been diagnosed as having a learning disability.

Physical Impairment

In the PR, the physician described the severity of the Appellant's medical conditions and impacts as follows:

- He has had low back pain "for approximately 10 years getting gradually worse." He uses a cane for walking. He has degenerative disc disease at his L3 "[seen] on CT and bilateral SI joint arthritic."
- He has undergone a recent abdominal aortic aneurysm repair – this limits the Appellant's ability to lift or strain.
- The Appellant becomes short of breath walking one block and he has "centrilobular emphysematous changes on CT."

In the functional skills section of the PR, the Appellant's physician indicated that the Appellant can walk unaided 1-2 blocks, climb 5+ stairs unaided, lift 2-7 kg, and can remain seated less than 1 hour. In the AR, the Appellant's physician described the Appellant's impairments as "back pain" and also reported that the Appellant's hearing is satisfactory (hearing aid in right ear), reading and writing are poor and his speaking is good. In the mobility and physical ability section of the AR, the Appellant's physician indicated that the Appellant could independently perform all of the listed activities (walking indoors, walking outdoors, climbing stairs, standing, lifting, carrying and holding) and did not provide any commentary.

Mental Impairment

In the PR, the physician indicated that the Appellant has limited education and "suspected to have a learning disorder." The physician reported significant deficits with cognitive and emotional function in the areas of executive (planning, organizing, sequencing, calculations, judgment), language (oral, auditory, written comprehension or expression) and memory (ability to learn and recall information). In the section of the AR regarding cognitive and emotional functioning, the Appellant's physician indicated a moderate impact in the area of bodily functions. He also indicated both a moderate and a minimal impact in the areas of language, and other neuropsychological problems (e.g. visual/spatial problems, psychomotor problems, learning disabilities etc.), and minimal impact in the areas of attention/concentration, and memory. The other areas listed were checked as no impact. The Appellant's physician wrote, "poor sleep, poor short term memory, chronic memory problems, poor comprehension of language, and "possible learning disability (born premature)." The Appellant's physician does not diagnose the Appellant with a mental impairment or mental health condition.

Severity of Impairments

In the May 15, 2014 Supplemental Medical Opinion, the Appellant's physician has circled the word "no" in response to the question, "In your professional opinion, does [the Appellant] have a severe physical and/or mental impairment?" The Appellant's physician did not provide any commentary to explain his answer. The Appellant's physician also crossed out the word "severe" in the question, "In your professional opinion, as a result of [the Appellant's] severe restrictions, does he require help to perform his [DLA]?" At the hearing, when asked about the physician's response to this question on the Supplemental Medical Opinion, the Appellant said that he felt his impairments had become more

severe in the time since his physician completed the form (5 weeks prior to the hearing).

Daily Living Activities

In the AR, the Appellant's physician reported the following impacts on the Appellant's DLAs:

- Independently manages all tasks of the DLAs of personal care, meals, and medications.
- For the DLA of basic housekeeping – can independently perform the task of laundry, but requires periodic assistance with the task of basic housekeeping (“unable to sweep or mop”).
- For the DLA of shopping – can independently perform the tasks of going to and from stores and paying for purchases, but requires continuous assistance for the tasks of reading prices and labels, making appropriate choices and carrying purchases home. The physician did not provide any commentary.
- For the DLA of pay rent and bills – can independently perform the tasks of banking and pay rent and bills, but requires periodic assistance with the task of budgeting (“has not done budgeting”).
- For the DLA of transportation – can independently perform the task of getting in and out of a vehicle, but requires continuous assistance with the tasks of using public transit and using transit schedules and arranging transportation (“doesn't understand schedules”).
- For the DLA of social functioning – is independent for appropriate social decisions, able to develop and maintain relationships, and able to secure assistance from others, but requires periodic support to interact appropriately with others and able to deal appropriately with unexpected demands (“feels uncomfortable in social situations. Doesn't know how to interact – has a ‘short fuse’”).
- Has marginal functioning with his immediate and extended social networks, but no commentary was provided.

In the May 15, 2014 Supplemental Medical Opinion, the Appellant's physician was asked “In your professional opinion, is [the Appellant's] ability to perform his [DLA] considered severely restricted due to his impairments? If so, please check the box beside the listed DLA if there is a restriction beyond that of a typical healthy person” and provide details. The Appellant's physician did not check any of the boxes, however, he did write comments. Beside the DLA prepare own meals, the physician wrote, “Yes he can.” Beside the DLA of shop for personal needs, the physician wrote, “he gets back pain before he finishes shopping & has to go out to car.” Beside the DLA of use of public or personal transportation facilities, the physician wrote, “gets lost.” Beside the DLA of perform housework to maintain acceptable sanitary conditions, the physician wrote, “He can do a little housework but others do most.” The physician wrote, “he needs a cane [and his right] leg will give out” beside the DLA of move about indoors and outdoors. Beside the DLA of manage personal medication, the physician wrote, “he forgets to take it.” The Appellant's physician wrote the word “yes” beside the DLAs of “make decisions about personal activities, care, or finances” and “relate to, communicate or interact with others” without any commentary or explanation.

In the Supplemental Medical Opinion, the Appellant's physician was asked, “In your professional opinion, is [the Appellant's] ability to perform these daily living activities, directly and significantly restricted?” The physician wrote, “Directly yes, Significantly as per DB2 – no.” At the hearing, the Ministry representative explained that “DB2” was the Ministry's previous designation for what is now PWD. The Appellant's physician circled the words “periodically restricted” in response to the

question, "if the [DLA] listed on the previous page are considered restricted, is [the Appellant's] ability to perform these DLAs restricted continuously or periodically for extended periods?" The physician wrote, "Difficult to say" as his comment on the frequency and duration of the periodic restrictions.

At the hearing, the Appellant and his representative referred the panel to the information set out in the Daily Living Activities Checklist. The Appellant indicated that his disability makes it difficult for him to complete the following activities for each listed DLA, as set out in the document:

Personal Care:

- getting in and out of the bath tub; applying lotions and creams; remembering or having the energy/motivation to bathe everyday.

Preparing Meals:

- peeling fruit or vegetables; standing at the sink and stove; using a can opener; opening jars; understanding recipes; understanding labels; knowing when food has gone bad.

Taking medications:

- Remembering to take all my medications when I am supposed to.

Housework

- Cleaning the bathtub; cleaning the toilet; washing dishes; vacuuming or sweeping floors; washing floors; dusting; carrying laundry; doing laundry; cleaning windows

Shopping

- Walking around stores; carrying groceries to the bus or car; carrying groceries into the house; being able to wait in line without becoming frustrated or angry.

Moving around inside the home

- Going up or down stairs or ramps; getting into bed and out of bed; bending to pick up things from the floor; kneeling and getting up from the kneeling position.

Moving around outside the home

- Walking very far; going up or down stairs or ramps

Using transportation

- Standing at the bus stop; sitting on the bus/Skytrain; going up or down stairs or ramps; understanding bus schedules.

Managing money and paying bills

- Understanding bills; budgeting for groceries or other things I need; stopping myself from buying things I do not need

Eating

- Remembering or being motivated to eat regular meals; eating healthy foods. The Appellant has written, "I don't have dentures, makes chewing difficult."

Communication

- Being able to make myself understood; understanding what people say to me; understanding most things in writing; hearing what people say to me face to face; hearing what people say to me on the telephone

Mental and emotional skills

- Coping with stress, planning ahead, attending to the most important things first; remembering information; completing tasks

Social skills

- Interacting with friends, family, partner; interacting with strangers in public; developing and maintaining relationships; being able to ask for help when I need it; being able to deal with unexpected situations

Help with Daily Living Activities

The Appellant's physician noted in both the PR and the AR that the Appellant uses a cane to walk and that he lives with family, but did not provide any commentary. In the May 15, 2014 Supplemental Medical Opinion, the Appellant's physician responded "yes" to the question, "In your professional opinion, as a result of [the Appellant's] severe [which the physician stroked out] restrictions, does he require help to perform his [DLA]?" and added, "needs help to get out of bath tub and other activities as required." The physician wrote "difficult to say" regarding the number of times per week the Appellant required this assistance.

In her letter of April 6, 2014 and in her testimony at the hearing, the Appellant's daughter indicated that she does all of the housework and the meal preparation for the family (her father's wrists hurt so he cannot peel vegetables, for example), including her father's laundry as he has difficulty going up and down the stairs. She also told the panel that she reminds her father to take showers and she reminds him to take his medication. As it is hard for her father to get in and out of the bathtub, the Appellant's daughter testified she will help him and will get help from a male friend or relative as well. She also testified that she does the family's shopping. The Appellant's daughter said that when her father was not living with her, she would regularly go to his home to assist him.

In the Daily Living Activities Checklist, the appellant has indicated that he needs the following items: eyeglasses, hearing aids and a cane.

Ministry's Position

For this appeal, the Ministry relied on and reaffirmed its reconsideration decision.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant was not eligible for PWD designation because he did not meet all of the requirements in section 2(2) of the EAPWDA, and specifically, that the Appellant does not have a severe mental or physical impairment that in the opinion of a prescribed professional (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, (ii) as a result of those restrictions he requires help to perform those activities.

The eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:
2 (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.

The “daily living activities” referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

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.

Panel’s decision

The panel will now consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severe Physical Impairment

The Appellant submitted that he suffers from severe physical impairments which significantly impair his ability to manage his daily tasks, namely: his crushed disc and resulting back pain for which he uses a cane to walk and which prohibits him from standing or sitting for extended periods; his heart condition which prevents him from walking very far, driving too long, or getting up from a laying position and in and out of the bathtub (this is also hindered by his back pain); his emphysema, which

causes him trouble breathing, particularly in hot weather; and his recent surgery for abdominal aortic aneurysm, which limits his ability to lift or strain.

The Ministry, in its reconsideration decision, considered the information in the Appellant's PWD application, the Daily Living Activities Checklist and in the physician's May 15, 2014 Supplemental Medical Opinion. It determined that the Appellant is independently able to manage all mobility and physical activities, based on the information provided by the Appellant's physician in the PR and AR. It concluded that the information provided did not establish a severe impairment of the Appellant's physical functioning, rather that it speaks to a moderate level of impairment.

The Panel's Findings

The diagnosis of a medical condition is not in and of itself evidence of the severity of impairment. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how and the extent to which a medical condition restricts daily functioning must be considered. This includes the evidence from the Appellant and from a prescribed professional regarding the nature of the impairment and its impact on the Appellant's ability to manage the daily living activities listed in section 2(1) of the EAPWDR.

In this case, information about the Appellant's circumstances was provided by the Appellant's family physician (the prescribed professional), who has known the Appellant for 10 years, in the PR and AR completed December 14, 2013 and in the recent Supplemental Medical Opinion of May 15, 2014. While the Appellant's physician has noted some restriction to the Appellant's functional skills in the PR (can walk unaided 1-2 blocks, lift 2-7 kg, sit less than an hour), in the AR, the physician indicated that the Appellant could perform all areas of mobility and physical ability. As well, the panel notes that the Appellant's physician expressly circled the word "no" in answer to the question whether, in his professional opinion, the Appellant has a severe physical and/or mental impairment as requested in the Supplemental Medical Opinion of May 15, 2014. The physician also crossed out the word "severe" in the question whether, as a result of the Appellant's "severe restrictions, does he require help to perform his DLA" on the same document. The information provided by the Appellant's physician in the Supplemental Medical Opinion of May 15, 2014 is consistent with the information provided by the physician in the PR and AR completed in December 2013, which speaks to its reliability. Although the Appellant told the panel that his conditions have become more severe since the May 15, 2014 Supplemental Medical Opinion, there was no evidence of this from the Appellant's physician.

Therefore, when the professional assessment of the Appellant's physician is considered, especially the Supplemental Medical Opinion of May 15, 2014, the panel finds that it was reasonable for the Ministry to determine that the information provided did not establish that the Appellant has a severe physical impairment.

Severe Mental Impairment

The Appellant submitted that he has deficits to his cognitive and emotional functioning; that is, poor sleep, poor short-term memory, chronic memory problems, poor comprehension of language and a possible learning disability because he was born prematurely. The Appellant's physician in the PR indicated that the Appellant has a limited education and a "suspected" learning disability. In the PR, the Appellant's physician indicated that the Appellant has deficits with cognitive and emotional

function in the areas of executive, language and memory. The physician indicated in the AR that the Appellant's mental impairment has a moderate impact in the area of bodily functions, a minimal to moderate impact in areas of language and other neuropsychological problems, and a minimal impact on memory and attention/concentration. The Appellant is noted as feeling uncomfortable in social situations and doesn't know how to interact with others (marginal functioning in his immediate and extended social networks) and has a "short fuse."

The Ministry found that the information provided by the Appellant's physician did not establish a severe mental impairment. The Ministry noted the information provided in the PR and AR (as recited above) and found that the information provided in the PWD application demonstrates that the Appellant has some cognitive and emotional deficits resulting in moderate to minimal impacts to his daily functioning, but the assessment does not establish the presence of a severe mental impairment. The Ministry also noted that the Appellant's physician had circled the word "no" in response to the question whether the Appellant has, in the physician's professional opinion, a severe mental or physical impairment in the May 15, 2014 Supplemental Medical Opinion.

The Panel's Findings

The panel finds that there is no diagnosis of a mental health condition or mental impairment, only the physician's note in the PR that the Appellant has a "limited education/suspected learning disability." In the AR, the Appellant's physician has indicated a minimal to moderate impact on those areas related to bodily function, attention/concentration, memory, language and other neuropsychological problems. The physician's commentary about the impact on these areas is, "poor sleep, poor short term memory, chronic memory problems, poor comprehension of language and possible learning disability (born premature)." Further, in the May 15, 2014 Supplemental Medical Opinion, the Appellant's physician expressly circled the word "no" in responding to the question whether the Appellant has a severe mental or physical impairment and crossed out the word "severe" in responding to the question whether as a result of the Appellant's "severe impairment, he requires help to perform" his DLA. Based on all of this information from the Appellant's physician, the panel finds that the Ministry reasonably determined that the evidence does not establish a severe mental impairment.

Restrictions to Daily Living Activities

The Appellant submitted that his ability to manage daily living activities is significantly restricted, pointing to the information provided by him in the Daily Living Activities Checklist. The Appellant's physician (the prescribed professional) reported in the AR that he is periodically restricted with the tasks of basic housekeeping ("unable to sweep or mop") and budgeting ("has not done budgeting"). The Appellant's physician also reported in the AR that the Appellant is continuously restricted with the tasks of reading prices and labels, making appropriate choices and carrying purchases home (but did not provide any commentary) and the tasks of using public transit and using transit schedules and arranging transportation ("doesn't understand schedules"). In the May 15, 2014 Supplemental Medical Opinion, the Appellant's physician indicated that the Appellant can prepare his own meals, gets back pain before he finishes shopping and has to go out to a car, gets lost using public or personal transportation, can perform a little housework but others do most, needs a cane and his right leg will give out when moving about indoors and outdoors and forgets to take his medication. The physician wrote that the Appellant's ability to perform these DLAs is directly, but not significantly

restricted, and that this restriction is periodic but that it is “difficult to say” the frequency and duration of the restriction.

The Ministry determined in its reconsideration decision that the information provided by the Appellant’s physician does not establish that a severe impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods. The Ministry considered the information provided by the Appellant’s daughter and found that it was not clear whether the Appellant is unable to perform any aspects of basic housekeeping or whether these duties are principally performed by his daughter “as part of a common division of labour” among family members living together. The Ministry also found that the information provided in the Supplemental Medical Opinion does not establish that due to a severe impairment, the Appellant’s overall ability to manage his DLA is directly and significantly restricted either continuously or periodically for extended periods.

The Panel’s Findings

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant’s severe impairment directly and significantly restricts his daily living activities, continuously or periodically for extended periods. In this case, the Appellant’s physician is the prescribed professional. Daily living activities are defined in section 2(1) of the EAPWDR and are also listed in the PR and in the AR.

In the AR completed in December 2013, the Appellant’s physician reported that the Appellant could independently perform the majority of the listed tasks of the DLAs. In the AR, the physician reported that the Appellant was periodically restricted with the tasks of basic housekeeping because he’s “unable to sweep and mop” and budgeting because he “has not done budgeting.” In the AR, the physician reported that the Appellant was continuously restricted with the tasks of reading prices and labels, making appropriate choices, carrying purchases home when shopping and using public transit, transit schedules (he doesn’t understand schedules) and arranging transportation. In the Supplemental Medical Opinion completed May 15, 2014, the Appellant’s physician indicated that the Appellant’s ability to perform certain DLA (shop for personal needs, use public transit, perform housework, move about indoors and outdoors, and manage personal medications) was periodically restricted but that it was “difficult to say” the frequency and duration of the restrictions. The physician’s comments, such as “he can do a little housework but others do most” and “gets lost” when using public transit clarify the nature of the Appellant’s restrictions in the performance of these DLA. As well, the Appellant’s physician has indicated in the May 2014 Supplemental Medical Opinion that the Appellant’s impairments do not “significantly” restrict his ability to perform the DLAs.

The Panel finds that when reading together the May 15, 2014 Supplemental Medical Opinion information with the information provided by the Appellant’s physician in the AR that the Appellant’s impairment periodically restricts his ability to perform some of his daily living activities the duration and frequency of the restriction is not clear, the Ministry was reasonable in determining that the Appellant’s impairments do not significantly restrict daily living activities either continuously or periodically for extended periods.

Help with Daily Living Activities

The Appellant submits that because of his impairments, he needs and receives continuous help from

his daughter with housework, meals and shopping and to remind him to take his medication. He uses his cane for walking. In the Supplemental Medical Opinion of May 2014, the Appellant's physician confirmed that the Appellant needs help to get out of the bath tub and other activities "as required" but that it is "difficult to say" how often this help is required. In the PR and AR, the Appellant's physician referred to the Appellant's use of a cane to assist him with his mobility.

The Ministry's position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot be determined that significant help is required from other persons. The Ministry notes in the reconsideration decision that the use of a "simple assistive device" such as a cane does not establish the existence of a severe impairment that directly and significantly restricts the Appellant's ability to perform DLA such that he requires the significant help of another person.

The Panel's Findings

Section 2(2)(b)(ii) of the EAPWDA also requires the opinion of a prescribed professional confirming that because of restrictions in his ability to manage daily living activities, the Appellant requires help with those activities. In the May 15 2014 Supplemental Medical Opinion, there is information that the Appellant requires help to get out of the bath tub "and other activities as required" but that it is "difficult to say" how many times per week help is required. There is also information that the Appellant requires a cane to assist with his mobility. While the Appellant's daughter testified that she performs the housework for her father, as well as meal preparation and laundry, the prescribed professional (the Appellant's physician) has not provided information that this assistance is required by the Appellant. Therefore, the panel finds that the Ministry reasonably concluded that it could not determine whether the Appellant needs significant help from other persons to manage daily living activities.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation, was reasonably supported by the evidence. Therefore the panel confirms that decision.