

PART C – Decision under Appeal

The decision being appealed is the June 5, 2014 reconsideration decision of the Ministry of Social Development and Social Innovation (the “Ministry”) 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 November 26, 2013;
 - A physician's report ("PR") dated September 6, 2013 completed by the Appellant's family physician who indicated that the Appellant had been a patient of hers for 2 years and she'd seen the Appellant 2-10 times in the 12 months preceding the report; and
 - An assessor's report ("AR") dated November 1, 2013, completed by a psychiatric nurse after one visit with the Appellant and based on the physician's report in the PR.
2. A series of medical reports about the Appellant prepared for his family doctor, including:
 - July 5, 2013 report from a general surgeon regarding gastroscopy ("gastritis, told to stop smoking/drinking") and colonoscopy ("benign: needs a repeat colonoscopy in 3-4 yrs") and that the Appellant's "U/S is benign (liver cyst)."
 - May 13, 2013 surgical pathology report indicating "mild background chronic inflammation ... in keeping with reactive gastropathy."
 - December 28, 2012 lab report (blood tests); and
 - January 30, 2013 lab report (blood tests).
3. 3-page "Disability Self Report" for the Appellant prepared by an advocate stamped received by the Ministry on November 5, 2013;
4. Appellant's request for reconsideration dated May 15, 2014; and
5. 3-page additional medical information document prepared by an advocate based on information reported by the Appellant to the advocate, signed by the Appellant's family physician and dated May 16, 2014. This document refers specifically to the Appellant's conditions and is prepared as a series of statements for the doctor to check mark, with a space on the third page for the doctor to provide additional comments, date and sign.

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 – Physical & Mental Impairment

In the PR, the Appellant's physician diagnosed the Appellant with chronic gastritis (onset 2009), COPD (chronic obstructive pulmonary disease) (onset 2009), Dyslipidemia (onset 2009), anxiety (onset 2012) and impaired glucose tolerance (onset 2010). The physician noted the Appellant has not been prescribed any medications and/or treatments that interfere with his ability to perform his daily living activities and at the hearing, the Appellant was adamant that he would not take prescription medications, only over the counter pain relief.

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

- "Intermittent [illegible] discomfort & other related symptoms heightens patient's anxiety and

impairs functioning.”

- “COPD causes some fatigue and results in (feelings of) inability to comply with medical regimen to assist his other medical conditions.”

In the functional skills section of the PR, the Appellant’s physician indicated that the Appellant can walk unaided 4+ blocks, climb 5+ stairs unaided, lift 2-7 kg, and can remain seated less than 1 hour “based on patient’s report.”

In the AR, the psychiatric nurse described the Appellant’s impairments as “chronic gastritis, COPD, anxiety, dyslipidemia, impaired exercise tolerance, L leg arthritis, depression” and also reported that the Appellant’s speaking and hearing is satisfactory, reading and writing are poor “English is a second language.” In the mobility and physical ability section of the AR, the psychiatric nurse indicated that the Appellant takes significantly longer than typical to perform all of the listed activities, writing “4+ blocks” beside walking indoors and walking outdoors, “5+ steps” beside climbing stairs, and “2-7 kg” lifting, with the commentary, “mobility and physical ability of the client is significantly restricted by his medical conditions (COPD, shortness of breath on exertion, L leg arthritis).”

In the Disability Self Report, the Appellant indicates that he can walk 3-4 blocks and can climb 5-10 stairs before he has to rest during the day, but he is unable to climb stairs or walk any distance at night when his shortness of breath worsens. The Appellant reported that he can not carry more than a minimal amount in the Disability Self Report. The Appellant reiterated this evidence during his testimony at the hearing, telling the panel that he can dress, clean and dress himself. He said he will drive himself to do his shopping and banking, but that he has difficulty walking for any distance or climbing more than a few steps because of his COPD and his shortness of breath. He told the panel he does not take any medication for his depression and has not been referred to counseling for it.

In the PR, the physician reported significant deficits with cognitive and emotional function in two areas - emotional disturbance (e.g. depression, anxiety) and impulse control - but did not provide any comments explaining the check marks.

In the section of the AR regarding cognitive and emotional functioning, the psychiatric nurse indicated a major impact in the areas of bodily functions, emotion (underlining the words “anxiety” and “depression”), attention/concentration, memory, and motivation. He also indicated a moderate impact in the areas of consciousness, impulse control, insight and judgment, executive, motor activity, language, psychotic symptoms, and other neuropsychological problems (e.g. visual/spatial problems, psychomotor problems, learning disabilities etc.), and a minimal impact in the area of “other emotional or mental problems.”. The psychiatric nurse wrote, “client’s cognitive and emotional functioning is significantly impaired. Client reported symptoms of depression – low mood most of the time, sleep disturbances, low energy and lack of motivation most of the time.”

Severity of Impairments

In the May 16, 2014 additional medical information/questionnaire, the Appellant’s physician has check marked the boxes beside the statement: “This is to confirm, in my medical opinion that [the Appellant] suffers from severe conditions including: depression, COPD, chronic gastritis, hepatic cyst, colonic polyp/adenoma and osteoarthritis.”

Daily Living Activities

In the PR, the Appellant's physician indicated that the Appellant's impairments restricted his ability to perform the DLAs of basic housework and use of transportation. The physician indicated that the restriction to the Appellant's use of transportation was periodic, but did not indicate whether the restriction to the performance of basic housework was continuous or periodic and the Appellant's physician did not provide any further commentary regarding her answers on the PR.

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

- Takes significantly longer than typical to perform all tasks of the DLAs of personal care, pay rent and bills, medications and transportation, but did not indicate how much longer it takes.
- Requires periodic assistance for all of the tasks of the DLAs of basic housekeeping, shopping and meals, writing "70% of the time – daughter helps" and, "Client requires periodic assistance with some of the daily living activities."
- Requires periodic support/supervision for all of the listed aspects of the DLA of social functioning (appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to deal appropriately with unexpected demands and able to secure assistance from others), writing "70% of time, growing social isolation."
- Marginal functioning with his immediate and extended social networks, but no commentary.

In the May 16, 2014 additional medical information, the Appellant's physician has check marked the box beside the statement, "[the Appellant] is directly and significantly restricted in his ability to do his daily living activities continuously, as a result of the conditions noted above" (the listed medical conditions noted previously). The Appellant's physician has not checked any of the boxes beside any of the other statements on the additional medical information document, although she has added the words "and arthritis" to the statement, "Paying for purchases: directly restricted from standing in line-ups due to anxiety."

Help with Daily Living Activities

The Appellant's physician did not provide any commentary in the PR that the Appellant requires assistance with his DLA. In the AR, the psychiatric nurse indicated that the Appellant receives help from family. In the May 16, 2014 additional medical information, the Appellant's physician has not check marked any of the boxes beside the statements under the heading "as a result of the above noted restrictions the following assistance is required with the following activities" but has crossed out the statements that the Appellant needs assistance paying bills and filling prescriptions.

In his testimony, the Appellant said that his daughter comes to his apartment once or twice a week and prepares his meals for him and she also takes and does his laundry for him once a week. The Appellant said that there are laundry facilities in his apartment building on the ground floor, but he lives on the third floor and there is no elevator. He said that he has never done his laundry and his daughter does it for him at her home. The Appellant said that he can shop for himself and will cook for himself, but his daughter provides meals for him and sometimes assists with grocery shopping.

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 living tasks and that all of the necessary information is before the Ministry, as provided in the PWD application and additional medical information. The Appellant argues that because of his COPD and arthritis, he cannot function and work like he used and this causes him to be depressed and anxious.

The Ministry considered the information in the Appellant's PWD application, as well as the medical reports of the Appellant's colonoscopy and gastroscopy and the surgical pathology and lab reports, the Disability Self Report, and the physician's May 16, 2014 additional medical information document. The Ministry noted that in the PR, the physician reported that the Appellant can walk 4+ blocks unaided, climb 5+ stairs unaided, lift between 5-15 pounds and remain seated for less than an hour. The Ministry also noted that in the AR, while he reported that it takes the Appellant significantly longer to perform the ability and mobility tasks, the psychiatric nurse did not indicate how much longer it takes the Appellant. The Ministry determined that the impacts to the Appellant's physical functioning by his impairments as described by the Appellant's physician and the psychiatric nurse, are more in keeping with a moderate degree of impairment. The Ministry found that there is not enough information provided by the Appellant's physician and the psychiatric nurse to establish a severe physical impairment.

The Panel's Findings

The diagnosis of a medical condition is not by 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 2 years, in the PR completed September 6, 2013 and in the additional medical information of May 16, 2014. The Ministry also considered information provided in the AR completed November 1, 2013 by the psychiatric nurse after one meeting with the Appellant. The Appellant's physician noted some restriction to the Appellant's functional skills in the PR (e.g. can lift 5-15 pounds, sit less than an hour). In the AR, the psychiatric nurse indicated that the Appellant "takes significantly longer than typical" to perform all areas of mobility and physical ability and his comments reflect the same information as provided by the physician in the PR. The Appellant's evidence is that he can walk short distances during the day, can climb some stairs, and can carry some weight (he said around 3 pounds), but that he is generally restricted by his COPD. In terms of the impacts of his medical conditions on the Appellant's ability to perform DLA requiring physical effort, the physician assesses him not restricted in all but basic housework and use of transportation – the latter on a periodic basis without explanation. In the AR, the psychiatric nurse assesses the Appellant either taking significantly longer than typical, or requiring periodic assistance from another person for most DLA without any commentary as to how much longer it takes him or why (see also restrictions to DLA discussion below).

When the professional assessment of the Appellant's physician is considered, together with the information from the psychiatric nurse and the Appellant's own evidence, 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

With respect to the severity of the Appellant's mental impairment, the Ministry noted discrepancies in the information provided in the PR by the Appellant's physician who has known him for two years and indicated impacts in only 2 areas, and in the AR by the psychiatric nurse who met the Appellant once and who indicated major and moderate impacts in several listed areas. The Ministry found it was difficult to develop a clear and coherent picture of the Appellant's cognitive and emotional functions from the evidence and that there was not enough information to establish the Appellant has a severe mental impairment.

The Appellant argued that he suffers from depression and anxiety and, as a result, he suffers from a lack of motivation, poor sleep, poor short-term memory, impulse control and lack of attention. The Appellant's physician in the PR indicated that the Appellant suffers from anxiety, onset in 2012, and that his COPD causes him fatigue and the pain increases his anxiety. With these diagnoses and impacts, he submits that the evidence establishes a severe mental impairment.

The Panel's Findings

The Appellant's physician in the PR indicated that the Appellant suffers from anxiety, onset in 2012, and that his COPD causes him fatigue and the pain increases his anxiety. In the PR, the Appellant's physician indicated that the Appellant has deficits with cognitive and emotional function in the areas of emotional disturbance and impulse control, but did not provide comments. In the May 16, 2014 additional medical information, the Appellant's physician checked the box beside "depression" in the list of the Appellant's medical conditions after the statement, "this is to confirm in my medical opinion that [the Appellant] suffers from severe conditions including:" The panel notes that the Appellant's physician did not provide any comments on the May 16, 2014 medical information document. The information provided by the psychiatric nurse in the AR after one interview with the Appellant was that the Appellant's mental impairment has a major or moderate impact in 13 of the 14 listed the areas, with the commentary that the Appellant's "cognitive and emotional functioning is significantly impaired. [The Appellant] reported symptoms of depression – low mood most of the time sleep disturbances, low energy and lack of motivation most of the time." No narrative is provided that describes these impacts in more specific terms; for example, there is no indication as to the areas of daily functioning in which the Appellant lacks motivation. The psychiatric nurse noted in the AR that the Appellant requires periodic support/supervision in his social functioning 70% of the time with the comment "growing social isolation" and has marginal functioning in his immediate and extended social networks, but no information is provided about the nature and degree of support/supervision required. The panel considers reasonable the Ministry's assessment that it was difficult to develop a clear and coherent picture of the Appellant's cognitive and emotional functions from the evidence.

The panel finds that the only diagnosis of a mental health condition or mental impairment before the Ministry is the physician's reference in the PR to the Appellant's anxiety – while the physician may have checked the box beside "depression" in the prepared medical information document of May 16, 2014, the diagnosis of depression was not indicated in the PR by the physician herself. At the hearing, the Appellant said that he does not take medication for his depression, has not attended counseling for it, and described depression stemming from frustration with his life circumstances.

Based on the above review of the available information, 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 by his impairments and that this information is all before the Ministry in the documents. The Ministry determined 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 in the PR, the AR and in the May 16, 2014 document found that it did not have enough evidence to confirm that the Appellant's impairments significantly restrict his ability to perform his DLA 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 and the psychiatric nurse 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.

The Appellant's physician reported in the PR that the Appellant is periodically restricted in his use of transportation and that he is restricted with basic housework, without indicating whether the restriction is periodic or continuous. In the AR, the psychiatric nurse reported that the Appellant takes significantly longer than typical to perform all tasks of the DLA of personal care, paying rent and bills, medications and transportation, and requires periodic assistance (70% of the time) from his daughter with all tasks of the DLA of basic housekeeping, shopping and meals. The psychiatric nurse also indicated that the Appellant requires periodic assistance with all aspects of social functioning "growing social isolation" and has marginal functioning in his immediate and extended social networks, but without any explanation. In the additional medical information document of May 16, 2014, the Appellant's physician did not check any of the boxes beside the tasks restricted by the Appellant's impairment.

The information provided by the Appellant's physician in the PR indicates that the Appellant can perform all of his DLA, but requires periodic assistance with use of transportation and assistance with basic housework, without any explanatory comments. The AR was completed by the psychiatric nurse who admitted he based it on one interview with the Appellant. The information in the AR reiterates the information provided by the Appellant in his testimony at the hearing. The Appellant's evidence is that and he feels anxious and depressed because of his impairments and his life circumstances. He drives himself to do his shopping, and his daughter provides him some prepared meals, although he does some of his own cooking. The Appellant also testified that his daughter does all of his laundry as he has never done his laundry – not because he is incapable of doing his laundry. The Appellant's testimony qualifies the information provided by the prescribed professionals. The panel also notes that the Appellant's physician did not check any of the boxes beside the statements in the additional medical information of May 16, 2014 (other than as noted) and did not provide any comments to clarify or explain information on this document.

The Panel finds that when considering all of the information from the prescribed professionals, together with the explanations offered by the Appellant, the Ministry was reasonable in determining that it did not have enough evidence from the prescribed professionals to establish that the Appellant's impairments significantly restrict daily living activities either continuously or periodically for extended periods, as required by the legislation.

Help with Daily Living Activities

The Appellant submits that because of his impairments, he needs and receives help from his daughter with housework, laundry, meal preparation and shopping.

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 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. The Appellant testified that his daughter performs the housework for him once or twice per week, as well as meal some preparation and all his laundry, and this is reiterated by the psychiatric nurse in the AR, however it is not clear that the Appellant requires this assistance because of his impairments (as opposed to having ongoing assistance from his family members). The prescribed professional who knows the Appellant well – his family physician - has not provided information that assistance is required by the Appellant as a result of his impairments. The panel must take into account that the information set out in the May 16, 2014 additional medical information was prepared by an advocate based on the Appellant's information and the panel notes that the Appellant's physician did not provide any commentary on the May 16, 2014 document to give details or establish that the Appellant requires the assistance. 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.