

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of August 14, 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 completed in March, 2014 consisting of the appellant's self-report, and a physician's report ("PR") and assessor's report ("AR") both completed by the appellant's physician of 1 year.

Additional Information Submitted

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

1. A "to whom it may concern" letter from the appellant's physician - dated September 3, 2014 - stating that "[The appellant] suffers from Fibromyalgia, insomnia and depression. As a result he suffers from chronic pain and fatigue as well. He has more severe flares on some days and has the inability to fully function on these days. As a result he finds it difficult to maintain a job due to the fluctuations in his symptoms."

Diagnoses

- In the PR, the physician diagnosed the appellant with fibromyalgia, and commented that "Patient complains of severe generalized muscle pain. The pain is limiting in terms of his daily functioning."

Physical Impairment

- In describing the appellant's functional skills, the physician indicated in the PR that the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 5+ stairs unaided, can lift 5 to 15 pounds, and can remain seated for 1 to 2 hours.
- The physician commented that the appellant experiences significant daily pain, but that pain medication was ineffective and the appellant could not tolerate the side effects.
- In the AR the physician described the appellant's impairment as "Chronic generalized muscular pain impairing his [DLA] periodically. He reported that the appellant requires periodic assistance, or takes significantly longer than typical, or both, with all aspects of mobility and lifting/carrying/holding except for standing.
- In his self-report the appellant wrote that he is often unable to get out of bed for a day or more and that he cannot work due to the disease being so unpredictable. He stated that his condition has gotten worse in the past few months.
- In his oral testimony the appellant said that there are days when he is functional, but that at least 7 days a month – up to 10 or 12 days a month - his fibromyalgia flares up to the point where he cannot function, often not being able to get out of bed.

Mental Impairment

- In the PR the physician indicated that the appellant has no difficulties with communication and no significant deficits with cognitive and emotional function.
- In the AR the physician described the appellant's ability to communicate as good in all respects. He reported "no impact" with respect to all categories of cognitive and emotional functioning.
- In his oral testimony the appellant reported that his situation has been making him feel

depressed.

DLA

- In the PR the physician indicated that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA. He also indicated that the appellant is periodically restricted with the DLA of *personal self-care, meal preparation, basic housework, daily shopping, mobility indoors and outdoors, and use of transportation*. He indicated that the appellant is unrestricted in terms of the DLA of *management of personal medications, management of personal finances, and social functioning*. The physician explained his use of the term “periodic” by commenting “pain experienced varies from day to day. Some days it is significant and causes impairment in [DLA].”
- In the AR the physician indicated the appellant independently manages all aspects of the DLA *manage personal finances* (pay rent and bills) and *manage personal medications*. With respect to the DLA of *daily shopping* and *use of transportation*, the physician indicated the appellant independently manages the tasks of reading prices and labels, making appropriate choices, paying for purchases, and using transit schedules/arranging transportation. The portion of the AR form dealing with *social functioning* – which is to be completed only if the applicant has an identified mental impairment – was marked by the physician as being not applicable.
- For all other tasks related to all other DLA, the physician reported the appellant as being independent, but also as either taking significantly longer than typical, needing periodic assistance from another person, or both.
- In his oral testimony the appellant said that he has his step-father and children help him on days when he cannot function. He also said that when his younger brother is in town his sister-in-law will help with meal preparation and housework.

Help

- In the PR the physician commented “Occasionally requires assistance with meal preparation, housework.”
- The physician commented that the appellant uses an assistive device (cane), commenting “Helps applicant walk and maintain balance, when he has Fibromyalgia flares.” He also indicated that the appellant receives help with DLA from family and friends, and that the appellant does not have an assistance animal.

Admissibility of Additional Information

In his oral testimony the appellant provided additional information regarding his impairment and the restrictions caused by it – matters which had been 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*.

With respect to the September 3, 2014 letter from the appellant’s physician, the diagnoses of insomnia and depression were not before the ministry at the time of reconsideration and cannot be said to be in support of information and records that were before the ministry. Accordingly, these diagnoses are not admissible in accordance with section 22 (4) of the *Employment and Assistance*

Act. The rest of the letter provides additional detail with respect to the variability of the appellant's impairment, which was a matter in evidence before the ministry. The ministry had no objection to admissibility of the letter. Accordingly, the panel admitted the letter into evidence except for the two new diagnoses of insomnia and depression.

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 fibromyalgia constitutes a severe physical impairment. He argued that the physician's use of the term "independent" in referring to the appellant's management of DLA gives a false impression, and doesn't adequately reflect the periodic nature of his impairment. He said that he is essentially completely unable to function for 7 to 12 days every month.

The ministry's position is that the information provided does not evidence a severe impairment. It argued that the physician indicated that the appellant is independently able to manage all areas, and that the physician did not indicate the degree or frequency of functional restrictions.

Panel Decision

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

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

In the appellant's case, the functional skills described by the physician are in the mid- to upper end of the range. While the physician has indicated that the appellant suffers "significant daily pain", he also indicated that it only causes significant impairment "some days". The physician has not provided any evidence in the PR, AR, or in his September 3, 2014 letter as to how frequently these days occur. The appellant's evidence indicates that he is essentially bed-ridden for 7 to 12 days every month. In the panel's view, if the appellant is impaired to this extent one would expect the physician to have provided some corroboration of this.

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.

There are 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.

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 advanced no argument with respect to a mental impairment, other than to observe that his situation has been making him feel depressed.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry argued that the physician provided no diagnosis of a mental impairment, and that the appellant has no difficulty with communication. The ministry referred to the physician's evidence in

the AR that the appellant's cognitive and emotional functioning has no impact on daily functioning.

Panel Decision

The physician provided no diagnosis of a mental impairment.

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 physician's evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that he independently manages the decision making aspects of *meal preparation* (meal planning), *daily shopping* (making appropriate choices), *manage personal medication* (filling/refilling/taking as directed), and *manage personal finances* (banking, budgeting).

The physician's evidence also indicates that the section of the AR form dealing with *social functioning* is not applicable.

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 though he is functional on days when he is not suffering a flare up, his fibromyalgia completely incapacitates him for 7 to 12 days every month.

The ministry's position is that the evidence is not sufficient to demonstrate that the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods. The ministry stated that while the physician indicated that the appellant requires periodic assistance with aspects of some DLA, there is no information as to the frequency or duration of these periods.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's family physician. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

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.

The physician's evidence indicates that the appellant independently manages almost all aspects of all DLA, while indicating that he takes significantly longer than typical, or requires periodic assistance, with many tasks related to many DLA. However, the physician has provided no information as to how much longer the appellant takes to perform DLA, and has provided no evidence as to how often and how long the appellant is restricted in his DLA other than the general statement that he is significantly restricted "some days" when he has "more severe flares".

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that the evidence is insufficient to show on the balance of probabilities that the appellant's ability to perform his DLA is significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he requires help with DLA due to the restrictions he experiences. He said that on days when he can't get out of bed, he relies on his step father and his children to help him with DLA. He stated that he also receives help from his sister-in-law.

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

A finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions affect his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.