

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated September 10, 2014 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – Summary of Facts

The appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the *Employment and Assistance Regulation*.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated January 31, 2014, a physician report (PR) and an assessor report (AR) both dated April 9, 2014 and completed by a general practitioner who has known the appellant for 2 months. The general practitioner wrote: “not my patient- doctor retired.” The evidence also included the following:

- 1) Report of X-Ray of bilateral knees on December 30, 2013 indicating in part that on the left side, there is mild marginal osteophytosis seen in the tricompartment and moderate to severe narrowing in the lateral compartment of the knee. On the right side, there is mild marginal osteophytosis seen in the tricompartment with no significant narrowing seen in the compartments;
- 2) Letter dated August 25, 2014 from the appellant’s advocate to the general practitioner who completed the PR and AR and who responded to various questions and signed the letter; and,
- 3) Request for Reconsideration dated August 25, 2014.

Diagnoses

In the PR, the appellant was diagnosed by the general practitioner with arthritis in his hands (bilateral), knees (bilateral) and lumbar spine, obesity, sleep apnea and right ear 50% decrease (hearing impaired). There is no diagnosis of a mental health condition.

Physical Impairment

In the PR, the general practitioner reported that:

- In terms of health history, the appellant “is unable to walk more than 2 blocks due to bilateral foot pain, leg pain, shortness of breath, back pain. Can’t do manual labour with fine motor requirements due to bilateral hand pain. ‘Moderate to severe’ arthritis left knee on x-ray December 2013. Obesity is preventing his mobility. Is unable to do anything for 2 to 3 weeks when back/knees flare up. Occurring daily.”
- The appellant requires an aid for his impairment as he “needs shower bar (can’t afford).”
- In terms of functional skills, the appellant can walk 1 to 2 blocks unaided and cannot climb any stairs unaided as he “requires handrail at all times”, can lift 2 to 7 kg (5 to 15 lbs.) and remain seated less than 1 hour.

In the AR the general practitioner indicated that:

- The appellant is assessed as independent with walking indoors and requiring continuous assistance with walking outdoors as he “can’t walk more than 2 blocks.” The appellant uses an assistive device for climbing stairs, identified by the general practitioner as a handrail. The appellant requires periodic assistance from another person with lifting and he requires periodic assistance with carrying and holding, with a comment added: “unable more than 15 lbs.”
- A cane is routinely used by the appellant, with the comment: “uses a cane substitute (canoe paddle) when back acts up. Can’t afford a cane.”

In the appellant’s self-report, he wrote that:

- He suffers from multiple medical conditions. He has lower back problems that started 10 years (ago), arthritis in both knees, irregular heartbeat, diabetes type 2, high cholesterol/high blood

pressure, and sleep apnea.

- When his back or knees go out, it takes him 3 to 4 weeks to recover and this occurs at least 4 times per year for his back and his knees have lately been on a daily basis.
- He is only able to walk up to 1 to 2 blocks at a time.
- He has to use the handrail when climbing stairs.
- He is only able to lift up to 5 to 15 lbs. at a time.
- He is only able to sit for less than 1 hour at a time. He is able to stand for 1 to 2 hours at a time but, when he does stand for that long, his feet will start to swell.

In the letter dated August 25, 2014, the general practitioner indicated that he:

- Agrees that the appellant states that he is only able to walk 1 to 2 blocks maximum and wrote: "per patient report; see x-ray report."
- Agrees that the appellant states he is unable to climb any stairs at all without the use of a handrail and wrote: "has to pull himself/ support himself."
- Agrees that the appellant states he is only able to lift or carry up to 15 lbs. maximum and wrote: "pain in hands."

Mental Impairment

In the PR, the general practitioner reported:

- The appellant has no difficulty with communication and no significant deficits with cognitive and emotional function, with no comments provided.

In the AR, the general practitioner indicated that:

- Regarding his ability to communicate, the appellant has a good ability with speaking and satisfactory with hearing, and the general practitioner wrote: "50% hearing loss left side". His reading and writing are poor with a note that he has an elementary school education.
- The sections of the report describing impacts to cognitive and emotional functioning and to social functioning are crossed out as not applying to the appellant.

In the appellant's self-report, he wrote that:

- He quit school at an elementary level and has difficulty with reading and writing. He also has a 50% hearing loss in his left ear.

In the letter dated August 25, 2014, the general practitioner indicated that he:

- Agrees that the appellant states that his reading and writing is at an elementary school level and wrote: "per his report."

Daily Living Activities (DLA)

In the PR, the general practitioner indicated that:

- The appellant has not been prescribed any medication and/or treatments that interfere with his daily living activities.

In the AR, the general practitioner reported that:

- The appellant is independent with moving about indoors and requires continuous assistance with moving about outdoors, described as "can't walk more than 2 blocks."
- For personal care, the appellant is independent with grooming, bathing, toileting, feeding himself and regulating his diet. He takes 2 to 3 times longer with dressing and also uses an

assistive device described as “has to sit to dress.” He also takes 2 to 3 times longer with transfers in and out of bed and transfers on and off a chair.

- For basic housekeeping, the appellant is independent with doing his laundry and requires continuous assistance with basic housekeeping described as “doesn’t clean. Can’t afford housekeeper” and “can do light dusting.”
- For shopping, the appellant is independent with making appropriate choices and paying for purchases and requires periodic assistance with carrying purchases home as he is “unable more than 15 lbs.” The appellant takes 2 to 3 times longer with going to and from stores and “uses cart of support” and uses an assistive device for reading prices and labels, identified as “glasses.”
- The appellant is independent with all tasks of the DLA of managing his meals and medications and paying rent and bills.
- Regarding transportation, the appellant takes 2 to 3 times longer with getting in and out of a vehicle and uses an assistive device, described as: “uses seat/door for support to get in/out.”

In his self-report, the appellant wrote that:

- The combination of all of his multiple medical conditions causes him to have to rely on others for assistance or the inability to do his DLA.
- He has to sit to get dressed. It takes him significantly longer to do multiple activities of personal care.
- He does not clean and he does not have money to pay someone to clean for him. His house is messy. He is unable to do any cleaning that requires bending.
- He has to use a cart when shopping. He needs his eyeglasses when reading prices and labels and he is unable to carry over 5 to 15 lbs. at a time.

In the letter dated August 25, 2014, the general practitioner indicated that he:

- Agrees that the appellant states that, due to the combination of his medical conditions/diagnoses, he is need of continuous assistance or he is unable to perform his basic housekeeping and carrying purchases home.
- Disagrees that the appellant states that he is in need of continuous assistance or he is unable to do his budgeting and paying rent and bills as he is behind on his bills.
- Agrees that the appellant states that he is need of assistance from an assistive device with dressing as he needs to sit, bathing as he needs a shower bar, going to and from stores as he uses a shopping cart, reading prices and labels as he uses eyeglasses and getting in and out of a vehicle, described as using the seat and door/handle to get in and out of vehicle.

Need for Help

The general practitioner indicated in the AR that, with respect to the assistance provided by other people, the appellant’s friends provide him with this help. The appellant routinely uses a cane and the general practitioner wrote: “uses a cane substitute (canoe paddle) when back acts up. Can’t afford a cane.”

In his Notice of Appeal dated October 2, 2014, the appellant expressed his disagreement with the ministry’s reconsideration decision, and wrote that he believes that he meets the legislative requirements set out for PWD designation.

The ministry relied on its reconsideration decision, as summarized at the hearing.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment based on the information provided and that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, **"daily living activities"**,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

- (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of the pain, restricted mobility and shortness of breath experienced due to his several medical conditions, including arthritis in both of his hands, his knees and lumbar spine, and obesity. The appellant wrote that when his back or knees go out, it takes him 3 to 4 weeks to recover and this occurs at least 4 times per year for his back and his knees have lately been on a daily basis.

The ministry's position is that while the information provided by the general practitioner indicates that the appellant has physical limitations, there is not enough information to confirm that the appellant has a severe physical impairment. The ministry stated that the general practitioner reported that the appellant is able to walk up to 1 to 2 blocks unaided, is independent with walking indoors but requires continuous assistance from another person with walking outdoors and it is unclear how the appellant is independent with his mobility indoors but requires continuous assistance outdoors. The ministry stated that the general practitioner indicated that the appellant cannot climb stairs unaided as he requires a handrail as an assistive device at all times; however, handrails are not considered an assistive device under the legislation.

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. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's general practitioner.

The general practitioner, who had known the appellant for 2 months, diagnosed the appellant with arthritis hands, knees, and lumbar spine, obesity, sleep apnea and right ear 50% decrease (hearing impaired). The general practitioner reported that the appellant "is unable to walk more than 2 blocks due to bilateral foot pain, leg pain, shortness of breath, back pain... 'Moderate to severe' arthritis left knee on x-ray December 2013. Obesity is preventing his mobility." The general practitioner indicated that the appellant requires an aid for his impairment, identified as a shower bar which he cannot

afford. In the PR, the general practitioner reported that the appellant can walk 1 to 2 blocks unaided and, in the AR, the appellant is assessed as independent with walking indoors and requiring continuous assistance from another person or he is unable to walk outdoors as he "can't walk more than 2 blocks." The panel finds that the assistance required with walking outdoors is for distances of more than 2 blocks and the general practitioner indicated that the appellant uses a cane substitute "when his back acts up." The general practitioner also wrote in the PR that the appellant "is unable to do anything for 2 to 3 weeks when back/knees flare up. Occurring daily." In his self-report, the appellant wrote that when his back or knees go out, it takes him 3 to 4 weeks to recover and this occurs at least 4 times per year for his back and his knees have lately been on a daily basis. The panel finds that the evidence shows that there are periods of time, which occur in a range from daily to every 3 months, when the appellant's physical functioning is reduced, although the frequency and duration of the exacerbation is not clear, or the extent of the reduction in the appellant's functioning.

The general practitioner also indicated in the PR that the appellant cannot climb any stairs unaided as he "requires handrail at all times" and, in the letter dated August 25, 2014, the general practitioner agrees that the appellant states he is unable to climb any stairs at all without the use of a handrail and wrote: "has to pull himself/ support himself." Section 2(1) of the EAPWDA defines "assistive device" to mean 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. The normal definition of a handrail is a narrow railing to be grasped with the hand for support and is designed for use for anyone for support and safety while climbing or descending stairs and the panel finds that the ministry reasonably determined that a handrail does not fall within the definition of an "assistive device."

The general practitioner also indicated that the appellant can lift 5 to 15 lbs. and remain seated less than 1 hour. In the AR, the general practitioner assessed the appellant as requiring periodic assistance from another person with lifting and with carrying and holding, with a comment added: "unable more than 15 lbs." In the letter dated August 25, 2014, the general practitioner indicated that he agrees that the appellant states he is only able to lift or carry up to 15 lbs. maximum and wrote: "pain in hands." In the PR, the general practitioner wrote in the health history, that the appellant "...can't do manual labour with fine motor requirements due to bilateral hand pain;" however, the ability to work and/or look for work is not one of the criteria for PWD designation in Section 2(2) of the EAPWDA nor is it listed in the definition of daily living activities in Section 2(1) of the EAPWDR.

The panel finds that the evidence demonstrates that while the appellant experiences some limitations to his physical abilities relating to longer distances or heavier weights, he remains independent with his mobility. In the absence of further detail from the medical practitioner regarding the extent of the exacerbations to the appellant's functioning, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

While the appellant wrote in his self-report that he has difficulty with aspects of communication, since he quit school at an elementary level and has difficulty with reading and writing and also has a 50% hearing loss in his left ear, he did not directly maintain a position that he has a severe mental impairment.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry stated that the general practitioner reported that the appellant does not have any difficulties with communication and no deficits to cognitive and emotional functioning.

Panel Decision

In the PR, the general practitioner did not diagnose a mental health condition and reported that the appellant has no significant deficits with cognitive and emotional function and no difficulty with communication, other than poor reading and writing due to a lack of education. The sections of the report describing impacts to cognitive and emotional as well as social functioning are both crossed out as being not applicable to the appellant. Given the absence of a mental health diagnosis and no reported impacts to the appellant's mental or social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical impairment directly and significantly restricts his ability to perform DLA on an ongoing basis to the point that he requires the significant assistance of another person or the use of an assistive device. The appellant wrote in his self-report that the combination of all of his multiple medical conditions causes him to have to rely on others for assistance or the inability to do his DLA. The appellant wrote that it takes him significantly longer to do multiple activities of personal care, he does not clean and he is unable to do any cleaning that requires bending, he has to use a cart when shopping, he needs his eyeglasses when reading prices and labels, and he is unable to carry over 5 to 15 lbs. at a time.

The ministry's position is that there is not sufficient evidence from the prescribed professional to establish that the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods of time. The ministry stated that the general practitioner indicated that the appellant can independently manage the majority of his DLA and he has not been prescribed medications that interfere with his ability to perform DLA. The ministry stated that although the general practitioner indicated that the appellant requires assistive devices for some tasks of DLA, such as a chair/bed for dressing, a shopping cart for shopping, eyeglasses for reading prices labels and a seat/door/ handle for getting in and out of a vehicle, these items are not considered "assistive devices" according to the definition in the legislation. The ministry argued that for those tasks that take the appellant longer, an assessment by the general practitioner that the tasks take the appellant 2 to 3 times longer does not indicate a significant amount of time for these tasks.

Panel Decision

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 DLA, continuously or periodically for extended periods. In this case, the general practitioner, who has known the appellant for only 2 months, is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the appellant's circumstances, the general practitioner indicated in the PR that the appellant has not been prescribed medications that interfere with his DLA. In the AR, the general practitioner reported that the appellant is independent with walking indoors and requires continuous assistance from another person with walking outdoors in excess of 1 to 2 blocks, which he can walk unaided. While the general practitioner assessed some tasks of the DLA personal care, shopping, and transportation as requiring the use of an assistive device, the panel finds that the ministry reasonably determined that sitting on a chair/bed to dress, using a cart while shopping and eyeglasses to read prices and labels, and using a seat/door for support when getting in and out of a vehicle, are not "assistive devices" according to the definition in Section 2(1) of the EAPWDA.

The general practitioner reported in the AR that the appellant takes 2 to 3 times longer with dressing, transferring in/out of bed and on/off of a chair, going to and from stores and getting in and out of a vehicle and requires periodic assistance from another person with carrying heavier purchases home when shopping and continuous assistance with heavier chores of housekeeping (note: "can do light dusting"), but is otherwise independent with performing the tasks of his DLA.

The appellant wrote in his self-report that when his back or knees go out, it takes him 3 to 4 weeks to recover and this occurs at least 4 times per year for his back and his knees have lately been on a daily basis. The general practitioner wrote in the PR that the appellant "is unable to do anything for 2 to 3 weeks when his back/knees flare up; occurring daily." As set out above, the panel finds that there are periods of time when the appellant's physical functioning is reduced, although neither the frequency or duration of the exacerbation, nor the extent of the reduction in the appellant's functioning are clearly described. The panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts his ability to manage his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that his physical impairment affects his daily living functions to a severe enough extent that assistance is required.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The general practitioner indicated in the AR that, with respect to the assistance provided by other people, the assistance is provided by the appellant's friends. The section of the report indicating assistance provided through the use of assistive devices indicates a cane is used when the appellant's back "acts up" and a CPAP machine and a shower bar are both required. The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

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