

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 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 appellant did not attend the appeal hearing. Having confirmed that the appellant was notified, the panel proceeded with the hearing in accordance with section 86(b) of the EAPWDR.

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report dated September 18, 2013; a physician's report ("PR") completed by the appellant's ophthalmologist on September 20, 2013; and an assessor's report ("AR") completed by the appellant's family physician on April 14, 2014.
- The appellant's Request for Reconsideration dated September 12, 2014.

Diagnoses

- In the PR, the appellant's ophthalmologist since August, 2013 diagnosed the appellant with blindness in his left eye, left ocular trauma, and inoperable left retinal detachment. The ophthalmologist wrote that the appellant has pain in the left eye which is likely intermittent and chronic, and stated that there is no prospect for recovery. He stated the eye will likely continue to deteriorate.

Physical Impairment

- In describing the appellant's functional skills, the ophthalmologist indicated in the PR that he did not know how far the appellant can walk unaided on a flat surface or how many stairs the appellant can climb unaided. He indicated there are no limitations to the appellant's lifting ability or his ability to remain seated.
- The ophthalmologist commented that the appellant has good vision in his right eye but may miss things coming from his left and will have some difficulty with depth perception. He felt that the appellant is not precluded from carrying a class V driver's licence, but that he should not have a commercial class I to IV licence.
- In the AR, the appellant's family physician of seven years indicated that the appellant requires periodic assistance from others with walking indoors and outdoors, climbing stairs, and standing since he bumps into things and can have dizziness. The family physician indicated that the appellant is independent with respect to lifting/carrying/holding.
- In his self-report the appellant wrote that he has limited movement and sight on his left side. He indicated that he is still bumping into things, stamping his foot, and kicking things because his perception is "messed up."

Mental Impairment

- In the PR the ophthalmologist indicated that the appellant has no difficulties with communication. The ophthalmologist did not know whether the appellant has any significant deficits with cognitive and emotional function, commenting "should be assessed at the discretion of family doctor."
- The ophthalmologist commented that the appellant may suffer psychological impact of loss of the eye's vision.
- In the AR the family physician reported that the appellant's ability to communicate is good in all respects.
- In describing impacts to the appellant's cognitive and emotional functioning, the family physician indicated moderate impacts to three of fourteen categories of functioning (bodily

function/sleep disturbance, emotion/depression/paranoia regarding neighbours, and attention/concentration – “His mind tends to jump from subject to subject.”) The remaining 11 categories of cognitive and emotional functioning were either not impacted or minimally impacted. The family physician commented that the appellant’s left eye burst as a result of an unprovoked assault, and that since then he is having difficulty coming to terms with the resulting blindness.

- In his self-report the appellant wrote that he is in an emotional mental state.
- In the Request for Reconsideration the appellant wrote that he is suffering trauma due to the assault and loss of his eye.

DLA

- In the PR the ophthalmologist 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’s impairment does not directly restrict his ability to perform any DLA.
- In the AR the family physician indicated that the appellant independently manages all aspects of the DLA of *personal self-care, basic housekeeping, meal preparation, management of personal medications, and use of transportation.*
- The family physician reported that the appellant independently manages all aspects of the DLA of *social functioning*, and that he has marginal functioning with both his immediate and extended social networks.
- The family physician reported that the appellant requires periodic assistance with the task of reading prices and labels related to the DLA of *daily shopping*, and commented that the appellant “has difficulty when shopping – going round the aisles he can be forgetful.” The family physician also indicated that the appellant requires periodic assistance with the tasks of banking and paying rent/bills related to the DLA of *managing personal finances*, commenting “bad with money – he gambles or drinks.”
- In his Request for Reconsideration, the appellant wrote that he cannot get an assistive device to assist with DLA or employment/sports activities.

Help

- In the PR the ophthalmologist reported that the appellant does not currently require any prostheses or aids for his impairment, but that the left eye may need removal in the event of chronic intractable pain, in which case the appellant would then need a prosthesis.
- The family physician indicated that the appellant receives assistance for DLA from family and friends. He identified no assistive devices being used by the appellant, and reported that the appellant does not have an assistance animal.

Admissibility of Additional Information

With his Notice of Appeal, the appellant included a one-page handwritten submission dated October 29, 2014. In his submission, the appellant wrote that:

- As a result of an assault in August, 2013, the appellant lost the sight in his left eye and accordingly has not been able to find work since.
- He has been on an emotional roller-coaster and was scheduled for surgery to remove his left eye on November 12, 2014.
- He is going through counselling and is suffering in trying to cope with living with one eye.

- He has been dealing with a family maintenance issue in court, causing more stress and critical suffering.

The appellant's written submission includes information that is consistent with, and tends to corroborate, information that was before the ministry regarding the impacts the appellant is experiencing as a result of loss of vision in his left eye. The panel has admitted this information as written testimony in support, in accordance with section 22(4) of the *Employment and Assistance Act*.

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 the loss of vision in his left eye, with the associated difficulties in mobility due to the loss of depth perception along with the pain and trauma, constitutes a severe physical impairment. He argued that the ministry should "allow for temporary PWD" until all issues of "unknown" status on the PR and AR are checked out.

The ministry's position is that the health professionals' assessments do not establish a severe degree of physical restriction as a result of vision loss in the left eye, so the information does not establish a severe impairment. The ministry argued that - while it recognizes the significance of the appellant's vision loss - the fact that the appellant does not use or require any aids, and that he is not precluded from carrying a class V driver's licence, indicates a moderate rather than a severe degree of impairment.

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 ophthalmologist and family physician.

In the appellant's case, the ophthalmologist indicated he did not know about the appellant's ability to walk or climb stairs, but he indicated that the appellant's other physical functions have "no limitations". The family physician indicated that the appellant requires periodic assistance with walking, climbing stairs, and standing, but he has not provided any evidence as to how frequently these periods occur or what sort of assistance the appellant requires.

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 loss of the vision in the appellant's left eye is a serious matter, 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 express argument with respect to a mental impairment. He did point out, however, that he is suffering stress, depression, and loss of sleep due to the trauma of the assault and loss of his eye.

The ministry's position is that the evidence does not establish a severe mental impairment. The

ministry argued that the health professionals provided no diagnosis of a mental impairment, and that the family physician identified only moderate impacts to three of fourteen categories of cognitive and emotional functioning.

Panel Decision

The evidence from the health professionals provides no diagnosis of a mental impairment, though the family physician indicated that there are some moderate impacts to three areas of cognitive and emotional function. These impacts do not appear to have translated into significant restrictions in the appellant's ability to manage DLA.

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 family 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), *social functioning* (making appropriate social decisions) and *manage personal finances* (budgeting). The appellant's reported difficulties with the tasks of banking and paying rent/bills do not appear to be related to his diagnosed impairment. There is no evidence of what sort of assistance, if any, the appellant receives with these tasks.

The physician's evidence also indicates that the appellant independently manages all aspects of *social functioning*.

Considering that there is no diagnosis from a medical professional as to a mental impairment, the evidence that the appellant's ability to communicate is good in all respects, and the evidence of limited impacts to cognitive and emotional functioning, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his difficulties with depth perception and the mental distress associated with the assault and loss of vision restrict his ability to manage DLA. He argued that he still bumps into things and gets dizzy, and that he is considered a liability for work.

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 argued that a severe impairment has not been established, and that the family physician indicated that the appellant is independent in almost every category of DLA.

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 ophthalmologist and 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 ophthalmologist indicated that the appellant is not significantly restricted in any DLA. The family physician's evidence indicates that the appellant independently manages almost all aspects of all DLA, while indicating that he requires periodic or continuous assistance with a minimal number of tasks related to some DLA. The family physician has provided no information as to what assistance the appellant receives with DLA.

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 advanced no argument with respect to requiring assistance with DLA.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry argued that no assistive devices are required.

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 condition affects 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.