

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 21, 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

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

PART E – Summary of Facts

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

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

1. The appellant's *PWD Application* consisting of:
 - the appellant's self-report ("SR") completed by the appellant and dated April 9, 2014 in which he described his disability as follows: *"I have a number of disability's (sic) in different parts of my body Every day is different. Disability's: neck, shoulders, back, lt hip, lt knee, rt knee, rt foot".* In response to a question asking how his disability affects his life and his ability to take care of himself the appellant states: *"Can't walk far. Lifting of anything. Rt shoulder wore out} no surgery can fix. Neck is wore out} no surgery can fix. I have challenges every day all day long. I have a number of surgery's: rt elbow, neck, rt knee, lt knee, lt shoulder, rt hand, hernia} stomach"*
 - a physician's report ("PR") completed by the appellant's general practitioner and dated May 25, 2014 which indicates that he has known the appellant for 2 years and that he has seen the appellant 11 or more times in the past 12 months.
 - an assessor's report ("AR") completed by the appellant's general practitioner and dated May 25, 2014.
2. An MRI of the appellant's right shoulder dated July 19, 2014.
3. The appellant's *Request for Reconsideration* signed and dated October 10, 2014 that states the following reasons for his request:
 1. *My doctor didn't reveal enough medical information about me or complete the form's (sic) for assistance properly {PWD}*
 2. *I have had a number of surgery's (sic) to correct things in the past. I am told now that no surgery can help my cervical part of my spine {the neck} My right shoulder has been damaged as well Their (sic) is no surgery that can help me I have seen 2 different surgeons They are bone spec*
 3. *I have been told things are going to get worse as time go's bye (sic). Well I think my medical should show the honesty of the damage done"*

The appellant included with his *Request for Reconsideration* a copy of page 12 of the PWD application which he had completed (but which is intended to be completed by the appellant's physician). He indicates that his impairment directly restricts his ability to perform DLA and that the following DLA are continuously restricted: daily shopping, and mobility outside the home. He indicates that the following DLA are periodically restricted: personal self care, meal preparation, basic housework, and mobility inside the home; and the following are not restricted: management of medications, use of transportation, and management of finances. He explains that by "Periodic" he means: *"I have nerve damage in the spine At times it flares up I can't do much sometimes for 5-6 days at a time"*. He adds that *"The biggest part of restriction comes from my spine and right shoulder and knees. Bending, lifting, walking. I am right handed"*. He comments in respect of the assistance that he needs with DLA *"I do have a friend on the same property that I live on. I do have help with lifting and carrying things"*.

The appellant's *Notice of Appeal* was dated October 24, 2014. His reasons for appealing are presented as argument in Part F.

The panel reviewed the medical evidence as follows:

Diagnoses

In the PR the appellant's physician diagnosed him with cervical/thoracic/lumbar/sacral spondylosis and chronic pain syndrome secondary to multiple musculoskeletal injuries.

Severity of Impairment:

Physical Impairment

- In the PR the physician noted that the appellant was not able to work in his chosen occupation due to the pain caused by his impairment. In describing the appellant's functional skills, the physician indicated that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5+ stairs unaided, can do no lifting, and can remain seated for less than one hour.
- In the AR the physician noted that the appellant has "*Physical limitations – chronic musculoskeletal pain*". He indicated that the appellant is independent in walking indoors but requires periodic assistance with walking outdoors, climbing stairs and standing; and takes significantly longer than is typical for lifting, and carrying and holding. The physician comments "Significant limitations lifting, twisting, bending".
- In the MRI report the *Impression* summary is as follows: "*Interval deterioration with enlargement of the full-thickness rotator cuff tear that now measures at least 4 x 4 centimeters and involves infraspinatus and subscapularis and shows some fatty atrophy of the supraspinatus muscle*".

Mental impairment

- In the PR the physician indicates that the appellant has no difficulties with communication and confirmed that there are no significant deficits with cognitive and emotional function. In the AR he assesses as "good" the appellant's ability in speaking, reading, writing, and hearing. In terms of *Cognitive and Emotional Functioning* the physician indicates "no impact" for all 14 items listed. He indicates that the appellant is "independent" in all areas of *Social Functioning*. In addition he indicates that the appellant has "good functioning" in his relationship with his immediate and extended social networks.

Restrictions in performing DLA

- In the PR the physician indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform daily living activities.
- In the AR the physician has noted that the appellant is "independent" in regard to all ADLs for personal care, basic housekeeping, shopping, meals, pay(ing) rent and bills, medications, and transportation.

Help required/provided

- In the PR the physician indicates that the appellant does not require any prostheses or aids for his impairment.
- In the AR the physician has written "N/A" in response to a question asking what support/supervision would be required by the appellant to maintain him in the community if he required help. The physician confirms that the appellant does not have an assistance animal.

Neither party provided any additional information on appeal.

PART F – Reasons for Panel Decision

The issue in 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 physician has failed to provide sufficient information to indicate the severity of the appellant's physical condition. The appellant has had several surgeries and has been advised that there is nothing more that can be done surgically to improve his condition. Moreover, he has been advised by various physicians that his condition will inevitably deteriorate and he may end up in a wheelchair. He has challenges all day every day and is unable to walk far, and unable to lift.

He does not need help everyday but he does need help carrying wood, food, water, and laundry.

The ministry argued that the appellant's physician has indicated that the appellant requires periodic assistance with walking outdoors, climbing stairs and standing, but the physician provided no information on how often the appellant requires such assistance. In addition, the ministry stated that while the appellant takes significantly longer with lifting, and carrying and holding due to significant limitations with lifting, bending and twisting, no information is provided by the physician on how much longer it takes. The ministry concludes that the impacts described by the physician are more in keeping with a moderate degree of impairment, not a severe degree of impairment.

Panel Decision

The panel notes that the appellant is not satisfied that his physician has adequately identified and described the severity of the appellant's condition. The appellant has completed page 12 of the PWD application noting that he is periodically restricted in personal self care, meal preparation, basic housework, and mobility inside the home; and continuously restricted in daily shopping and mobility outside the home. But his physician has indicated that the appellant can perform all of these activities independently. Accordingly, there is a lack of congruence between the appellant's self assessment of the severity of his physical condition and the physician's assessment.

The panel recognizes that section 2(2) of the EAPWDA requires that a severe physical impairment be diagnosed by a medical practitioner. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the applicant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's GP) identify the impairment and confirm that impairment will continue for at least two years. The panel also notes that the legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided at reconsideration presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

The panel concludes that while the pain experienced by the appellant is a serious matter for him, the medical assessment fails to provide sufficient information to establish a clear picture of the appellant's physical functioning and therefore the panel finds the ministry reasonably determined that a severe physical impairment has not been established.

Severe Mental Impairment

The appellant advanced no argument with respect to a severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is simply that there is no evidence to establish a severe mental impairment.

Panel Decision

The panel notes that in the PR the appellant's physician indicates that the appellant has no difficulties with communication and confirmed that there are no significant deficits with cognitive and emotional function. In the AR he assesses as "good" the appellant's ability in speaking, reading, writing, and hearing. In terms of *Cognitive and Emotional Functioning* the physician indicates "no impact" for all 14 items listed. He indicates that the appellant is "independent" in all areas of *Social Functioning*. In

addition he indicates that the appellant has “good functioning” in his relationship with his immediate and extended social networks.

Considering that:

- the appellant has made no claim of having a mental impairment,
- there is no diagnosis from a medical professional as to a mental impairment,
- the appellant’s ability to communicate is good in all respects,
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*, and
- the evidence indicates no impact to cognitive and emotional functioning,

the panel concludes that the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant’s position is that he is not able to walk far and is unable to lift. He indicates that he is periodically restricted in the following DLA: personal self care, meal preparation, basic housework, and mobility inside the home; and continuously restricted in daily shopping, and mobility outside the home.

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 the appellant’s physician indicated that the appellant is independent in all aspects of his DLA and there was no indication that he takes significantly longer to perform them. The ministry notes that it could be reasonable to assume that not being able to lift at all might impact the appellant’s ability to manage his DLA, but his physician has indicated that he is independent in all aspects of his 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 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. Additionally, 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.

The panel understands the appellant’s frustration with what he perceives to be inadequate evidence from his physician which he feels does not accurately portray the extent of his restrictions. However, the panel is required to place significant weight on the professional evidence. In this case, the evidence of the physician is consistent that the appellant independently manages all aspects of the prescribed DLA.

There is a reference 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. In the panel's view, paid employment generally requires a higher level of functionality than DLA.

Based on the foregoing analysis, the panel concludes that the ministry reasonably determined that the evidence is insufficient to show that the appellant's ability to perform his DLA is significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant stated that he doesn't need help every day but he does need help carrying things such as wood, food, water, and laundry. He also indicated that lifting is a big problem for him. He noted that he has a friend who lives on the same property who assists him with lifting and carrying.

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 and the appellant does not require the services of an assistance animal.

Panel Decision

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. While the appellant indicates that he benefits from the help of his friend for lifting and carrying, the panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) 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.