

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 5, 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

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 Employment and Assistance Regulation.

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 June 10, 2014; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on June 10, 2014; and an assessor's report ("AR") completed by the physician on June 17, 2014.
- The appellant's Request for Reconsideration form with a brief handwritten reconsideration submission dated October 28, 2014.

Diagnoses

- In the PR the appellant's physician (who had known the appellant for six months and had seen the appellant 11 or more times) diagnosed him with musculoskeletal system back pain.

Physical Impairment

- In the PR the physician described the appellant's health history as "Back pain stops [appellant] from working/sitting/walking at times. Has back pain most days. Medication helps."
- The physician also commented "Treatment that could help would include physiotherapy/massage therapy."
- In terms of physical functioning the physician reported that the appellant can walk 4+ blocks unaided on a flat surface, his stair-climbing ability is unknown, his lifting capacity is 15 to 35 pounds, and he can remain seated for one to two hours.
- In the AR the physician indicated that the appellant independently manages all aspects of mobility and physical ability including walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding.
- In his self-report the appellant wrote that he suffers from low back pain, commenting "standing/sitting too much, mornings are difficult, pain up legs from stairs." He wrote that his back pain caused morphine addiction, and that his current pain medication is helping.

In his reconsideration submission the appellant wrote that:

- He requires assistance as he cannot pay for his pain medication, which is crucial for treating his back pain and opioid dependency.
- Without the pain medication he will be unable to work and may feel he has to return to illicit substance use.
- He is requesting help with paying for his pain medication so he can be a functioning member of society.

Mental Impairment

- In the PR the physician reported that the appellant has no difficulties with communication, and in the AR he noted that the appellant's speaking and hearing are good but that his reading and writing are poor.

- In the PR the physician indicated that the appellant has significant deficits in two of twelve categories of cognitive and emotional function: emotional disturbance and attention/sustained concentration, commenting “Has anxiety & difficulty concentrating.”
- In the AR the physician indicated that the appellant’s impairment has no impact on his cognitive and emotional functioning.

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, and commented “When back is sore [appellant] has a hard time moving around.”
- In the PR the physician indicated that the appellant’s impairment does not directly restrict his ability to perform the DLA of *meal preparation, management of medications, daily shopping, use of transportation, management of finances, and social functioning*. He reported that the appellant is periodically restricted in the DLA of *personal self-care, basic housework, and mobility indoors and outdoors*. He described the term “periodic” as meaning “periodic back pain” and commented “When back pain is acting up cannot do anything.”
- In the AR the physician indicated that the appellant independently manages all tasks related to all DLA, except that he requires periodic assistance from another person with the budgeting aspect of *management of personal finances*.

Help

- In the PR and AR the physician reported that the appellant does not require any prostheses or aids for his impairment, and in response to the question “What assistance does your patient need with [DLA]?” the physician wrote “Medication helps.”
- In the AR the physician indicated that the appellant receives help with DLA from family and that he does not have an assistance animal.

On appeal neither party provided any additional 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, as expressed in his Notice of Appeal, is that his back pain along with foot issues constitutes a severe physical impairment. He argued that he has recently had to pay for orthotics and a podiatrist, and he missed a lot of work trying to find out what is wrong with his feet so he needs help to pay for his pain medication. He also argued that if he can't get support with his prescription, he will have to stop working and "go on assistance."

The ministry's position, as set out in the reconsideration decision, is that there is not enough evidence to establish a severe physical impairment. It argued that the physician indicated that the appellant is independent in all aspects of mobility and physical ability.

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 terms of physical functional skills, the physician's observations in the PR put the appellant's abilities at the mid- to high end of the scale except for the ability to remain seated. This is consistent with his observations in the AR where the physician reported that the appellant independently manages all aspects of mobility and physical ability.

The panel notes that section 2(2) of the EAPWDA requires a severe physical impairment to be diagnosed by a medical practitioner. There is no evidence from a medical practitioner with respect to the foot problems mentioned by the appellant or any restrictions they may impose on the appellant's functioning. Similarly, the physician did not diagnose opiate addiction as an impairment.

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 impairment do not appear to have translated into significant restrictions in his ability to manage his DLA independently.

For the foregoing reasons, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment as contemplated by the legislation.

Severe Mental Impairment

The appellant advanced no argument with respect to a mental impairment, though the physician indicated that the appellant has deficits in cognitive and emotional functioning in the form of anxiety and difficulty concentrating.

The ministry's position is that there is not enough evidence to establish a severe mental impairment. The ministry argued that the physician indicated minimal or no impacts to cognitive and emotional function, and no difficulties with communication.

Panel Decision

The evidence from the physician provides no diagnosis of a mental impairment. In the PR he indicated that the appellant has significant deficits in two areas of cognitive and emotional function, though in the more-detailed description in the AR he indicated no impacts. The lack of a diagnosis tends to indicate that the appellant's anxiety and effects on concentration are more likely to be situational rather than the result of a mental disorder.

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), *manage personal medication* (filling/refilling/taking as directed), *social functioning* (making appropriate social decisions) and *daily shopping* (making appropriate choices.). The physician indicated that the appellant requires periodic assistance with the budgeting aspect of *managing personal finances*, but he has provided no explanation of why this is so and there is no evidence of what sort of assistance, if any, the appellant receives with this task.

The evidence of the physician in both the PR and AR 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 appellant's ability to communicate is good other than poor reading and writing,
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*, and
- on balance the evidence indicates 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 back pain significantly restricts his ability to perform DLA. He also argued that without financial assistance to purchase his pain medication he will have to stop working and "go on assistance."

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 evidence shows that the appellant independently manages the majority of his DLA, and that there is no indication that it takes him significantly longer than typical to perform them.

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. 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.

In the appellant’s case the physician’s evidence is consistent in the AR and PR that the appellant independently manages all aspects of the DLA of *meal preparation, management of medications, daily shopping, use of transportation, and social functioning*. Based on its analysis under the discussion of Severe Mental Impairment above, the panel has concluded that the appellant independently manages the DLA of *decision making*.

There is no evidence of the types of restrictions experienced by the appellant with the DLA of *basic housework, mobility indoors and outdoors*, or the budgeting aspect of *management of personal finances*, and the physician has provided no information with respect to how frequently the periods of back pain occur that are sufficient to restrict the appellant’s functioning. No evidence has been provided to the panel with respect to the types of assistance the appellant requires with these functions.

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. 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 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.