

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 12, 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 the parties the hearing was held in writing, in accordance with section 22(3) of the *Employment and Assistance Act*.

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 form (left blank but referencing an attachment); a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on July 2, 2014; and an assessor's report ("AR") completed by the physician on July 11, 2014.
- A cover letter from the appellant's advocate with attached pages containing "a rough draft of suggestions for [the physician's] consideration in completing section 2 of [the PWD application form]" This cover letter and attached pages are referenced hereinafter as the "Self-Report Attachment").
- The appellant's Request for Reconsideration form with attached reconsideration submission dated October 30, 2014, and attached advocate-prepared questionnaire (the "Questionnaire") completed and signed by the physician on October 28, 2014.

Diagnoses

- In the PR the physician (who had known the appellant for 2 months and seen him two to ten times) diagnosed the appellant with depression (onset 2004), anxiety disorder (onset 2013), ADHD (attention deficit hyperactivity disorder)(onset 1995), and a C1 fracture (onset 2011).
- In the AR the physician described the appellant's impairments that impact his ability to manage DLA as being "ADHD". In the Additional Information section of the AR the physician commented "C1 fracture but no severe neurological impairment. Impairment due to ADHD/anxiety/depression mostly."

Physical Impairment

- In the Health History portion of the PR the physician commented "C1 fracture – no neurological fallout but chronic pain."
- In the Additional Comments section of the PR the physician commented "C1 fracture stable but causing pain. No neurological fallout."
- In terms of physical functioning the physician reported in the PR that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5+ stairs unaided, can lift 5 to 15 pounds, and can remain seated for 1 to 2 hours.
- In the AR the physician reported that the appellant independently manages walking indoors and outdoors, climbing stairs and standing. He reported that the appellant requires continuous assistance from another person with lifting/carrying/holding.
- The physician indicated that he is providing services of pain management and referral to a spinal clinic.
- In the Questionnaire the physician indicated that the appellant has a severe impairment and commented "Decrease[d] range of motion of neck. Chronic pain in neck and head. Depression." He responded "Yes" to the question "Has your patient's cervical pain become worse since the application was made in July?"

In the Self-Report Attachment the appellant reported that he:

- Experiences chronic and severe pain in neck, left arm, shooting pain and hotspots down his left leg, debilitating migraines, significantly restricted mobility and flexibility.
- Can walk less than one block before experiencing severe pain, can only climb 2-5 steps before experiencing severe pain, can lift less than 5 pounds before experiencing severe pain, can sit for less than 1 hour

Mental Impairment

- In the Health History portion of the PR the physician commented “Depression [and] anxiety – fear of social interaction...ADHD – Difficulty managing tasks.”
- In the PR the physician indicated that the appellant has no difficulties with communication “except to read and write.” In the AR the physician described the appellant’s speaking and hearing as “good”, and his reading and writing as “satisfactory”.
- In the PR the physician indicated that the appellant suffers significant deficits in seven of twelve categories of cognitive and emotional function: executive, memory, emotional disturbance, motivation, impulse control, motor activity, and attention/sustained concentration.
- In the Additional Comments section of the PR the physician commented “No meds used for ADHD, improvement expected if he is on medication...Depression and anxiety meds can be optimized to improve functioning.”
- In the AR the physician indicated that the appellant’s impairments have a moderate impact on 7 of 14 categories of cognitive and emotional function: emotion, impulse control, attention/concentration, executive, memory, motivation, and other neuropsychological problems. He reported minimal or no impacts in the 7 remaining categories.

In the Self-Report Attachment the appellant reported that he:

- Experiences a lot of anxiety, agitation, stress, depression, and lack of motivation.
- Is isolated/withdrawn, has difficulty interacting with friends.
- Has difficulty making decisions.
- Experiences significant short term memory loss, inability to concentrate, and is easily confused.

DLA

- In the PR the physician indicated that the appellant has not been prescribed medication or treatment that interferes with his ability to perform DLA, and commented “Patient has been on stable dosages for months.”
- In the PR the physician reported that the appellant is not directly restricted with the four DLA of *personal self-care, management of medications, basic housework, and daily shopping*. He reported the appellant as being directly restricted in the six DLA of *meal preparation, mobility indoors and outdoors, use of transportation, management of finances, and social functioning*. With respect to social functioning the physician explained “Anxiety [and] depression causes social phobia.”
- In describing the degree of restriction the physician wrote “ADL takes slightly longer than usual.”
- In the AR the physician indicated that the appellant independently manages all tasks related to the four DLA of *personal self-care, basic housework, manage personal medication, and use of transportation*. He also indicated that the appellant independently manages most tasks related

to the DLA of *daily shopping* (except for needing periodic assistance with making appropriate choices and carrying purchases home), *manage personal finances* (except for needing periodic assistance with budgeting), and *social functioning* (except for needing periodic assistance with securing assistance from others). The physician described the appellant as having marginal functioning with respect to both his immediate and extended social networks. He reported the appellant as needing periodic assistance from another person with all tasks related to the DLA of meal preparation.

- In the Questionnaire the physician responded “Yes” to the question “Does your patient often take significantly longer than normal to complete [DLA] as a direct result of his limitations?”
- In the Questionnaire the physician indicated that the appellant is significantly restricted in his ability to perform four DLA: *manage personal finances* (“forgetful”), *daily shopping*, *use of transportation*, and *basic housework*.

In the Self-Report Attachment the appellant stated that:

- His DLA might be slowed down or restricted by neck pain, fatigue, lack of energy, low motivation or mood, and mobility or flexibility.
- He goes to emergency regularly to get a shot of a pain killer.
- His morning routine of *personal self-care* takes two times longer than before his accident.
- When his severe pain becomes unbearable he will not engage in *meal preparation* at all as he is in bed. He relies on assistance from his girlfriend and his mother, and opts to cook simple meals.
- He forgets to take his *medications* on time and has to have a blister pack.
- His ability to do *basic housekeeping* is impaired depending on pain levels and it often goes undone. He needs significant help from girlfriend and mother.
- When his neck pain gets worse it increases his anxiety and depression so he does not go *shopping*.
- When his neck pain worsens his *mobility indoors and outdoors* are affected.
- His *use of transportation* is restricted by anxiety and fear of crowds. He relies on his girlfriend and mother for rides.
- With respect to *management of finances*, he is unable to get to the bank, forgets, and becomes overwhelmed.
- Severe pain, ADHD, and other issues cause him to be socially isolated and impair his communications.

Help

- In the PR the physician reported that the appellant requires prostheses or aids in the form of bathroom bars, supportive pillows, and supportive shoes. Asked to describe the assistance the appellant needs with DLA the physician responded “Assistance might be needed for personal care and housework, but patient isn’t dependent fully on assistance. None of the conditions render him fully dependent on others.” In Additional Comments the physician stated “Impaired functioning overall but still able to maintain some independence.”
- In the AR the physician indicated that the appellant routinely uses no assistive devices to help compensate for his impairment, and that the appellant does not have an assistance animal. He noted that the appellant receives assistance for DLA from family and friends.
- In the Questionnaire the physician indicated that the appellant requires significant help daily from others with the three DLA of daily shopping, manage personal finances (“forgetful”), and

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basic housework.

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.

Severe Physical Impairment

The appellant's position is that between the PR and the AR the physician has confirmed that the appellant has a severe physical impairment, with severe chronic pain requiring significant ongoing help. The appellant also argued that in the Questionnaire the physician confirmed that the appellant's cervical pain has become worse since the PWD application was submitted in July, and that the appellant has a severe impairment with decreased range of motion and chronic pain in neck and head.

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. The ministry argued that the functional skill limitations are not significantly restricted aside from lifting over 15 pounds, and that the physician's narrative does not describe a severe restriction in mobility.

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. 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.

The panel notes that the physician had been provided with the Self-Report Attachment at the time he completed the PR and AR. In most instances the degree of restriction reported by the physician is less than that reported by the appellant. Given the emphasis on professional evidence in the legislation, where there is a difference between the evidence of the physician and the appellant the panel has given more weight to the physician's information.

The appellant's physical functional skills as described by the physician in the PR are generally in the mid-range of the scale. This is consistent with the physician's evidence in the AR where he indicated that the appellant independently manages his mobility indoors and outdoors, stair climbing, and standing. The physician noted in the AR that the appellant requires continuous assistance with lifting/carrying and holding, which presumably is for weights over the appellant's 5 to 15 pound lifting capacity as identified by the physician.

While the physician diagnosed the C1 fracture as an impairment and noted that it resulted in chronic pain, he also noted repeatedly that it did not result in any neurological "fallout". In the AR the physician described the appellant's impairment that impacted his ability to manage DLA as being ADHD. He also commented "Impairment due to ADHD/anxiety/depression mostly." When read together, this information indicates to the panel that the physician considered the chronic pain issue to not significantly restrict the appellant's functioning.

In the Questionnaire the physician indicated that the appellant's cervical pain had become worse in the three intervening months since the PWD application forms had been completed. He referred to a decreased range of motion of the neck and chronic pain in the neck and head. There is no narrative from the physician to explain why the appellant's pain would have increased since the physician described the C1 fracture as being "stable" in the PR. There is also no narrative to describe the degree to which the pain may have increased or the effect it has on the appellant's functioning.

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.

For the foregoing reasons, the panel has concluded that while the appellant's functioning is impacted by his physical impairments, 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's position is that his depression, anxiety disorder and ADHD together constitute a severe mental impairment. He argued that the physician confirmed that his ADHD makes him forgetful and that he needs help with financial management. He also argued that the physician confirmed that he has depression, anxiety and social phobia which are sufficiently severe to significantly restrict his DLA on an ongoing basis.

The ministry's position is that the information provided is not sufficient evidence of a severe mental impairment. The ministry argued that the physician reported that the appellant is stable on medication and that most impacts noted on daily functioning are described as being "moderate", with

no further comment.

Panel Decision:

At the time the PR and AR were completed the physician had been seeing the appellant for about two months. The physician indicated in the PR that the appellant was taking no medications for his ADHD, but that improvement could be expected if he were on medication. He also indicated that while the appellant had been on stable dosages of medication for months, his depression and anxiety medications could be optimized to improve functioning. In the Questionnaire, which was completed about three months later, there is no further information about efforts being made to improve the appellant's mental function, or the results of such efforts.

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 *personal self-care* (regulating diet), *manage personal finances* (other than budgeting), *manage personal medication* (filling/refilling/taking as directed), and *social functioning* (making appropriate social decisions). The physician indicated that the appellant requires periodic assistance with the decision-making aspects of *daily shopping* (making appropriate choices), *meal preparation* (meal planning) and the budgeting aspect of *manage personal finances*, but he has provided no explanation of the nature of the assistance required or the frequency or duration of the restriction. In the Questionnaire the physician responded to a question about the frequency of restrictions by noting "daily", but there is no additional narrative to reconcile that observation with his previous statements that restrictions were "periodic".

The evidence of the physician in the AR indicates that the appellant independently manages all aspects of *social functioning* (except for needing periodic support/supervision securing assistance from others).and that he has marginal functioning with both his immediate and extended social networks.

Considering that:

- the appellant's ability to communicate is good or satisfactory in all respects,
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*,
- the physician's evidence indicates at most moderate impacts to cognitive and emotional functioning, and
- no further information has been provided about the prospects of improving the appellant's mental functioning through optimization of his medications,

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 he is significantly restricted in the DLA of mobility, personal self-care, lifting and carrying, shopping, financial management and interacting with others effectively on an

ongoing basis. The appellant argued that the ministry improperly based its decision on the physician's comments that the appellant is not dependent fully on others. The appellant noted that "Nowhere does the legislation say that the PWD must be fully dependent on others for assistance with daily living tasks." The appellant also argued that he takes significantly longer than typical to perform many DLA, and he referred to a passage from Hansard of Wednesday, May 8, 2002 wherein the minister of the day stated that "Someone who takes a long time...to dress and to do daily living activities would obviously require some assistance. They may not be getting that assistance, but they require it, so they're eligible."

The ministry's position is that since the majority of DLA are performed independently or require little help from others, the information from the physician does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry argued that where the physician has indicated that the appellant requires periodic assistance, there is no indication of the frequency or duration of the periodic assistance.

Panel Decision:

The legislation – s. 2(2)(b)(i) of the EAPWDA – 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 appellant rightly points out that the legislation does not require that an applicant must be fully dependent on others in order to be eligible for PWD designation.

In examining the evidence the panel noted that there is a significant degree of inconsistency and lack of clarity with respect to the degree of restriction the appellant faces with his DLA. In the PR the physician indicated that the appellant is restricted in five of the prescribed DLA (*meal preparation, mobility indoors and outdoors, use of transportation, management of finances, social functioning*) and indicated that he might need assistance with two others (*personal self-care and basic housework*.) The physician provided no information in the PR as to whether the restrictions were continuous or periodic. In the AR, which provides a more detailed breakdown of individual tasks related to each of the prescribed DLA, he indicated that the appellant independently manages most tasks related to most DLA, needing periodic assistance with only a few tasks related to four DLA. In the Questionnaire, the physician indicated that the appellant is significantly restricted in four DLA (*manage personal finances, daily shopping, use of transportation, basic housework*) but then subsequently commented that he needs significant assistance with three DLA (*daily shopping, manage personal finances, basic housework*.)

In his Self-Report Attachment the appellant stated that his morning routine of personal self-care

typically takes two times longer than before his accident. In the PR, in describing the degree of restriction, the physician stated that the appellant's DLA "takes slightly longer than usual." In the Questionnaire, the physician responded "yes" to the question "Does your patient often take significantly longer than normal to complete most daily living activities as a direct result of his limitations?" No additional information was provided about which DLA were restricted in this way, and no information about how much longer than typical these DLA may take.

In the panel's view, the Questionnaire should have been an opportunity for the appellant to clarify the information and inconsistencies in the previous evidence. It did not do so, and instead added to the inconsistencies. The onus is on the appellant to demonstrate that he satisfies the legislative criteria to qualify for PWD designation. While the evidence does indicate that the appellant experiences some restrictions to his ability to manage DLA, it does not demonstrate on the balance of probabilities that those restrictions are significant.

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's position is that he requires significant assistance with DLA from his girlfriend and his mother.

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 mobility devices are required, and that in the physician's comments in the PR regarding aids (bathroom bars, supportive pillows and supportive shoes) it is not apparent whether those items are in use or are recommended.

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.