

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 18, 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 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 May 15, 2014; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on July 3, 2014; and an assessor's report ("AR") completed by a social worker on June 12, 2014.
- The appellant's Request for Reconsideration form with attached reconsideration submission dated November 10, 2014.
- A letter from the physician dated November 7, 2014.
- A CT scan imaging report dated August 29, 2014.

Diagnoses

- In the PR the appellant's physician (who has known the appellant for more than five years and had seen the appellant two to ten times in the previous year) diagnosed him with cardiomyopathy, ischemic heart disease ("IHD"), and diabetes.
- In his letter of November 7, 2014 the physician wrote that the appellant has recently been diagnosed with significant peripheral arterial disease with claudication (pain in the legs) symptoms. The physician also referred to the appellant having significant medical problems with stable coronary artery disease, chronic heart failure, and hypertension.
- In the CT report of August 29, 2014 the physician indicated that the appellant has 80 to 99% blockage of various arteries, and a calcified right plural plaque due to previous asbestos disease.
- In the AR the social worker (who had known the appellant for two weeks and had met with him twice) referred to lumbar herniated discs, sciatica, two heart attacks and headaches. She also commented "vision blurs daily".
- In his oral testimony the appellant said that he has COPD (chronic obstructive pulmonary disease).

Physical Impairment

- In the PR the physician commented "significant cardiac [illegible] starting in 2009 [and] has had stents. [Illegible] ischemic cardiomyopathy. Unable to manual labour."
- In terms of physical functional skills, the physician reported that the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 5+ stairs unaided, lift 15 to 35 pounds, and has no limitation to remaining seated.
- In his letter of November 7, 2014 the physician reported that as a result of the recently diagnosed peripheral arterial disease, the appellant is now unable to walk more than a block at a time without having to stop with significant leg pains. He indicated that surgery is pending for this condition.

In the AR the social worker reported that the appellant independently manages walking indoors and outdoors, climbing stairs, and standing, though taking significantly longer than typical with each. She stated that the appellant requires continuous assistance with lifting and with carrying/holding, and commented as follows regarding each activity:

- Walking indoors – sometimes balance is off and he must steady himself.
- Walking outdoors – 100 yards then must rest.
- Climbing stairs – one stair at a time – both feet. Needs railing. Difficult.
- Standing – five minutes max.
- Lifting/carrying/holding – needs help now for most things. Ten pounds he can manage. 20 feet.

In his self report the appellant stated that he:

- Has pain in legs and feet due to diabetes.
- Is not able to sit or stand for long periods of time due to pain.
- Requires daily medication and monitoring of diabetes and blood pressure.
- Is not able to lift or carry anything over five pounds.
- Requires assistance with household maintenance, cooking, cleaning, shopping, and other similar activities.
- Used to be very physically active, but is no longer independent.
- Depends on his daughter and friends to help with daily tasks and rides to doctors' appointments.
- Has to nap most days due to fatigue.

In his reconsideration submission the appellant stated that:

- There has obviously been a miscommunication between himself and his physician as he is not able to walk four blocks or lift more than five pounds.
- The physician agrees the appellant is not able to work for numerous reasons.

Mental Impairment

- In the Health History portion of the PR the physician reported that the appellant “feels depressed because of chronic med. problems. Often has decreased concentration, memory and self motivations. Requires help at these times.”
- In the PR the physician indicated that the appellant has difficulties with communication. In the AR the social worker noted that the appellant’s speaking, reading and writing are satisfactory but that he suffers “some hearing loss.”
- The physician reported that the appellant has significant deficits in one of twelve categories of cognitive and emotional function (emotional disturbance.) In the AR the social worker identified major impacts in four of fourteen categories of cognitive and emotional disturbance (bodily functions, motivation, motor activity, and other emotional or mental problems.) She also identified moderate to major impacts in five other areas (consciousness, emotion, attention/concentration, executive, and memory.)
- The social worker commented that the appellant finds he must concentrate even when he is just walking as he tends to lose focus, and that the appellant finds it difficult to accept his limitations now.

In his self-report the appellant stated that he:

- Deals with daily fatigue, mood swings and depression.
- Is unable to focus or organize his thoughts.
- Some days due to depression finds it hard to get out of bed.

DLA

- In the PR the physician indicated that the appellant has been prescribed medication or treatment that interferes with his ability to perform DLA, commenting “insulin and hypoglycemia.”
- The physician indicated that the appellant is continuously restricted in performing the DLA of *basic housework*, and periodically restricted in the DLA of *meal preparation, daily shopping, and use of transportation*. He explained his use of the term “periodic” as follows: “When med issues worsen needs hospitalization [and] help once stable.”
- The physician indicated the appellant is unrestricted in the DLA of *personal self-care, management of medications, mobility indoors and outdoors, management of finances, and social functioning*.
- The social worker reported that the appellant independently manages the five DLA of *manage personal finances, manage personal medications, personal self-care* (though he takes significantly longer than typical with most aspects of *personal self-care*), *use of transportation* (though getting in/out of a vehicle is difficult and painful, he uses the bus and his wife often drives him) and *social functioning*. She reported that the appellant has good functioning with both his immediate and extended social networks, though she commented that he “stays home a lot.”
- The social worker reported that the appellant requires continuous assistance from his daughter with the three DLA of *basic housekeeping, daily shopping, and meal preparation*.

In his reconsideration submission the appellant stated that:

- He is not able to maintain his residence to an acceptable sanitary condition, and that his former spouse assists with the house cleaning, outside work, taking him shopping and various other activities.
- He is waiting for a date for an operation on his right leg for a painful problem that is causing his leg to go numb and cold.

In his oral testimony the appellant stated that:

- He is unable to walk for more than a block at a time.
- He forgot to appeal a decision from BC Hydro and his power has been cut off.
- He has been advised by his physician not to have the proposed surgery on his leg because the risk of complications is too high at this time.
- He gets totally depressed, feels isolated, and feels he’s lost everything.
- He used up all his savings on living expenses.
- In order to qualify for income assistance he had to apply for his Canada Pension early and so is getting 30% less than if he could have waited.
- He would much rather work if he could than collect income assistance.

In response to questions from the panel the appellant responded that:

- He can’t walk from one telephone pole to another and can’t take his dog for walks anymore.
- Both feet burn at night and he sometimes can’t sleep.
- Recently prescribed medication helps this condition.
- He prepares most of his own meals.
- He has to be careful not to fall when showering.

- Sometimes he can't remember the last time he had a shower and has to be reminded by his daughter.
- He sometimes forgets his dog's name.
- He was alone with the physician when the physician completed the PR – he should have had someone with him.
- His daughter does all the housework. He can't run a vacuum because his back gets sore.
- His former spouse helps with the yard work.
- Laundry is easy enough for him, though he has to be reminded to do it.

Help

- In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment. In response to the question "What assistance does your patient need with [DLA]?" the physician wrote "Supervision & assistance [with] house/yard work & sometimes meals."
- The social worker indicated that the appellant does not routinely use any assistive devices, and that he does not have an assistance animal.

Admissibility of Additional Information

The appellant's oral testimony provides additional detail about the impacts he is experiencing as a result of his impairments. This information is consistent with, and tends to corroborate, information that was before the ministry at the time of reconsideration. The panel has accepted it as oral testimony in support, in accordance with section 22(4) of the *Employment and Assistance Act*.

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 his medical conditions (heart condition, circulatory issues and diabetes) and associated difficulties such as numbness, when coupled with depression, constitute a severe physical impairment. He argued that he cannot walk as far or lift as much as the physician has indicated. He stated that when the social worker's written information is compared to the physician's, it is obvious that there was a communication problem between the appellant and the physician. The appellant also argued that he should not have to be totally unable to care for himself in order for his impairments to be considered "severe".

The ministry's position, as set out in its reconsideration decision, is that based on the information on physical functioning and abilities provided by the physician and the social worker, there is not enough evidence to establish a severe physical 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 physician and social worker.

As pointed out by the appellant, the panel notes that there are some inconsistencies between the evidence of the physician and the social worker. Where the evidence of the two professionals is inconsistent with each other, the panel has generally given more weight to the physician's evidence as he has known the appellant for much longer than the social worker and can be expected to be more familiar with the appellant's impairments. The social worker based her observations on two office visits with the appellant which took place before the physician completed the PR, so the social worker did not have the benefit of the physician's information when she completed the AR.

In terms of physical functional skills, the physician has indicated that the appellant's abilities are generally in the mid-to upper end of the scale. In his November 7 letter the physician indicated that because of a more recently diagnosed condition, the appellant's mobility is now significantly reduced. The panel notes that the appellant and the social worker have indicated that the appellant's lifting capacity is less than that noted by the physician. However, for the reasons noted above the panel has given more weight to the physician's evidence.

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 appellant's COPD or blurred vision, or any restrictions they may impose on the appellant's functioning. The physician did report a "calcified right pleural plaque likely due to previous asbestos disease" in the CT scan report, but he provided no information to indicate this condition limits the appellant's physical abilities.

The panel notes one's ability to participate in paid employment is not a legislative criterion for PWD designation. The focus of the legislation is the ability to perform DLA. Paid employment generally requires a higher level of functioning than DLA.

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 clearly 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 and difficulty focusing his thoughts and concentrating constitute a severe mental impairment. He argued that the physician and the social worker both reported significant deficits in cognitive and emotional functioning. The appellant pointed to his failure to remember to appeal the hydro decision as evidence of his impaired mental functioning.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to establish a severe mental impairment. The ministry argued that because of inconsistencies in the information provided by the physician as compared to that of the social worker it is difficult to develop a clear and cohesive picture of the degree of restrictions the appellant has with his cognitive and

emotional functioning.

Panel Decision

The physician did not diagnose a mental impairment in the Diagnoses portion of the PR, but he did indicate under Health History that the appellant feels depressed because of his chronic medical problems and he noted a significant deficit in emotional functioning. He also referred to periodically decreased concentration, memory and motivation. The social worker, in contrast to the physician, indicated that the appellant experiences moderate to major impacts in most areas of cognitive and emotional functioning. For the reasons provided in the foregoing discussion of Severe Physical Impairment, the panel has given more weight to the physician's evidence.

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 his finances and medications. The social worker's evidence confirms that the appellant independently manages the decision making aspects of *personal self-care* (regulating diet), *meal preparation* (meal planning), *manage personal finances* (banking, budgeting, paying rent and bills), *manage personal medication* (filling/refilling/taking as directed), and *social functioning* (making appropriate social decisions). The social worker indicated that the appellant requires continuous assistance with the decision-making aspect of *daily shopping* (making appropriate choices.), but she has provided no explanation of why this is so except that the appellant's daughter helps him with this task.

The evidence of the physician in the PR and the social worker in the AR indicates that the appellant independently manages all aspects of *social functioning* and that he has good functioning with both his immediate and extended social networks.

Considering that:

- the appellant's ability to communicate is satisfactory other than some possible hearing loss (which was not diagnosed by the physician),
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*, and
- the physician's 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 heart and circulatory issues, diabetes and leg pain, coupled with his depression and difficulties focusing his thoughts, significantly restrict his ability to perform his DLA. He argued that his mobility is significantly limited and that he relies on his daughter and former spouse to help him with DLA.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods. The ministry argued that because of inconsistencies in the information provided by the physician as compared to that of the social worker it is difficult to develop a clear and cohesive picture of the degree of restrictions the appellant has with 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 and social worker. 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 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 and social worker is consistent in indicating that the appellant is not significantly restricted in five of the ten prescribed DLA: *personal self-care, management of medications, management of finances, decision making, and social functioning*. He also independently manages most aspects of *mobility indoors and outdoors*, though he does experience restrictions with this DLA. The physician reported that the appellant requires periodic assistance with *use of transportation*, but provided no information about the frequency or duration of those periods, or the nature of the restrictions, except to indicate that it is only when the appellant's symptoms are severe enough to put him in hospital. The social worker indicated that the appellant independently uses the bus and otherwise relies on rides from others.

Regarding the DLA of *meal preparation*, the physician and social worker indicated that the appellant receives assistance, but the appellant said in oral testimony that he does most of his own meal preparation. With respect to basic housekeeping and daily shopping, the evidence indicates that the appellant does experience restrictions in these areas, but there is insufficient evidence as to the extent of the restrictions or the frequency with which they occur.

Considering the evidence as a whole, it indicates that the appellant is subject to periods when his symptoms are worse than at other times and are likely to more significantly restrict the appellant's DLA, but there is no evidence as to how often these periods occur or how long they last.

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's position is that he requires significant assistance with DLA from his daughter and former spouse.

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

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.