

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated December 16, 2014 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet three of the five criteria required for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) section 2. The ministry found that the appellant meets the criteria of being 18 years of age or older and, that in the opinion of a medical practitioner, his impairment is likely to continue for two or more years. However, the ministry determined that, based on the information provided, the following criteria as set out in section 2(2)(b) of the EAPWDA were **not** met:

- The minister is satisfied that the appellant has a severe mental or physical impairment;
- In the opinion of a prescribed professional, the appellant's impairment significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- As a result of the restrictions, the appellant requires the significant help or supervision of another person to perform the DLA restricted by his impairment.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2

PART E – Summary of Facts

The appellant did not attend the teleconference hearing. The panel confirmed the appellant had been notified of the date and time of the hearing and after waiting 10 minutes, the panel proceeded with the hearing in the appellant's absence under s. 86(b) of the *Employment and Assistance Regulation*. The appellant's representative (the nurse who completed the Assessor Report discussed below) attended the hearing and made submissions on his behalf.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application, containing the following three parts:
 - The applicant information portion of the Self Report completed July 10, 2014;
 - The Physician Report (PR) dated July 31, 2014 completed by the appellant's family doctor who indicated he had known the appellant for 2 years and indicated he had seen him 2-10 times in the previous year; and
 - The Assessor Report (AR) dated July 18, 2014 completed by a nurse who indicated she has known the appellant since April 2014 and had seen him 2-10 times.
2. The appellant's request for reconsideration dated December 4, 2014 to which he attached a letter dated December 2, 2014 from the nurse who completed the AR, discussed below.

The following is a summary of the evidence from the PR and AR, as well as the December 2, 2014 letter from the nurse, regarding the appellant's impairments as they relate to the three PWD criteria at issue.

Severity of impairments (criteria set out in subs. 2(2) EAPWDA)

In the PR completed July 31, 2014, the appellant's family doctor diagnosed him with anxiety disorder and chronic pain, both onset in 1992. In his comment in the PR regarding the severity of the appellant's conditions, the appellant's doctor indicated that the appellant had a motor vehicle accident in 1992-1993 and the appellant has been on methadone since 1998 to treat his chronic lower back pain. The appellant's doctor indicated the appellant has a history of a fractured left radius which has left his [left] arm unable to straighten completely and he has arthritis in the wrist, though the doctor noted this is not x-ray proven as of the date of the PR. The doctor indicated that the appellant has stated he is unable to write due to a learning disability, which has not been completely diagnosed. The appellant's doctor also indicated that the appellant has a history of COPD, knee effusion (water on the knee) and diabetes ("diet uncontrolled"). The doctor indicated that the appellant had not been prescribed medications which interfere with his ability to perform his DLA and did not require any prostheses or aids for his impairment. In the AR, the nurse wrote that the appellant "struggles with chronic pain, emphysema, uses methadone to manage pain, arthritis and impaired mobility in L arm. Also struggles with chronic depression."

In the functional skills assessment in the PR, the family doctor indicated that the appellant could walk 4+ blocks unaided on a flat surface, that he could climb 5+ steps unaided, that he could lift 7-16 kg (15 to 35 lbs) and had no limitation in remaining seated. The family doctor indicated that the appellant had no difficulties with communication. In the AR the nurse indicated that the appellant's ability to communicate was satisfactory in the areas of reading and hearing, good in speaking and poor in

writing with the comment "poor recall has learning disability." The nurse indicated in the AR that the appellant was able to independently perform all areas of mobility and physical ability (walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding) writing the comment "limited in amount of weight < 20 lbs."

At the hearing, the nurse indicated that she wrote the December 2, 2014 letter based on a conversation with the appellant and she used his words to clarify her answers in the AR. She referred to her comment in the December 2, letter under the heading "severity of impairment," where she wrote the following regarding the appellant's physical impairment:

- Mobility aids: has had to rely on using a cane for mobility when he had difficulty walking from "water on the knees" with last episode February/March 2014
- Depending on pace of walking, does experience shortness of breath, limiting distances he is able to walk, secondary to chronic obstructive pulmonary disease
- As noted on page 17 of [AR, appellant] is limited to lifting 20 pounds due to previous injury to left arm
- Suffers from lower back pain when trying to [lift] i.e. bringing in wood for wood stove.

At the hearing, the nurse stated that the appellant sees a respiratory therapist and he has difficulty walking any distance at all.

In the PR, the appellant's family doctor indicated that he has significant deficits with cognitive and emotional function in two of the twelve listed areas (emotional disturbance and memory) but did not provide any commentary. In the AR section regarding the appellant's cognitive and emotional functioning, the nurse indicated that the appellant's mental impairment had a major impact in the area of neuropsychological problems, circling the words "learning disabilities." The nurse indicated that the appellant's mental impairment had a moderate impact in the areas of emotion ("chronic depression, anxiety attacks"), attention/concentration (circled the words "poor short term memory" and wrote "getting worse"), memory and motivation. The nurse indicated a minimal impact for bodily functions, circling the words "sleep disturbance" and writing "sleep apnea." The nurse indicated no impact in the other seven listed areas (consciousness, impulse control, insight and judgment, executive, motor activity, language, and psychotic symptoms). The nurse added the comments, "has severe constipation since switch to methadone from methadone. [Learning disability] makes even filling out application very difficult. Recall poor. Spelling poor. Does not use computer."

At the hearing, the nurse stated that the appellant suffers with depression which has gotten worse, particularly since there have been recent investigations for kidney disease, prostate issues and possible bladder cancer, and his anti-depressant medications have been doubled. Although the appellant is suffering from chronic insomnia, his doctor does not want to increase his sleep medications at the same time as increasing the anti-depressants. The appellant's depression and anxiety are not well-managed and he would be helped by weekly small group sessions, but he says he cannot afford to attend them.

In the December 2, 2014 letter under the heading "severity of impairment," the nurse wrote the following regarding the appellant's emotional impairment:

- Anxiety in crowds
- Only go to town if "absolutely has to" has had panic attacks when in large groups
- Some anxiety with driving
- [The appellant] has significant depressive symptoms for past 10 years, has been on several

different medications to treat depression with ongoing sleep problems, low motivation, poor appetite, memory deficits are getting worse, social withdrawal, some emotional lability

- Recent physical health changes (urological problems) have added to stress level and physical testing is required in [larger urban centre], adding to anxiety levels

Ability to perform DLA (criteria set out in subs. 2(2)(b) EAPWDA)

In the PR, the appellant's family doctor indicated that the appellant's impairment does not directly restrict his ability to perform his DLA and checked "no" beside all of the listed DLA except that of "social functioning," beside which the appellant's family doctor has checked "yes" and indicated the restriction is "periodic" with the comment "has anxiety with [large] crowds." In the AR, the nurse indicated that the appellant was able to independently perform all of the listed tasks of each DLA, writing the comments "so long as not too heavy" beside the task of carrying purchases home under the DLA of shopping, and "always over budget" beside the task of budgeting under the DLA of pay rent and bills. The nurse indicated that the tasks of using public transit and using transit schedules and arranging transportation were not applicable – explaining at the hearing that the appellant lives in a community that does not have public transportation. The nurse indicated in the AR that the appellant was independent in all listed areas of social functioning, writing the comment "sometimes get irate" beside "able to deal appropriately with unexpected demands." The nurse indicated that the appellant had good functioning in his immediate social network and marginal functioning in extended social networks, but did not provide any commentary.

In the December 2, 2014 letter under the heading "daily living activities," the nurse wrote the following:

- Anxiety around large crowds – client lives 40km from [the nearest town]. [The appellant] is able to tolerate anxiety levels coming to [the nearest town] but intensity of anxiety increases when going to larger centres ... for specialist medical appointments. Prefers to live in more isolated community due to anxiety.
- Depression impacts motivation level to do even daily tasks such as walking dogs, getting firewood, personal hygiene, engaging in social activities friends, depression worse since being unable to find employment, appetite very poor and often doesn't eat until supper time, chronic insomnia (goes to bed between 1-3 a.m.) makes getting up early difficult and often doesn't get out of bed until 9:30-10:00 a.m., will take naps during the day due to fatigue and low energy.
- Is able to complete some tasks around the house but takes much longer than other able bodied individuals and tends to procrastinate doing said tasks.

Assistance required/provided (criteria set out in subs. 2(2)(b)(ii) EAPWDA)

In the section of the AR describing the assistance provided for the appellant, the nurse indicated the appellant receives help from friends, uses a cane to compensate for his impairment, and wrote "does have dogs – finds them helpful, soothing."

In the December 2, 2014 letter under the heading "help required with daily living," the nurse wrote the following:

- [The appellant] does not need physical assistance to perform personal care; however, low motivation impacts his personal hygiene and he does not bath/shave etc. as frequently as he did.

- Roommate does most of the laundry so does not need assistance.
- Able to go shopping in small, local supermarket as closer and does not experience the levels of anxiety at the larger stores in a nearby town ... or city ..
- Can make meals but does not prepare formal meals due to low appetite and will eat more sandwiches
- [The appellant] is more socially isolated and does not seek out new social relationships in his community; does not seek out even closer friends that live nearby.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2 of the EAPWDA. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment, that his physical or mental impairment in the opinion of a prescribed professional directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods, and, as a result of those restrictions he requires help to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

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.

The following section of the *EAPWDR* applies to this appeal:

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(2) For the purpose of the Act, “prescribed professional” means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner;
- (b) registered psychologist;
- (c) registered nurse or registered psychiatric nurse;
- (d) occupational therapist;
- (e) physical therapist;
- (f) social worker;
- (g) chiropractor; or
- (h) nurse practitioner.

Existence and severity of impairments

In his notice of appeal, the appellant wrote that he is not able to work, that he has several “little things” wrong that add up to one big thing – that he has arthritis in his left wrist and elbow and sometimes can’t pick up a coffee cup with his left hand, he has lower back pain, and his right knee hurts. He also wrote that his “psyche says if I went to sleep tonight and didn’t wake up it would be ok” and that he wasn’t suicidal, but “hanging out waiting to die.” The appellant’s advocate told the panel that the appellant’s family doctor (who completed the PR) has retired and the appellant indicated that he thought the doctor’s nurse completed the PR based on his file and missed some information. On the appellant’s behalf, the nurse repeated the submissions set out in her letter of December 2, 2014 to the ministry on reconsideration. The nurse told the panel she does not know how often the appellant requires a cane for mobility when his knee has water on it – only referring to her notes in the December 2, 2014 letter. The nurse stated that the appellant’s depression and anxiety has recently become worse, his anti-depressant medications have been doubled, but his condition is not well-managed. The nurse stated that the impacts to the appellant’s functioning tend to be more around his mental health issues.

In the reconsideration decision, the ministry based its determination that the appellant’s impairments were not severe on the information provided by the appellant’s family doctor in the PR completed July 31, 2014, by the nurse in the AR completed July 18, 2014, as well as the additional information submitted by the nurse in the December 2, 2014 letter. In the functional skills section of the PR, the family doctor notes only some restriction with lifting (limited to 7-16 kg or 15-35 lbs), and in the AR, the nurse indicates independence in all aspects of mobility and physical abilities. The ministry also noted that the nurse indicated in the December 2, 2014 letter that the appellant uses a cane for mobility when he has difficulty with walking due to “water on the knees” but that no further information was provided to explain the frequency or duration in which this occurs (the last episode was reported as February/March 2014). The ministry determined that the information provided did not establish the appellant has a severe physical impairment.

In terms of the appellant’s mental impairment, the ministry noted the answers of the appellant’s family doctor in the PR that he had significant deficits with cognitive and emotional functioning in two areas (emotional disturbance and motivation). The ministry noted that in the AR, the nurse indicated a major impact to the appellant’s cognitive and emotional functioning in neuropsychological problems, specifically a learning disability, but that the other areas had moderate to no impact. The ministry

recognized that the appellant has a learning disability that affects his cognitive and emotional functioning, but was not satisfied that the information provided is evidence of a severe mental impairment. The ministry also noted the information from the nurse in the December 2, 2014 letter that the appellant has anxiety with crowds and significant depressive symptoms for the past 10 years which has affected many areas of his cognitive and emotional functioning, his motivation level is impacted and he takes significantly longer to manage activities of DLA due to procrastination. The ministry acknowledged that while the nurse's December 2, 2014 letter further explained the appellant's restrictions, the information was not significantly different from that found in the original PWD application and does not describe a severe mental impairment that significantly restricts the appellant's ability to perform his DLA. The ministry acknowledged that as a result of the appellant's depressive mood he has impacts to his cognitive and emotional functioning, however the ministry was not satisfied that the appellant is impacted to a severe degree.

Analysis and decision

The legislation provides that the minister may designate a person as a PWD if the minister is satisfied that the person has a severe mental or physical impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years (subs. 2(2)(a) of the EAPWDA). The appellant's family doctor confirmed in the PWD application that the appellant's impairments are anxiety disorder and chronic pain and that the conditions will continue for at least 2 years. The issue before this panel is whether the ministry reasonably concluded that the information provided does not confirm that the appellant has a severe physical and/or mental impairment.

In the PWD application form, the ministry has provided a definition of "impairment" which, although it is not set out in the applicable legislation, offers guidance in considering the existence and severity of an applicant's impairment. The ministry states, "impairment" is a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." To determine the severity of an impairment, there is both a cause – the impairment itself – and an effect – the degree to which it restricts the ability to function independently, effectively, appropriately or for a reasonable duration.

Physical impairment

In this case, the appellant's physician has diagnosed him with chronic pain to his lower back as a result of a car accident. He also has a history of pain, specifically in his left arm and wrist, together with knee pain (water on the knee), COPD and diabetes (diet controlled). The appellant's nurse has noted the appellant suffers from COPD and emphysema. In the PR, the family doctor has noted the appellant is restricted in lifting items heavier than 7-16 kg (15-35 lbs) and that he is independent with his mobility, using no aids for his impairment, or assistive devices. In the AR, the nurse indicated the appellant was independent in all aspects of mobility, although in the December 2, 2014 letter, the nurse notes that the appellant uses a cane for mobility when he has difficulty walking because of water on his knee (with the last known episode in February/March 2014), experiences some shortness of breath when walking due to his COPD, and suffers from low back pain.

The panel notes that the legislation provides that the determination of the severity of an impairment is at the discretion of the minister, taking into account all of the evidence, including that of the appellant.

However, the starting point must be the medical evidence. The panel notes that the information provided by the appellant's family doctor and nurse is that the appellant suffers some restriction in his ability to lift heavier objects more than 20 lbs and may occasionally require a cane for mobility if there is water on the knee (although the last known episode is February/March 2014 – nearly a year before the hearing). The appellant's family doctor and the nurse have confirmed in the PR and AR that he is able to independently perform the tasks of the DLA associated with physical ability (personal care, basic housekeeping, shopping, meals, and transportation).

The panel finds that the ministry's determination that the information provided does not establish a severe physical impairment is reasonable.

Mental Impairment

In its reconsideration decision, the ministry acknowledged that the appellant has a learning disability, although the panel notes the family physician indicated in the PR that it was not completely diagnosed. It is established by the appellant's family doctor that the appellant has anxiety disorder and the nurse reported that he suffers from depression.

As stated previously, the panel notes that the determination of the severity of an impairment is at the discretion of the minister, taking into account all of the evidence, including that of the appellant, but that the starting point must be the medical evidence. In the PR, the physician confirmed that the appellant has significant deficits with cognitive and emotional function in two areas (emotional disturbance and motivation), but did not provide any commentary to explain the answer. In the AR, the nurse's answers regarding the impact of the appellant's mental impairment on his cognitive and emotional functioning indicates that his impairment has a major impact in neuropsychological problems – learning disability. The nurse indicated that his impairment has a moderate impact in the areas of emotion, attention/concentration, memory and motivation and had minimal impact on his bodily functions (sleep disturbance caused by sleep apnea). The nurse's comments to explain her answers focused on the appellant's learning disability (difficult to fill out application, poor recall and spelling and doesn't use a computer). As well, in the AR the nurse indicated that the appellant was independent in all aspects of social functioning, with good functioning with his immediate social network, and marginal functioning in his extended social networks, but without providing any commentary. The appellant is assessed by his family doctor with no difficulties in communication and by the nurse with good or satisfactory communication in all areas, with the exception of poor writing due to poor recall, attributed to a learning disability.

In the recent information from the appellant's nurse (December 2, 2014), there is information restating that the appellant's anxiety disorder affects his ability to go to larger centres and he avoids crowds as he has panic attacks. The nurse also indicated the appellant's significant depressive symptoms cause ongoing sleep problems, low motivation (which impacts his motivation to do daily tasks), social withdrawal and some emotional lability. The nurse indicates that the appellant is able to complete tasks around his house and can do his shopping at a small local store he is comfortable with, will make his meals, but that he is becoming more socially isolated. Based on this evidence, the panel finds that without further information from the appellant's prescribed professionals explaining the severity or restriction of the appellant's anxiety and depression on his "ability to function independently, effectively, appropriately or for a reasonable duration," the ministry's determination that it has not been established that the appellant has a severe mental impairment is reasonable.

Direct and significant restrictions in the ability to perform DLA.

The nurse (the appellant's advocate) repeated the submissions set out in her December 2, 2014 letter that because of his anxiety around large crowds and depression, the appellant isolates himself, lacks motivation to perform his daily tasks and takes much longer to perform them. The appellant relies on help from his roommate to do his laundry, but does his shopping at a small local store.

The ministry determined that the majority of the appellant's DLA are performed independently and that the information from the prescribed professionals (the appellant's family doctor and the nurse) does not establish that his impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry noted that in the PR, the family doctor reported that the appellant independently performed all but one DLA – social functioning was periodically restricted due to anxiety with large crowds. The ministry noted no information was provided to explain the degree of this restriction or the assistance required to manage social functioning. The ministry noted the nurse's report in the AR that the appellant could independently manage all areas of daily living, and could independently manage all areas of social functioning, with good functioning in his immediate social network, but marginal functioning in his extended social network. The ministry did not refer to the information provided by the nurse in the December 2, 2014 letter in this section.

Analysis and decision

The legislation requires in subs. 2(2)(b) of the EAPWDA that a prescribed professional confirm that the appellant's impairments directly and significantly restrict his ability to perform his DLA continuously or periodically for extended periods. The panel notes that although a prescribed professional may indicate that, because of a restriction, an individual requires assistance either continuously or periodically for extended periods, this does not necessarily meet the legislative test of being a "direct and significant restriction." The DLA to be considered for a person with a severe impairment are, as set out in subs. 2(1) of the EAPWDR, as follows:

- Prepare own meals;
- Manage personal finances;
- Shop for personal needs;
- Use public or personal transportation facilities;
- Perform housework;
- Move about indoors and outdoors;
- Perform personal hygiene and self care;
- Manage personal medication;

With additional DLA for a severe mental impairment listed as follows:

- Make decisions about personal activities, care or finances; and
- Relate to, communicate or interact with others effectively.

In the appellant's case, when all of the information from the prescribed professionals (the appellant's family doctor and nurse) is read together, the family doctor and nurse have indicated that the appellant can independently perform all of the tasks of all his DLA associated with a physical impairment. Although the appellant's roommate does his laundry for him, there is no indication that

the appellant is incapable of doing his own laundry. For the DLA specifically related to persons with a mental impairment, the nurse has indicated in the AR that the appellant can independently perform all of the tasks listed for the DLA. The nurse indicates in the December 2, 2014 letter that the appellant lacks motivation and takes longer to perform tasks of DLA.

The panel finds reasonable the ministry's determination that the information provided does not demonstrate a severe mental or physical impairment that in the opinion of a prescribed professional significantly restricts his ability to perform her DLA continuously or periodically for extended periods.

Help with DLA

The appellant's advocate (the nurse) indicated in the December 2, 2014 letter that the appellant uses a cane for mobility when he has water on his knee, but the last episode she knows of was February or March 2014, and told the panel that the appellant's roommate does all of the laundry for him. The ministry noted that the appellant's family doctor did not indicate that the appellant requires or uses any assistive devices. The ministry determined that as it had not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

The legislation requires in subs. 2(b)(iii) that in the opinion of a prescribed professional, as a result of the appellant's restrictions, the appellant requires help to perform DLA. The panel notes the evidence before the ministry was that the appellant uses a cane for mobility when he has pain in his knee, but that the last episode was in February/March 2014. At the hearing, the nurse indicated that she did not know how often the appellant uses a cane for mobility. The panel finds that the ministry's determination that because 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, is reasonable.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation is reasonably supported by the evidence. The panel therefore confirms the ministry's decision.