

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “Ministry”) January 8, 2015 reconsideration decision in which the Ministry determined that the Appellant did not meet all of the requirements for designation as a person with disabilities (“PWD”) under Section 2 of the *Employment and Assistance for Persons with Disabilities Act*. The Ministry found that the Appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the Ministry was not satisfied that the evidence established that:

- the Appellant has a severe physical or mental impairment;
- in the opinion of a prescribed professional, the Appellant's daily living activities are directly and significantly restricted either continuously or periodically for extended periods by a severe impairment; and,
- in the opinion of a prescribed professional, as a result of these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform daily living activities.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (“EAPWDA”) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) Section 2.

PART E – Summary of Facts

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

For its reconsideration decision, the Ministry had the following evidence:

1. Appellant's PWD application consisting of:

- His self-report dated August 15, 2014.
- A physician's report completed on August 7, 2014 by a doctor who indicated that the Appellant has been a patient for 6 years and he had seen the Appellant 2-10 times in the past 12 months.
- An assessor's report completed on August 15, 2014 by a registered social worker who indicated that was the first contact with the Appellant and she met with him for 1 hour. She also referred to the doctor's report.

2. Appellant's request for reconsideration dated December 5, 2014, with a Supplemental Medical Opinion completed by the social worker on December 12, 2014. This supplemental opinion has a number of questions and spaces for details to the responses.

In his notice of appeal and submissions for this appeal, the Appellant provided information regarding his impairments which are summarized as follows::

- His back pain gets so bad that it affects his day to day life; medications don't always work.
- The pain keeps him up late sometimes and wakes him early in the morning, making him tired and unable to go to work; being tired most of the time is not a good feeling.
- Cannot work for too long and cannot stand for too long when the pain in his back becomes unbearable.
- Also gets headaches and sometimes his knees hurt as well.
- Is going to see another doctor.

Pursuant to section 22(4) of the Employment and Assistance Act, the Panel admits the information in the Appellant's appeal statements because that information is consistent with and tends to corroborate the evidence the Ministry had at reconsideration.

The Ministry provided no submissions for this appeal as it is relying on its reconsideration decision.

The Panel has summarized the other relevant evidence as follows.

Diagnoses

The doctor diagnosed the Appellant with seizure – alcohol related, epilepsy, back pain (disc bulges L4-5-S1), recurrent pneumothorax, gastritis (could be alcohol related), recovering alcoholic and depression.

Physical Impairment

The Appellant described his disabilities as follows:

- Suffers from alcohol-related seizures, epilepsy, back pain (disc bulges L4-5-S1), recurrent pneumothorax, gastritis; takes medications for seizures, acid reflux and pain.
- All diagnosed conditions prevent him from living a normal life and limit his ability to care for himself and his children.

- Due to regular, immense back pain cannot complete personal grooming, cooking, shopping, cleaning, laundry, or do any mobile activities, stand for more than 15 minutes, bend over or use his arms; can hardly bend down to pick up anything and can hardly lift his young children.
- Without help from his girlfriend and her child, would not be able to take care of himself – they do all the shopping, housework and help him every day.
- Can't count how many times has ended up in the hospital due to seizures which are difficult to recover from and leave him incapacitated for days.

The doctor reported the following regarding the Appellant's physical impairments:

- Suffers from seizures most likely related to excessive alcohol intake - controlled with medication.
- Suffers from recurrent spontaneous pneumothorax – cause is not known.
- Suffer from disc bulges at L4-L5-S1 levels; has to take pain killers; disc bulges are a barrier to lifting, prolonged sitting and standing; lower back problem unlikely to improve.
- Chronic pain is a barrier to any major physical activity.
- Can walk 4+blocks unaided on a flat surface, can climb 5+steps unaided, can lift 15-35 lbs. and can remain seated for 1-2 hours.

The social worker provided the following information about the Appellant's impairment:

- Attempted to return to previous employment 5-10 times, unsuccessful due to pain.
- Pain, numbness extends down to left knee – comes/goes; experiences headaches/migraines from physical effort; standing results in severe pain – must sit down.
- Has lung pain 2-3 times a week – has taken medication for pain.

Mental Impairment

The Appellant described his disability as follows:

- Suffers from depression, affecting his ability to complete personal grooming, cooking, shopping; has little motivation to complete tasks.
- Depression increased so he can no longer work where he was employed for several years; even harder to cope with the fact he cannot properly care for his young children.
- Countless seizures also affected his memory and coherence with, for example, understanding bus schedules, bills and remembering important appointments; his girlfriend writes down all appointments and without her he could not take the bus; gets nervous and anxious in public places and cannot ride the bus alone.
- Health conditions affect his ability to maintain and build relationships with family and friends; gets extremely nervous around his girlfriend's family; unable to enjoy doing things with friends, such as going to the park or on hikes.
- Has difficult time staying positive.

The doctor provided the following information about the Appellant's conditions:

- Depression has been moderate off and on, could be related to alcoholism.
- Has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance (depression), motivation and impulse control, "because of ongoing depression and back pain."
- Depression might be contributing to his ongoing mood changes and depression; could be related to alcohol intake.

The social worker reported the following impacts from the Appellant's mental impairment:

- No impact to impulse control, insight and judgment, executive, language, psychotic symptoms.

- Minimal to major impact on bodily functions (e.g. toileting problems, sleep disturbance).
- Moderate impacts to emotion (e.g., anxiety, depression, other moodiness), to memory and to other neuropsychological problems.
- Moderate to major impacts to attention/concentration (unable to maintain concentration, poor short term memory), to motivation and to motor activity.
- Chronic severe pain and stiffness due to bulging disc in his back, results in Appellant being moody, unable to focus, weepy 50% of the time.
- Suicidal indication – about 2-3 years ago; Appellant self-medicating with alcohol.
- Unable to focus, concentrate due to chronic, severe back pain, lack of sleep, depression.
- Has taken medication for pain, anxiety and depression.

Daily Living Activities

The doctor reported that the Appellant:

- Has not been prescribed any medications and/or treatments that interfere with his ability to perform daily living activities.
- Experiences no direct restrictions in his ability to manage personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation and management of finances.
- Experiences “Pain on bending down”.
- Is continuously restricted in his ability to manage social functioning activities – “social interaction is restricted because of depression”.

In the assessor’s report, the social worker provided the following information about the Appellant’s ability to manage daily living activities:

- Experiences challenges with physical activity; ability to perform daily living tasks is severely restricted due to chronic severe back pain and associated side effects, such as balance, coordination and stiffness.
- Speaking ability is good; reading is satisfactory – tends to experience eye strain; writing is satisfactory; hearing is satisfactory – had ear infections, hearing getting worse.
- Can independently walk indoors and outdoors, takes 2-4 times longer; can independently climb stairs, takes 3-4 times longer; can independently stand 15-20 minutes – has to hold onto furniture, often falls so avoids as much as possible; going up stairs causes pain, uses handrails going down; can stand independently for 15-20 minutes.
- Needs continuous assistance lifting items over 5 lbs., and with carrying and holding.
- Personal care - independently manages grooming, toileting (takes 2-3 times longer, holds onto counter), feeding self and regulating diet; needs periodic assistance with transfers in/out of bed and chairs taking 4-5 times longer – experiences chronic, severe pain and stiffness on waking; holds onto chair/table/counter for stability; needs periodic assistance with bathing taking 2-3 times longer, holds onto countertop, towel bars or his girlfriend assists.
- Basic housekeeping – unable to perform these, needs continuous assistance – girlfriend does these, cannot carry anything over 5 lbs. due to back pain.
- Shopping – independently reads prices and labels, makes appropriate choices and pays for purchases; needs periodic assistance with going to and from stores and takes 2-3 times longer – uses carts for balance, stops/slows down often; needs continuous assistance with carrying purchases home – cannot lift/carry heavy items; mostly unable to do.
- Meals, paying rent and bills and medications – all areas managed independently.

- Transportation – needs periodic to continuous assistance depending on vehicle; needs continuous assistance using transit schedules/arranging transportation; on public transit uses disability ramp to get on/off – stairs are difficult to navigate due to chronic severe back pain, balance and coordination issues.
- Social functioning – independently manages appropriate social decision making, developing and maintaining relationships, interacting appropriately with others and securing assistance with others; needs periodic or continuous assistance with dealing appropriately with unexpected demands, depending on the situation.
- Has marginal functioning with his immediate social network – back pain/lung condition has resulted in restricted activities and socialization; has marginal functioning with his extended social network.

In the supplemental opinion, the social worker provided the following information about the Appellant's ability to manage daily living activities:

- Shopping for personal needs is severely and continuously restricted – experiences chronic pain, stiffness, challenges with carrying, balance, coordination due to his back condition.
- Using public or personal transportation facilities is severely and continuously restricted – challenges with stairs and navigation due to pain, stiffness, balance, coordination.
- Performing housework is severely and continuously restricted – has difficulty carrying, lifting heavy items.
- Moving about indoors and outdoors is severely and continuously restricted – depends on weather conditions, challenges with balance, coordination due to severe, chronic back pain.

Help with Daily Living Activities

The doctor reported that the Appellant does not require any prostheses for his impairments. Sometimes if the Appellant gets a seizure, he needs to be looked after.

The assessor reported that the Appellant:

- Depends on his girlfriend and her older child to complete daily living tasks on an ongoing basis. Sometimes his mother, other family and friends help.
- Requires transportation, a walker, scooter/power wheelchair, bathing aids (grab bars).
- Uses grab bars, counters, shopping carts and other household items to assist with standing, walking, etc.
- Does not have an assistance animal.
- Sees a mental health counsellor; has not self-medicated with alcohol for 2 + years.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation because he did not meet all the requirements in section 2(2) of the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the Appellant's circumstances

Applicable Legislation

The following sections of the EAPWDA apply to the Appellant's circumstances in this appeal:

2 (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 "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

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 chronic pain is a barrier to any physical activity and affects his day to day life. Medications do not always work. Because of the pain, he cannot stand for too long, he cannot lift items, do any household activities, or care for himself or his children. He also has frequent seizures which are difficult to recover from and leave him incapacitated for days.

In its reconsideration decision, the Ministry wrote that it had reviewed the Appellant's self-report, the information from the doctor and from the social worker. The Ministry noted that the social worker's assessment did not correlate to the doctor's assessment. The Ministry placed more emphasis on the information from the doctor because the Appellant had been a patient since 2007 whereas the social worker had met the Appellant for one hour to complete the assessor's report. The Ministry acknowledged that the information provided demonstrates that the Appellant experiences limitations

to his physical functioning due to pain; however, it determined that the assessments describe a moderate rather than a severe physical impairment.

The Panel's Findings

The diagnosis of a serious medical condition or a medical professional's statement that a condition or an impairment is severe does not in itself establish a severe impairment for the purposes of satisfying the criteria for PWD designation. To meet the requirements in section 2(2) of the EAPWDA, there must be evidence of how and the extent to which an impairment directly restricts daily functioning and the ability to manage the daily living activities defined in section 2(2)(b) of the EAPWDR. Such evidence includes information from the Appellant as well as from medical or prescribed professionals.

The Appellant stated that he is unable to return to his former type of work. The Panel notes that, in contrast to the Canada Pension Plan disability legislation and the province's Person with Persistent Multiple Barriers legislation, the ability to work and/or find work are not criteria for designation as a PWD and qualifying for disability assistance under this province's EAPWD legislation.

The doctor diagnosed the Appellant with seizure – alcohol related, epilepsy, back pain, recurrent pneumothorax and gastritis. The Appellant described how the severe back pain he experiences directly restricts his ability to stand, bend, lift, carry, manage personal self-care, do household tasks, take care of his children and generally manage day to day activities. He relies on his girlfriend and her daughter for help with most tasks. The Appellant also described how frequent headaches and seizures leave him incapacitated.

The information in the Appellant's self-reports is consistent with the information the social worker provided in the assessor's report and in the supplemental medical opinion. The Panel notes, however, that the social worker completed the assessor's report on the basis of about an hour's interview with the Appellant. No information was provided by the social worker about any additional or independent assessments done by her. The doctor, on the other hand, has known the Appellant for more than 6 years and he provided details about the Appellant's health history. Therefore, the Panel gives much more weight to the information from the doctor.

The doctor wrote that the Appellant's chronic pain is a barrier to any major physical activity. However, the doctor also reported that the Appellant can walk 4+blocks unaided on a flat surface, can climb 5+steps unaided, can lift 15-35 lbs. and can remain seated for 1-2 hours. The doctor further indicated that the Appellant experiences no direct restrictions in his ability to perform the following daily living activities: personal self-care, meal preparation, basic housework, daily shopping, or mobility inside and outside the home. There is also no information from the doctor about the need for or use of any assistive aids. The Panel acknowledges that the Appellant does experience restrictions with physical activities; however, when all of the evidence is considered the Panel finds that the Ministry reasonably determined that the information provided describes a moderate rather than a severe physical impairment.

Severe Mental Impairment

The Appellant's position is that he suffers from depression, which affects his ability to complete personal care tasks, cook and shop, concentrate and be motivated to do things. He also gets nervous and anxious in public places, and his conditions affect his ability to maintain and build relationships

with family and friends.

The Ministry found that the information provided by the Appellant's doctor and the social worker demonstrates that the Appellant experiences some limitations with his cognitive and emotional functioning. However, it determined that the information provided did not establish that the Appellant has a severe mental impairment.

The Panel's Findings

The Appellant's doctor diagnosed the Appellant with depression, which has been moderate off and on. The doctor also reported that the Appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance (depression), motivation and impulse control because of ongoing depression and back pain. Based on her interview with the Appellant, the social worker noted the Appellant had moderate impacts to emotion (e.g., anxiety, depression, other moodiness), to memory and to other neuropsychological problems, and moderate to major impacts to attention/concentration, to motivation and to motor activity. That report also described the Appellant as unable to focus or concentrate due to chronic, severe back pain, lack of sleep and depression.

However, in assessing how depression and cognitive and emotional deficits impact the Appellant's daily functioning, the doctor reported no direct restrictions to personal self-care, management of medications, the use of transportation or management of finances. The doctor did indicate continuous restrictions only in areas of social functioning, noting that social interaction is restricted because of depression. The assessor's report is generally consistent with the doctor's assessment; that is, the Appellant independently manages meal planning and preparation, financial matters and medications. According to that report, he also independently manages most aspects of social functioning, although he has restricted his activities and socialization. When all of the reports are considered, the Panel finds that the Ministry reasonably determined that the information provided did not establish a severe mental impairment.

Restrictions to Daily Living Activities

The Appellant submitted that because of his impairments most daily living activities are restricted and he needs help especially with tasks impacted by his severe back pain and his depression.

The Ministry stated that it relies on the medical opinion and expertise of the Appellant's doctor and the social worker to determine whether the Appellant has met this criterion. The Ministry found that the assessments indicated a moderate level of restriction, but not a severe impairment that significantly restricted his daily living activities continuously or periodically for extended periods.

The Panel's Findings

To qualify for PWD designation, the Appellant must provide a prescribed professional's opinion confirming that his severe physical or mental impairment directly and significantly restricts his daily living activities, continuously or periodically for extended periods. It is not enough, however, for the prescribed professional to merely report that such activities are restricted. The prescribed professional must assess the degree of restriction and the extent of assistance needed to manage the daily living activities defined in section 2(1) of the EAPWDR and also listed in the physician's and assessor's reports. In this case, both the Appellant's doctor and the registered social worker are prescribed professionals.

The doctor reported that the Appellant experiences no restrictions to personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, the use of transportation or the management of finances. Only social functioning is continuously restricted. For the reasons stated above, the Panel gives more weight to the assessment provided by the doctor; however, it does note that for several daily living activities the social worker's report is consistent with the doctor's. For example, she reported that the Appellant independently manages all aspects of meal preparation, financial management, medications, some aspects of personal care (grooming, feeding self) and some aspects of shopping. Other physical activities such as transfers in/out of bed or chairs take significantly longer and require periodic assistance.

When considered together, the Panel finds that the reports from the prescribed professionals indicate that the Appellant generally manages the majority of daily living activities independently. Therefore, the Panel finds that the Ministry reasonably determined that the prescribed professionals' opinions did not confirm that the Appellant's impairments directly and significantly restrict his daily living activities continuously or periodically for extended periods.

Need for Help with Daily Living Activities

The Appellant's position is that he requires significant help to manage day to day tasks. He relies on his girlfriend, her daughter and sometimes family members for help. The Appellant also submitted that he uses grab bars and would benefit from having a walker or a scooter

The Ministry noted discrepancies between the doctor's report that the Appellant did not require any aids and the information from the social worker indicating that he did. The Ministry's position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot determine that the Appellant requires significant help from other persons or an assistive device.

The Panel's Findings

Section 2(2)(b)(ii) of the EAPWDA, also requires the opinion of a prescribed professional confirming that, because of direct and significant restrictions in his ability to manage daily living activities, the Appellant needs help with those activities. The Panel notes the same discrepancies the Ministry found between the information from the doctor and the information from the social worker. The Panel has indicated that it gives more weight to the doctor's assessment. The doctor's report had no information about help provided by anyone, except that, sometimes if the Appellant gets a seizure, he needs to be looked after. The doctor also specifically indicated that the Appellant did not need any assistive aids.

Based on the doctor's evidence and based on the Ministry's determination that the Appellant's daily living activities are not directly and significantly restricted, the Panel finds that the Ministry reasonably concluded that the requirements in section 2(2)(b)(ii) of the EAPWDA were not satisfied.

Conclusion

Having reviewed all of the evidence and the relevant legislation, the Panel finds that the Ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore the Panel confirms that decision.