

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated December 18, 2014 which found that the appellant did not meet the statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a Person With Disabilities (PWD). The ministry found that the appellant met the age requirement and that he has an impairment that 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
- 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 DLA.

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 evidence before the ministry at the time of the Reconsideration Decision included the appellant's PWD Application comprised of the applicant information and self-report ("SR") prepared by the appellant and dated August 25, 2014, as well as a physician report ("PR") dated September 3, 2014 and an assessor report ("AR") dated September 8, 2014, both prepared by the appellant's general practitioner ("the GP") who at the time had known the appellant for 2 months and treated him between 2 and 10 times.

Further evidence before the ministry at the time of the Reconsideration Decision included the following:

1. The appellant's Request for Reconsideration ("RFR") dated December 4, 2014;
2. A fax letter from a hospital dated November 25, 2014 and addressed to the appellant's GP confirming the appellant's December 17, 2014 appointment at a hand and upper extremity clinic ("the Referral");
3. A renal sonogram report dated July 21, 2014; ("the Sonogram Report") and
4. A diagnostic report with findings in respect of the appellant's hips, ankles and feet. ("the Diagnostic Report")

Additional Evidence

At the hearing, the appellant sought to introduce additional documentary evidence. That evidence consisted of the following:

1. A letter dated January 26, 2015 prepared by the appellant's GP verifying that the appellant "is being treated for suspected psychosis NYD [not yet diagnosed]. He is pending formal psychiatric consultation." ("the GP Letter").
2. A prescription summary form dated February 7, 2014 listing three medications prescribed to the appellant with one being for insomnia, one as a sleep aid and one for a skin condition.
3. A prescription for a pain medication dated December 12, 2014.

(collectively "the Additional Documents")

The ministry did not object to the admission of the Additional Documents and the panel found that they were in support of the information and records that were before the ministry at the time the reconsideration decision was made. Specifically, the appellant had raised the issues of pain and a mental disorder in his RFR and he had noted difficulties sleeping and ongoing pain in the SR. These conditions were further referred to by the GP in the PR and AR. The panel therefore admits the Additional Documents pursuant to section 22(4)(a) of the *Employment and Assistance Act*.

Diagnoses

In the PR, the appellant is diagnosed by the GP as follows:

- Enlarged prostate and urinary retention with date of onset as 2011;
- Minor degenerative changes over ankle joints and first metatarsophalangeal ("MTP") with date of onset as "1980's"; and
- Hypertension with no date of onset.

The GP comments further that she has no records from the appellant's previous physician.

In the Sonogram Report, the impressions are noted as bilateral non-obstructing renal stones, no post-renal hydronephrosis and enlarged prostate and moderate bladder retention.

The Diagnostic Report notes a finding of minor degenerative changes seen at the appellant's ankle joints and first MTP joints bilaterally.

In the AR, the GP comments that the appellant suffers from osteoarthritis in his ankle joints and first MTP joints and right "trigger finger".

Physical Impairment

In the SR, the appellant describes his physical impairment and symptoms as including the following:

- Osteoarthritis and associated pain in the legs 24 hours per day which increases with walking.
- A right hand injury with needle like pain on opening and closing.
- An enlarged prostate resulting in urination difficulty and frequency.
- High blood pressure for which he has taken two different medications without relief.
- Insomnia resulting in feelings of disorientation, fatigue and anemia the following day.

In his RFR, the appellant reports suffering from pain in his hand and legs for which he has been prescribed medication. The appellant notes that he has been referred to a specialist for his hand injury in December 2014.

In the PR, the GP writes that:

- The appellant reports not being able to walk or stand for more than one hour.
- The appellant's osteoarthritis is likely to progress.
- The appellant experiences urinary frequency and difficulty with urination and that his prostate issues are likely to progress without surgery which he has declined. The appellant has been prescribed medication.
- The appellant requires no aids or prostheses for his impairment.
- Functional skills reported indicate that the appellant can walk 1-2 blocks and climb 5 or more steps unaided, lift under 2 kg and remain seated for less than 1 hour.

In the AR, the GP reports that:

- The appellant lives alone and that his physical impairments include osteoarthritis in his ankle joints and first MTP joints as well as "right trigger finger."
- The appellant's ability to communicate through speaking, reading and writing are all satisfactory while his hearing is noted as poor.
- The appellant is described as being independent walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding.

Mental Impairment

In the SR, the appellant does not report that he suffers from a mental impairment.

In his RFR, the appellant reports suffering from schizophrenia for which he has been prescribed medication. The appellant notes that he has been referred to a specialist for his schizophrenia in January 2015.

In the PR, the GP has indicated that it is unknown as to whether the appellant experiences any significant deficits with cognitive and emotional function.

In the AR, the GP has not completed the section which would otherwise indicate whether the appellant has a

mental impairment that restricts or impacts his functioning.

Daily Living Activities (DLA)

In the PR, the GP notes that the appellant's impairment periodically restricts his mobility outside of the home but that he experiences no restriction in the remaining listed activities or social functioning. The GP comments that with respect to the appellant's mobility outside the home he is not able to walk for more than 1 hour.

In the AR, the GP reports that the appellant is independent in all aspects of his DLA other than basic housekeeping and food preparation for which he requires periodic assistance from another person. For food preparation, the GP adds the comment that the appellant may need help with cutting foods due to his right trigger finger. With respect to social functioning, the GP has provided no comment as to whether the appellant experiences any restrictions.

Need for Help

In the PR, the GP did not indicate that the appellant requires an assistive device. In the AR, the GP indicates that the appellant receives help from a friend and that the assistance that would be necessary would be someone to help cut foods during meal preparation.

In his Notice of Appeal which is dated December 31, 2014, the appellant writes that he has the right to appeal.

At the hearing, the appellant described his medical problems as follows:

- He has osteoarthritis which is getting worse such that he cannot walk more than 80 metres without pain or stand for long periods of time. He says he has been prescribed pain medication but cannot afford it.
- He experiences strong pain in his back when sitting for one hour or more but the GP has not been able to determine the source of the pain.
- He is unemployable due to the pain in his legs and back.
- He experiences pain in his right hand when opening or closing it and while lifting items. He experiences pain when using his right hand to prepare anything and while he can cut things when preparing food, it is painful and he only does so because he is forced to. He saw a specialist in December 2014 and received some manner of injection.
- His prostate condition causes him to wake frequently at night to go to the washroom and as a result he does not sleep properly. He has been told by a specialist that this condition is incurable.
- He has a skin condition on his scalp that is incurable and he is waiting for an appointment with a dermatologist.

The appellant stated at the hearing that he is in pain 24 hours per day and that his multitude of medical conditions collectively demonstrate that he is disabled.

In response to questions, the appellant stated that he had investigated less expensive medications but that they are not as effective as those prescribed to him. He stated that he used Tylenol but that he did not want to use it too much due to potential health problems it could cause.

The appellant stated that he underwent lithotripsy on December 12, 2014 to treat kidney stones and that he had to be re-admitted to hospital four days later due to severe pain. He stated further that this procedure had been planned three or four months prior.

The appellant confirmed that he attended the scheduled appointment with a hand specialist on December 17, 2014 and underwent injections.

The appellant stated that he is waiting for a referral to see a psychiatrist for treatment of his schizophrenia which he says he has experienced since 2010. He says the GP has prescribed him medication to control this condition.

At the hearing, the ministry referred to the Reconsideration Decision as well as section 2 of the *EAPWDA* and section 2 of the *EAPWDR* and submitted that it was not satisfied that the appellant had met all of the criteria for designation as a PWD. It stated that while it was satisfied that the appellant was at least 18 years of age and that his impairment was likely to continue for two year or more, it was not satisfied that the evidence demonstrated that the appellant has a severe physical or mental impairment that in the opinion of a prescribed professional directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods and that as a result of those restrictions he requires help to perform those activities.

In response to questions, the ministry stated that employability is not a factor for consideration in the determination of a person's eligibility for PWD designation.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's Reconsideration Decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that he has an impairment that 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,
- 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 DLA.

The criteria for being designated as a PWD are set out in Section 2 of the *EAPWDA* as follows:

Persons with disabilities

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.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the *EAPWDR* defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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.

Severity of impairment

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions 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. In making its determination, the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the GP.

Severity of mental impairment

The appellant takes the position that he suffers from schizophrenia and that he is being treated with medication and a referral to a psychiatrist.

The ministry takes the position that the evidence does not support a finding that the appellant has a severe mental impairment.

Panel Decision

On review of the PR and the AR which were both prepared in early September 2014, the appellant's physician does not diagnose the appellant with a mental impairment. Similarly, the appellant's SR which he prepared in August 2014 makes no mention of a mental impairment.

However, in the RFR which was dated in December 2014, the appellant maintains that he suffers from schizophrenia and that he takes medication to control it. At the hearing, the appellant said that he has suffered from this condition since approximately 2010 and that he takes medication to control it but the panel notes that

the GP Letter rather refers to the appellant's "suspected psychosis NYD."

The panel finds that there is conflicting evidence as to the appellant's mental condition. Despite the appellant's statement that he has suffered from schizophrenia since 2010 and that the GP has prescribed medication to control it, the GP has not provided a diagnosis of a mental condition in either the PR or the AR and the GP Letter refers only to a suspected psychosis that has not yet been diagnosed.

While the panel finds that there is some evidence of a mental condition primarily in the RFR, the appellant's evidence at the hearing and the GP Letter, the conflicting evidence as noted above combined with the lack of a diagnosis from the GP in either the PR or the AR leads the panel to find that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe mental impairment under section 2(2) of the *EAPWDA*.

Severity of physical impairment

The appellant takes the position that he has a myriad of permanent physical impairments that impact on his functional skills and ability. These include osteoarthritis, pain in his back and legs, a right hand injury, hypertension and a prostate condition.

The ministry takes the position that the appellant's functional skill limitations do not support a finding that he suffers from a severe physical impairment.

Panel Decision

In the PR, the appellant's GP diagnoses the appellant as suffering from an enlarged prostate with associated urinary retention, minor degenerative changes over his ankle joints and first MTP and hypertension. She describes the appellant's osteoarthritis and prostate issues as likely to progress with the latter including a surgical option which the appellant declined. The appellant is described as able to walk 1-2 blocks unaided on a flat surface, climb 5 or more steps unaided, lift under 2kg and remain seated for less than one hour.

In the AR, the GP notes that the appellant is independent in all listed aspects of mobility and physical ability and that he does not require an aid for his impairment. For those DLA which are of a physical nature, the appellant is noted by the GP as being independent in all respects other than basic housekeeping and food preparation for which the appellant requires periodic assistance from another person. Specifically, the GP notes that the appellant "may need help" with cutting food due to his right trigger finger.

In the SR, the appellant describes constant leg pain, osteoarthritis, a right hand injury, an enlarged prostate, high blood pressure and insomnia and he expanded on these conditions at the hearing.

The Sonogram Report notes bilateral non-obstructing renal stones, no post renal hydronephrosis and enlarged prostate and moderate bladder retention and the appellant gave evidence of undergoing a lithotripsy on December 12, 2014 to address his renal stones.

The Diagnostic Report notes a finding of minor degenerative changes seen at the appellant's ankle joints and first MTP joints bilaterally.

The evidence as a whole indicates that the appellant suffers from a number of physical conditions but, as indicated above, these do not in and of themselves constitute a severe physical impairment. It is necessary to consider how these conditions restrict the appellant's ability to function independently or effectively. As mentioned previously, the appellant is noted by his GP as being independent in all aspects of mobility and physical ability and all DLA aside from basic housekeeping and food preparation for which only periodic assistance is required.

Overall, while it is clear that the appellant does suffer from a number of physical conditions, the panel finds that the ministry was reasonable in its finding that there is not sufficient evidence to establish that the appellant has a severe physical impairment under section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform DLA on an ongoing basis.

The ministry's position is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by his physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional, in this case the GP, provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods.

DLA are defined in section 2(1) of the *EAPWDR* and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the PR, the GP notes that the appellant's impairment does not directly restrict his ability to perform DLA while in the AR, the GP describes the appellant as independent in all but two of the 28 listed tasks of DLA commenting only that the appellant requires periodic assistance with basic housekeeping and food preparation.

The panel notes that the evidence of the GP indicates that the appellant is independent in all but two tasks of DLA. Therefore, based on this evidence the panel finds that the ministry was reasonable in finding that there is not sufficient evidence to establish that the appellant's mental and physical impairments directly and significantly restrict his ability to perform DLA, either continuously or periodically for extended periods under section 2(2)(b) of the *EAPWDA*.

Help with DLA

The appellant's position is that his physical and mental impairments affect his DLA to the extent that assistance from others is necessary.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

In the PR, the GP indicates that the appellant does not require any aids or prostheses for his impairment and in the AR, notes that the assistance that the appellant needs with DLA is someone to help cut foods during meal preparation.

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the *EAPWDA*.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's Reconsideration Decision which determined that the appellant was not eligible for PWD designation was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.