

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated January 16, 2015 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:

1. The appellant's PWD Application comprised of:
 - a. the Applicant Information and Self-report ("SR") prepared by the appellant and dated October 16, 2014;
 - b. the Physician Report ("PR") dated October 7, 2014 and prepared by the appellant's general practitioner ("the GP") of three months; and
 - c. the Assessor Report ("AR") dated October 16, 2014 and prepared by a psychiatric nurse ("the PN") who had treated the appellant 11 or more times; and
2. The appellant's Request for Reconsideration ("RFR") dated January 12, 2015 which has attached to it a letter dated January 9, 2015 and prepared by the PN ("the PN letter").

Diagnoses

In the PR, the appellant is diagnosed by the GP as suffering from depression and social anxiety disorder with date of onset for both noted as 2010. The GP further comments that the appellant is receiving treatment for depression and anxiety.

In the AR, the PN writes that the appellant has a longstanding history of depression and anxiety and this is similarly documented in the PN letter.

Physical Impairment

The appellant does not indicate in either the RFR or SR that he suffers from a physical impairment.

In the PR, the GP indicates that with respect to functional skills, the appellant can walk 4 or more blocks and climb 5 or more steps unaided and that he has no limitations lifting or remaining seated. The GP has not diagnosed the appellant with a physical impairment.

In the AR, the NP reports that the appellant lives with family, friends or a caregiver and that he is independent with all aspects of mobility and physical ability.

Mental Impairment

In the RFR the appellant disagrees with the suggestion that he is able to maintain good functioning with immediate and extended social networks as he finds dealing with social situations terrifying and stressful. He finds leaving the house to be hard and has no friends aside from his immediate family with the majority of his personal communication occurring with his mental health worker. The appellant says that he is gradually and slowly exposing himself to social situations but that his motivation to complete tasks and daily activities have been affected and he cites the examples of missing appointments due to the inability to keep a schedule and that his hygiene and eating also suffers.

The appellant continues in the RFR saying that his main fear is being forced to get a job to support himself; this will lead to his becoming overwhelmed and suicidal and that he instead needs to be eased into his rehabilitation.

In the PN letter, the appellant is described as moving to his current location in 2013 from another province where he previously received disability benefits due to his severe depression and anxiety. On his arrival, the appellant was assigned a long term case manager as he was deemed low functioning with few skills for community integration. The author noted that the appellant's family has a history of mental illness.

The PN continues in the letter to describe the appellant as motivated to change as he feels lonely and isolated but that he is unable to take steps needed for employment and social integration without mental health support in the form of a disability pension, ongoing counselling and support and further support from employment assistance programs.

In the SR, the appellant describes the unpredictable nature of his condition. He says that on some days he feels "okay" and that he could be able to handle a day of work but that on other days he feels "so distraught and hopeless that I would rather be dead than wake up in the morning." The appellant writes that the uncertainty he experiences makes it difficult to maintain employment due to continued anxiety about the thought of working on a "bad day" which led to a previous suicide attempt. The appellant describes difficulty with sleep resulting in low energy and continued fear of social situations despite the fact that his social anxiety seems to be improving somewhat. The appellant writes that he is working with a mental health professional and attending group therapy on a weekly basis, that he takes medication for his depression and that he is willing to take part in workplace rehabilitation programs in the future.

In the PR, the GP notes that the appellant has severe depression with suicidal ideation, poor communication skills due to low mood and poor concentration and energy levels leading to an inability to engage in meaningful activities. The GP describes the appellant's medical conditions as chronic but which can be minimized with counselling and medication and with duration that cannot be estimated but that can run lifelong. The GP indicates that the appellant experiences significant deficits with cognitive and emotional function in the area of emotional disturbance and reiterates that the appellant has severe depression and social anxiety disorder, poor concentration resulting in an inability to perform any activity for a tangible amount of time. The GP adds that the appellant has been seen by a psychiatrist, that he is attending individual and group counselling and that he is taking anti-depressant medication.

In the AR, the PN has noted that the appellant's ability to write and hear are both good but that his reading and speaking are only satisfactory with the additional comment that his reading is affected by his difficulty remaining focused and that his speaking is affected by his difficulty with social situations. The PN further indicates the degree to which the appellant's mental impairment impacts his daily functioning. Specifically, she indicates that the appellant experiences major impacts on emotion and motivation and moderate impact on bodily functions and motor activity. The appellant is further noted as experiencing minimal impact on impulse control, insight and judgment, attention/concentration, executive, memory and other neuropsychological problems and no impact on consciousness, language, psychotic symptoms and other emotional or mental problems. The NP comments that the appellant has a longstanding history of depression and anxiety and needs long term case management with the goal to increase his ability to cope with daily stressors and to set goals for the future. The PN writes that the appellant is motivated for a referral to an employment assistance program to assist him in becoming more suitable for employment.

Daily Living Activities (DLA)

In the PR, the GP indicates that the appellant's impairment does not directly restrict his ability to perform DLA.

In the AR, the PN reports that the appellant is independent with all DLA but comments that he experiences difficulty maintaining a routine for healthy eating and being motivated in the area of meal planning.

With respect to social functioning, the PN indicates that the appellant is independent while making appropriate social decisions but requires periodic support/supervision in his ability to develop and maintain relationships ("has significant social anxiety. Spends most of his time alone."), interacting appropriately with others ("Is ongoing counselling to learn social skills"), dealing appropriately with unexpected demands ("causes increased anxiety levels") and securing assistance from others ("needed support even to apply for income assistance"). The appellant is assessed as having marginal functioning with his immediate and extended social networks.

Need for Help

In the PR, the GP did not indicate that the appellant requires an assistive device but has indicated that he is attending counselling and treatment and taking medication to minimize his conditions.

In the AR, the PN similarly indicates that the appellant receives help from health authority professionals and that he is undergoing counselling. The PN comments further that the appellant requires regular support from his case manager and some assistance navigating community resources.

In his Notice of Appeal which is dated January 23, 2015, the appellant writes that he does not believe that he has the ability to provide for himself through work as he does not think he can work enough to feed and shelter himself and that he cannot sustain long term employment without becoming suicidal. He says that if it were not for financial support from family, he would be living on the street.

Evidence At Hearing

After hearing submissions from the appellant's advocate, the appellant answered a number of questions from the panel. He stated that the most difficult part of his impairment is its inconsistency. He said that on some days he feels fine going out but on other days he won't. His case worker is the psychiatric nurse who prepared the AR and wrote the PN letter. He had previously been under the care of a psychiatrist.

The appellant said that he lives with his brother and sister in law and relies on them a lot. His brother takes care of paying for food and he helps out around the house when he can but nothing is really expected of him that way. For banking and finances, he doesn't have a lot to manage and uses online banking. His ability to go to the drug store to pick up his medication varies and he tries to go on his good days prior to running out. If he doesn't want to deal with cooking he won't eat and his hygiene is mostly on and off. On average, the appellant said that he has 1-2 good days per week. He is unable to venture outside the home for such activities as grocery or other shopping except on those days.

The panel was satisfied that the appellant's oral evidence was corroborative and therefore in support of the information and records that were before the ministry when the decision being appealed was made and as such it is admitted pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

At the hearing, the ministry referred to and relied upon the Reconsideration Decision

In response to questions, the ministry stated in the AR that the PN only noted two major impacts on the appellant's daily functioning and that while major and moderate impacts may affect someone's life, they don't necessarily impact their ability to perform DLA and in this case, there simply isn't information to support such an argument. The ministry agreed that when assessing whether the appellant has a serious mental or physical impairment, one must look at the entire PWD application and other supporting evidence.

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. 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 prescribed professionals – in this case, the GP and the PN.

Severity of mental impairment

The appellant takes the position that he has been diagnosed with severe and chronic depression and social anxiety disorder and that these conditions when viewed against their impact on his daily functioning constitute a severe mental impairment.

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

Panel Decision

As set out above, in the PR the appellant's GP has diagnosed him with severe depression with suicidal ideation as well as social anxiety disorder with significant deficits with cognitive and emotional function in the area of emotional disturbance. As a result, the GP says that the appellant cannot engage in meaningful activities or perform any activities for tangible amounts of time.

In the SR, the PN further refers to the appellant's "longstanding history of depression and anxiety" and describes varying impacts on his daily functioning as follows:

- Major impact on emotion and motivation;
- Moderate impact on bodily functions and motor activity;
- Minimal impact on impulse control, insight and judgment, attention/concentration, executive, memory and other neuropsychological problems; and
- No impact on consciousness, language, psychotic symptoms and other emotional or mental problems.

In the PN letter, the appellant is described as suffering from severe depression and anxiety and as a “low functioning young man with few skills for integrating in the community.”

In the SR, the appellant describes days where he feels so distraught that he would rather be dead than wake up in the morning. He describes difficulty with sleep and energy levels and while his social anxiety is seeing some improvement, he remains afraid of social situations.

The panel finds that the evidence referenced above demonstrates a consistency of diagnosis and of restrictions on the appellant’s ability to function independently or effectively. Both the GP and the PN agree that the appellant suffers from severe depression and anxiety and both provide evidence in the PR and AR respectively as to the impact of these conditions on the appellant’s functioning. The GP states clearly in the PR that the appellant’s depression and social anxiety disorder, which cause him to suffer stress in interacting with others and with poor motivation and concentration, result in his being unable to engage in meaningful activities. In his own evidence, the appellant noted ongoing suicidal ideation, with bad days during which he is housebound far outnumbering his good days on a weekly basis.

In the Reconsideration Decision, after reciting the evidence from the SR, PR, AR and PN letter, the ministry simply states that it is not satisfied that the information establishes a severe mental impairment but provides no analysis or explanation as to why.

Given the evidence that was available at reconsideration and the narrow manner in which the ministry appears to have applied it in the Reconsideration Decision, and considering the extent to which the appellant’s mental impairment impacts his daily functioning, the panel concludes that the ministry’s determination that there is not sufficient evidence to establish that the appellant has a severe mental impairment under section 2(2) of the *EAPWDA* was not reasonable.

Severity of physical impairment

The appellant has not advanced an argument that he suffers from a severe physical impairment and 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 does not diagnose the appellant as suffering from any physical medical condition. The appellant is described as able to walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, and that he has no limitations lifting or remaining seated.

In the AR, the PN notes that the appellant is independent in all aspects of mobility and physical ability as well as with all DLA that are of a physical nature.

The appellant does not indicate in either the SR or the RFR that he suffers from a physical impairment.

The evidence as a whole indicates that the appellant does not suffer from a severe physical impairment and the panel concludes that the ministry’s determination that there is not sufficient evidence to establish that the

appellant has a severe physical impairment under section 2(2) of the EAPWDA was reasonable.

Restrictions in the ability to perform DLA

The appellant's advocate argued that his severe mental impairment directly and significantly restricts his ability to perform DLA on an ongoing basis. Specifically, the advocate argued that in determining this issue, the appellant and his daily functional impairments must be looked at as a whole and not simply on the basis of which boxes are checked in the PWD application.

Further, the advocate argued that despite the GP not indicating in the PR that the appellant's impairment directly restricts his ability to perform DLA (which she suggested was an error) and despite the PN indicating in the AR that the appellant is independent in all aspects of DLA, the fact that 10 of the 14 categories of the appellant's daily functioning in the AR are impacted clearly demonstrates that his DLA would also be affected.

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. The ministry further argues that the moderate and major impacts on the appellant's function as set out in the AR do not necessarily equate to an inability to perform DLA and in this case, there simply is insufficient evidence to satisfy the legislative requirements.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that a prescribed professional, in this case the GP and the PN, 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, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

In the PR, the GP has checked the "No" box indicating that the appellant's impairment does not restrict his ability to perform DLA. The panel can find no evidence to support the advocate's contention that this was in error.

In the AR, the PN writes that the appellant is independent in all aspects of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications and transportation. The only additional comments provided are that the appellant has difficulty with motivation when it comes to meal planning and with maintaining a routine for feeding himself and eating a healthy diet. This is consistent with the appellant's evidence at the hearing.

The appellant is also independent when making appropriate social decisions while requiring periodic support/supervision developing and maintaining relationships, interacting appropriately with others, dealing with unexpected demands and securing assistance from others and he is further noted as having marginal functioning in his immediate and extended social networks.

The panel notes that the evidence of the GP and the NP indicate that the appellant is independent with virtually all of his DLA save and except social functioning for which he requires periodic support/supervision. While the advocate urges the panel to find that the impact of the appellant's mental impairment on his daily functioning must lead to the conclusion that his ability to perform his DLA would be similarly impacted, that

argument is inconsistent with and not supported by the evidence or the legislation.

Section 2(2) of the *EAPWDA* provides separate considerations for the determination of whether an applicant for PWD designation suffers from a severe physical or mental impairment and whether that impairment if made out directly and significantly restricts the person's ability to perform DLA. The establishment of a severe impairment is not in and of itself determinative of a direct and significant restriction on the ability to perform DLA.

The panel therefore finds that the ministry was reasonable in finding that there is not sufficient evidence to establish that the appellant's severe mental impairment directly and significantly restrict his ability to perform DLA, either continuously or periodically for extended periods, as provided under section 2(2)(b) of the *EAPWDA*.

Help with DLA

The appellant's position is that that his 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. In the AR, the PN similarly indicates that the appellant receives help from health authority professionals and that he is undergoing counselling. The PN comments further that the appellant requires regular support from his case manager and some assistance navigating community resources. The appellant's evidence is that the help he requires is limited to his brother paying for food and household chores as the appellant is not expected to help with those.

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.