

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated January 9, 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 the appellant's Request for Reconsideration ("RFR") dated December 23, 2014 as well as his PWD Application comprised of the following:

1. Applicant information and self-report ("SR") prepared by the appellant and dated September 10, 2014;
2. Physician report ("PR") dated September 14, 2014 and prepared by the appellant's general practitioner ("the GP") of five years; and
3. Assessor report ("AR") dated September 12, 2014 and prepared by a nurse practitioner ("the NP") who had treated the appellant on one occasion.

Diagnoses

In the PR, the appellant is diagnosed by the GP with the following:

- Degenerative disc disease with date of onset as January 2014; and
- Lumbar radiculopathy with date of onset as January 2014.

The GP comments further that x-rays demonstrate "multilevel degenerative disc disease of the thoracic spine" and that the appellant experiences "radicular symptoms (nerve root compression) to his right L5 dermatome."

In the AR, the NP notes the same diagnoses as set out in the PR but does not include an onset date for either.

Physical Impairment

In his RFR, the appellant reports that he is able to walk, stand and climb stairs independently but that it takes twice or sometimes three times as long depending on his pain levels to walk and climb stairs. He says that he is unable to stand for more than 15 minutes due to increases in pain and that he must alter his position and activity due to pain. He continues that when he overdoes activities (ie, walking, standing, climbing stairs or doing housework) it makes it impossible to do anything for 1-2 days afterwards due to increased pain in his hips and lower back. He notes that he constantly has to modify his physical activities to be mobile the following day.

He writes that he experiences significant pain in his lower back and hip and sometimes in his leg at all times with physically demanding activities or activities that require movement, bending, flexing or twisting of the back causing more pain. When he is able, these activities take the appellant twice as long as he has to stop frequently, change his position or rest until the pain subsides and he is then immobile for 1-2 days after due to pain.

The appellant says he is independent in the majority of DLA including self-hygiene, eating and dressing but requires help or takes significantly longer for more physically demanding activities such as housekeeping, carrying groceries, getting in and out of many types of vehicles, preparing meals and washing dishes. He says he continuously needs help with activities that require carrying such as laundry and groceries and that bending to vacuum, wash floors, toilets and the tub cause increased pain and the need for help. He says he can prepare a meal if it is quick but if it is involved he must sit frequently as it takes 2-3 times longer.

The appellant says that he is able to lift 10 lbs that doing so causes pain and further restrictions the next days and he cites his inability to pick up a laundry basket from the floor or carry a full laundry basket.

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

- Stabbing pain in right hip while walking on uneven ground. Pain is constant and uncomfortable.
- Pain in left hip but not as severe;
- Burning pain in lower back while bending, walking, sitting and/or laying down;
- Unable to carry groceries home from the store;
- Not able to walk for more than a few minutes;
- Needs assistance to carry laundry to and from facilities;
- Unable to sleep for any length of time due to discomfort;
- Difficulty securing employment due to pain; and
- Pain causes stress which brings on eczema on hands.

In the PR, the GP writes that:

- The appellant is limited in mobility – stairs, walking, carrying – due to pain.
- Prolonged standing for more than five minutes causes severe low back and gluteal pain.
- The duration of the appellant's impairment is unknown and there are no remedial treatments.
- The appellant has not been prescribed any medication or treatment that interferes with his ability to perform DLA and he requires no aids or prostheses for his impairment.
- Functional skills reported indicate that the appellant can walk 4 or more blocks and climb 5 or more steps unaided, lift under 2-7 kg and remain seated for less than 1 hour.
- X-rays demonstrate multilevel degenerative disc disease of the thoracic spine with the appellant experiencing persistent pain related to most activities. In addition, the appellant has radicular symptoms (nerve root compression) to his right L5 dermatome.

In the AR, the NP reports that:

- The appellant lives alone and that his physical impairments include degenerative disc disease and lumbar radiculopathy.
- The appellant's ability to communicate through speaking, reading, writing and hearing are all good.
- The appellant is described as being able to stand and climb stairs independently but that the latter takes significantly longer than typical.
- The appellant is described as requiring continuous assistance from another person while lifting, carrying and holding and is noted as unable to carry more than 10lbs and requires assistance carrying groceries and laundry to and from the laundrymat.
- The appellant is described as requiring continuous assistance from another person walking indoors and outdoors for which he takes significantly longer than typical. The NP comments further that the appellant has difficulty walking for more than 10 minutes and requires rides.

Mental Impairment

In the SR, the appellant notes that his pain causes him stress.

In the PR, the GP has indicated that the appellant does not experience any significant deficits with cognitive and emotional function.

In the AR, the NP has noted that the impact of the appellant's mental impairment impacts his daily functioning insofar as he experiences major impact on bodily functions, moderate impact on emotion and motivation and no impact on consciousness, impulse control, insight and judgment, attention/concentration, executive, memory, motor activity, language, psychotic symptoms, other neuropsychological, emotional or mental problems. The NP further comments that the appellant experiences severe sleep disturbance secondary to pain and that his chronic pain results in his inability to participate in many activities thereby impacting his emotions and motivation.

Daily Living Activities (DLA)

In the PR, the GP notes that the appellant is not restricted in personal care, meal preparation, management of medications, mobility inside the home, management of finances, social functioning and mobility outside the home although for this latter activity the GP has checked the "Continuous" box. The restriction on the appellant's use of transportation is noted as unknown with the further comment that the appellant has no form of transportation and that he is limited to approximately 10 minutes of walking due to pain.

The GP further notes that the appellant is periodically restricted with basic housework and daily shopping and notes that he has limited ability doing cleaning and carrying his groceries.

In the AR, the NP reports on the appellant's ability to carry out his DLA as follows:

For personal care, the appellant is independent but takes significantly longer dressing as well as independent grooming, toileting, feeding himself and regulating his diet and transfers on and off a chair. He requires periodic assistance bathing ("difficulty in/out tub") and transfers in and out of bed which takes significantly longer, specifically rising from bed.

For basic housekeeping, the appellant requires continuous assistance from another person or is unable in respect of laundry and basic housekeeping and takes significantly longer with both. He is able to do laundry but not carry it to the laundromat and he is further noted as unable to vacuum.

For shopping, the appellant is assessed as independent reading prices and labels, making appropriate choices and paying for purchases. He is reported as requiring continuous assistance or unable and taking significantly longer than typical for going to and from stores ("unable to walk due to distance") and carrying purchases home.

For meals, the appellant is assessed as independent with meal planning and safe storage of food but requires continuous assistance or unable and taking significantly longer than typical with food preparation and cooking with the further comment that he has difficulty standing to prepare and cook food and wash dishes.

The appellant is assessed as independent with all aspects of paying rent and bills and medications. The appellant requires periodic assistance from another person getting in and out of a vehicle which takes significantly longer than typical and depends on the type of vehicle. Use of transit and transit schedules is not applicable.

With respect to social functioning, the NP indicates that the appellant is independent while making appropriate social decisions, developing and maintaining relationships and interacting appropriately with others but that he requires periodic support/supervision with his ability to deal appropriately with unexpected demands and securing assistance from others. The appellant is noted as having good functioning with his immediate and extended social networks.

Additionally, the NP comments that the appellant's DLA are "severely impacted by his limited mobility", and that that it is "difficult for him to walk more than 10 minutes, stand more than 5 minutes, sit in one spot, carry laundry and groceries, etc." and that these activities cause severe lower back and gluteal pain.

Need for Help

In the PR, the GP did not indicate that the appellant requires an assistive device. In the AR, the NP indicates that the appellant receives help from family, friends and health authority professionals.

In his Notice of Appeal which is dated January 15, 2015, the appellant writes that although he is able to do certain activities, his physical ailments restrict him from heavy lifting and repetitive day to day movements. He says he has difficulty performing basic daily chores such as carrying laundry and vacuuming and that he must walk at a slower pace because of his disability.

Evidence At Hearing

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

- he applied for the PWD designation on the advice of a doctor due to his inability to work.
- he can cook and do light housework on his own but that he needs help with grocery shopping and laundry.
- he can walk but slowly and that he has to walk stairs because he lives on the second floor of his building.

In response to questions, the appellant stated that his submissions in the RFR were his own but were written by the NP. With respect to his physical condition, he confirmed that he is unable to work and that his problems vary from day to day. He said that if he tries to move or carry heavy objects he will have to spend the next day at home with a hot pack on his back. He said he is taking medication for pain in his back and that the dosage has been increased over time. He said that on review of the AR, the notation that he requires continuous assistance with walking indoors and outdoors is not correct and that they rather take significantly longer as noted in the NP's comments.

The appellant answered questions regarding his ability to complete his DLA. He said that he can cook and do his own dishes as he lives alone and he can also do basic simple housework but that he has difficulty with heavier housekeeping, laundry and grocery shopping.

With respect to the help that he receives, the appellant stated that a neighbour comes over and does heavier housekeeping once each week for 20-30 minutes and that his brother helps with laundry every 12-14 days and with grocery shopping every 5-7 days. The appellant says that he does not have grab bars in his bathroom and that he has no other aids.

The panel was satisfied that the appellant's oral evidence was 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 relied upon and referred to the Reconsideration Decision and further referred to section 2 of the *EAPWDA* and section 2 of the *EAPWDR*. The ministry stated that the PWD designation is not based on employability but on the severity of impairment and the impact that it has on an applicant's ability to perform DLA.

The ministry noted that on review of the PR and the AR, specifically looking at the appellant's described mobility and physical ability, the overall impact on the appellant is more in keeping with a moderate degree of severity rather than a severe physical impairment. Further, the ministry stated that the evidence in the PR and the AR does not demonstrate the appellant as suffering from any deficits with cognitive or emotional functioning that would support a finding that he has a severe mental impairment.

With respect to DLA, the ministry submitted that the AR was prepared before the PR and was largely based on the SR and as such the NP would not have had the benefit of the GP's diagnosis and opinion of the restrictions on the appellant's DLA. Overall, the ministry was not satisfied that the evidence supported a finding that the appellant's DLA were, in the opinion of a prescribed professional, significantly restricted either continuously or periodically for extended periods. The ministry further stated that as it had not been established that the

appellant's DLA were significantly restricted, it could not be determined that significant help was required from other person.

In response to questions, the ministry stated that in a smaller community it would be common for a GP to prepare both the PR and the AR based on an applicant's file materials and that the medical information must be based on a clinical understanding of the person which can be difficult to ascertain on a single visit. The ministry felt that the information from the NP was more in keeping with a self-assessment.

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.

In his Notice of Appeal dated January 15, 2015, the appellant writes that although he is able to do certain activities, his physical ailments restrict him from heavy lifting and repetitive day to day movements and that he has difficulty performing basic chores such as carrying laundry and vacuuming. He says that he must walk at a slower pace because of his disability.

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 and the NP.

Severity of mental impairment

The appellant did not advance an argument that he suffers from a mental impairment and 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, the GP does not diagnose the appellant with a mental impairment and notes that he has no significant deficits with cognitive and emotional function. In the AR, the NP notes that the appellant's mental impairment has a major impact on his bodily functions and a moderate impact on his emotion and motivation but comments that his sleep disturbance, emotions and motivation are secondary due to pain and an inability to participate in many activities as opposed to a diagnosed condition. Otherwise, the appellant is noted in the AR as experiencing no other impacts on his functioning.

The panel finds that the appellant has not been diagnosed with a mental impairment. While the NP attributes severe sleep disturbance and impacts on the appellant's emotions and motivation to what is described as chronic pain, there is no diagnosis or reference to a mental impairment in the AR or the PR. The evidence therefore 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 as provided in section 2(2) of the *EAPWDA*.

Severity of physical impairment

The appellant takes the position that his diagnosed degenerative disc disease and lumbar radiculopathy are severe in nature and that his ability to work and function have been impaired.

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 degenerative disc disease and lumbar radiculopathy. He describes the appellant's mobility as limited due to pain and references climbing stairs, walking, carrying. He further comments that standing for more than 5 minutes causes the appellant to experience severe low back and gluteal pain. The appellant is described as able to walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift under 2-7 kg and remain seated for less than one hour.

In the AR, the NP notes that the appellant is independent while climbing stairs and standing and the appellant clarified at the hearing that he is also independent walking indoors and outdoors but has difficulty walking for more than 10 minutes and requires rides. The appellant requires continuous assistance carrying groceries and other items greater than 10 lbs and he also requires help carrying laundry to the laundromat and home.

In the SR, the appellant describes pain in his left hip and back which impacts on his mobility and physical ability.

The evidence as a whole indicates that the appellant suffers from a physical impairment but, as indicated above, this does not itself constitute a severe physical impairment. It is necessary to consider how these conditions restrict the appellant's ability to function independently or effectively. In his evidence, the appellant stated that he is largely independent and that he is primarily impacted in his ability to carry heavier items and perform heavy housework. He is able to otherwise live independently.

Overall, 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 impairment directly and significantly restricts 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 and the NP, 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.

In the PR, the GP notes that while the appellant is restricted in basic housework and daily shopping, he is not restricted with personal self care, meal preparation, management of medications, mobility inside and outside the home, management of finances and social functioning. For basic housework and daily shopping, the GP notes that the restrictions are periodic in nature insofar as he has limited ability doing cleaning and carrying groceries. This is consistent with the evidence given by the appellant at the hearing.

In the AR, the NP makes the following observations with respect to the appellant's ability to perform his DLA:

For personal care, the appellant is independent dressing, grooming, toileting, feeding himself and regulating his diet and transfers on and off of a chair. He requires periodic assistance with bathing ("difficulty in/out of tub") and transfers in and out of bed ("difficulty rising from bed").

For basic housekeeping, the appellant is described as requiring continuous assistance and taking significantly longer with laundry and basic housekeeping with the comment that he is able to do laundry but needs help carrying it to the laundromat and he is unable to vacuum. At the hearing, the appellant maintained that he is able to do basic simple housework.

For shopping, the appellant requires continuous assistance and takes significantly longer carrying purchases home and also takes significantly longer going to and from stores but is otherwise independent.

For those DLA relating to his meals, the NP notes in the AR that the appellant requires continuous assistance with food preparation and cooking but this is inconsistent with the appellant's evidence that he cooks for himself.

The appellant is largely independent in social functioning other than requiring periodic assistance dealing with unexpected demands and securing assistance from others although it is noted that the appellant receives consistent assistance from family, friends and neighbours.

The panel notes that the evidence of the GP and the NP indicate that the appellant is independent in most aspects of his DLA but requires assistance primarily with heavy housework, carrying laundry and carrying groceries. Overall, 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 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, the NP notes that the assistance that the appellant needs with DLA includes family, friends and health authority professionals. The appellant's evidence is that the help he requires is limited to heavier lifting, carrying groceries, carrying laundry and heavy housecleaning but otherwise he is able to take care of himself.

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.