

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the Ministry) December 1, 2014 reconsideration decision in which the Ministry determined that the Appellant did not meet all of the statutory 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 establishes 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 September 22, 2014.
- A physician's report completed on October 7, 2014 by an oncologist who indicated that the Appellant has been her patient since February 2013, and she had seen him between 2-10 times in the past 12 months.
- An assessor's report signed on October 14, 2014 by a registered social worker. There is also a statement at the end of the report regarding services provided by a counselling department signed by "Assessor..... Clinical Counsellor". Therefore, it is not clear to the Panel who completed the assessor's report; however, the assessor indicated that October 14, 2014 was the first contact with the Appellant.

2. Appellant's request for reconsideration dated November 11, 2014, together with his written statement.

For this appeal, the Appellant's submitted:

- A statement describing the Appellant's conditions signed by him on December 19, 2014.
- A typed statement consisting of four questions and answers signed by the oncologist on January 10, 2015. In that statement some information was struck out but not initialed. Below the oncologist's signature, the following statement appears: "I have read the above questions and provided the above answers, which express my personal knowledge of my patient's situation and my opinion as to his disability". There is no information as to if or when the oncologist interviewed the Appellant for this report or if the statement was prepared by the advocate for the oncologist's signature.
- Written arguments from his advocate which are summarized in Part F – Reasons.

In its submission for this hearing, the Ministry wrote that it accepts the information that was submitted to this Tribunal, signed by the oncologist, dated January 10, 2015 regarding the Appellant's PWD application. Since the Ministry provided no other submissions, the Panel will consider the reconsideration decision to be the Ministry's position for this appeal.

Pursuant to section 22(4) of the Employment and Assistance Act, the Panel admits the information regarding the Appellant's conditions and impairments as described in the December 19, 2014 statement signed by the Appellant and in the January 10, 2015 report signed by the oncologist as being consistent with and tending to corroborate the evidence the Ministry had at reconsideration.

The Panel has summarized the relevant evidence as follows.

Diagnoses

The oncologist diagnosed the Appellant with stage 4, terminal cancer: rectal cancer (onset 2013) with metastasis to the liver (2014) and to lung (2014), and with prostate cancer (onset 2013). In the October 2014 physician's report, there was no diagnosis of any mental health condition.

Physical Impairment

In his self-reports, the Appellant described his impairments as follows:

- He has stage 4 cancer which is terminal; after surgeries he has a permanent colostomy; was scheduled for more treatments in January 2015; with treatments will feel even weaker and his immune system will be weaker.
- During weekly chemotherapy and radiation treatments he felt nauseated, very weak, sensitive to cold and light all the time, and was unable to sleep; had no appetite and his immune system was compromised; had to stay indoors most of the time to avoid infections.
- Life has stopped being normal; stopped working; is unable or is too slow performing daily living activities.
- Experiences sharp pains every now and then at unpredictable times; 2 or more times a week; makes him bed or couch bound for a couple of hours or more; has periodic and unpredictable episodes of diarrhea in his colostomy bag causing it to explode, drains him of energy so needs to rest to take pressure off his system.
- When in pain or having diarrhea, has no interest or motivation; is unable to perform daily living activities until feels better and then takes him 3 times longer to do them.
- Feels depressed, worried and anxious most of the time because of pain, uncertainties in his life and having to deal with the unknown; worries a lot about his child and how his medical condition is affecting him.
- Life has stopped being normal; has stopped working; is unable or is too slow performing daily living activities.
- Personal Care – when has pain on and off on a daily basis, is unable to attend to personal care, such as taking a shower, dressing or grooming – lies down and conserves his energy.
- Meal Preparation/cooking – unable to do when feel pain; no interest/motivation when feeling worried, anxious or down; a friend does the cooking for him; has no appetite at times; always eats slowly in small portions and has to watch his diet.
- Basic housework – unable to do or takes significantly longer when has pain or feels anxious or worried; when has diarrhea attacks, is unable to do at all.
- Daily shopping – limits to twice a week to avoid crowds/public places because immune system has been compromised; goes early or late when less people present and tries to finish shopping as quickly as possible; keeps purchases light as cannot lift or carry heavy items; needs to walk slowly to conserve his energy.
- Use of transportation – unable to drive when in pain or having diarrhea attacks; avoids using public transportation as it exposes him to viruses; tries to protect his immune system.
- Management of finances – able to do his; however goes to bank once or twice a month to avoid exposure to viruses.

In October 2014, the oncologist described the Appellant's physical health conditions and impairments as follows:

- Metastatic disease will be treated with surgery and chemotherapy; Appellant will experience side effects of chemotherapy; disease ultimately fatal.
- For physical functioning skills, the doctor indicated "unknown" regarding the Appellant's ability to walk unaided on a flat surface, climb 5+ stairs unaided, lift weights and remain seated.

In the January 2015 statement, the following information about the Appellant was provided:

- Has a severe physical/medical condition because his cancer is in Stage 4 and is terminal, further surgeries are not advised; most likely will undergo chemotherapy.

- Immune system has been seriously compromised and has to be careful about exposure to virus or infection; has to have a colostomy bag for as long as he lives.
- Suffers from explosive diarrhea at least twice a week at unpredictable times; gets severe stomach cramps and is unable to empty colostomy bag in time; feels very weak, drained of energy and is unable to move afterwards for a few hours; experiences sharp pains every now and then on a daily basis.

Mental Impairment

In December 2014, the Appellant described his conditions as follows:

- While in pain, has no interest or motivation.
- Feels depressed, worried and anxious most of the time because of the pain, the uncertainties in his life and having to deal with the unknown; also worries about his child and how his medical conditions affects the child.

In the physician's report, the doctor reported "unknown" to the question are there any significant deficits with cognitive and emotional function. In the December 2014 statement, the following information was provided about the Appellant:

- Because diarrhea recurrences are unpredictable and because of how he suffers during the episodes is often depressed, seriously distressed, feeling anxious and stays home in bed most of the time.
- Frequently lacks the energy, motivation or interest or mental clarity (poor short term memory, deficit regarding attention or sustained concentration) to perform and complete daily living activities.

In the assessor's report, the social worker reported the following cognitive/emotional impacts:

- Major impact to bodily functioning; moderate impact to emotion and motivation.
- Minor impact to attention/concentration; no impact to impulse control, insight and judgement, executive, memory, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems.
- "Periodic episodes of abdominal pain, accompanied by explosive diarrhea causes marked distress/anxiety. Breaks out into a heavy sweat. These episodes occur unpredictably and without warning. Colostomy bag swells up to and half times. It normally lasts for two hours."

Daily Living Activities

In the October 2014 physician's report, the oncologist indicated:

- "No" – to the question whether the Appellant's impairment directly restricts his ability to perform daily living activities, adding "not currently, will likely affect ADLs [activities of daily living] in future as disease progresses.
- "Don't know" on the chart listing daily living activities and restrictions.

The January 2015 statement had the following information about the Appellant:

- In response to a question whether the Appellant is significantly restricted in his ability to perform daily living activities, the answer was yes, after further consultation with the Appellant and with the cancer having metastasized is more aware that the Appellant frequently lacks energy, motivation, interest or mental clarity (poor short term memory, deficit regarding attention or sustained concentration) to perform and complete daily living activities.
- While undergoing therapy and radiation, he experienced side effects such as nausea, diarrhea and severe lack of energy to perform daily living activities and continues to experience these.

- Has about twice a week episodes of abdominal pain and explosive diarrhea which are unpredictable and cause marked distress, anxiety and depression, and inability to sleep properly; his colostomy bag swells and he has to stay in the washroom for over 2 hours; is so drained of energy and this significantly restricts his mobility, physical ability and capacity to perform daily living activities by himself.
- Is unable to or takes significantly longer to perform daily living activities when he experiences abdominal pain, explosive diarrhea, poor energy, depression and distress which happens at unpredictable times twice a week or more; feels pain on a daily basis.
- When in pain and feeling depressed is unable to and lacks interest or motivation to attend to personal care, meal preparation, basic housework, grocery shopping and use of public transportation; when able to do these, takes significantly longer due to physical conditions and anxiety/depression and needs to conserve energy all the time.
- When undergo treatments, his immune system is down and remains weak; has to stay home most of the time to not be exposed to virus and infection; will most likely undergo further chemotherapy and radiation sessions so will be more physically weak with low energy levels, with a weaker immune systems and will experience nausea, sensitivity to light and cold, may have disturbance of sleep that will further significantly restrict his capacity to perform daily living activities; therefore requires significant and continuous help with daily living activities as a direct result of his impairments.

The October 2014 assessor's report had the following information about the Appellant:

- Has good communication abilities in all areas (speaking, reading, writing, hearing).
- Is independently able to manage all areas of mobility and physical ability; i.e., walking indoors/outdoors, climbing stairs – “okay except when abdominal attacks occur”; also standing, lifting, and carrying and holding, - “Periodic episodes of abdominal pain and diarrhea (explosive) as a result of not having a gall bladder. These are unpredictable and can occur weekly. Impacts functioning significantly”.
- Independently manages all areas of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, transportation, social functioning.
- Has good functioning with his immediate and extended social networks.

Help with Daily Living Activities

In the physician's report, the oncologist indicated that the Appellant does not require any prostheses or aids for his impairment. The January 2015 statement had the following information:

- will most likely undergo further chemotherapy and radiation sessions so will be more physically weak with low energy levels, with a weaker immune systems and will experience nausea, sensitivity to light and cold, may have disturbance of sleep that will further significantly restrict his capacity to perform daily living activities; therefore require significant and continuous help with daily living activities as a direct result of his impairments.

In the assessor's report, “N/A” [not applicable] was written in the sections for assistance provided by others, through the use of assistive devices and by assistance animals. There was also a statement that a patient and family counselling department provides short-term social work and counselling services to patients diagnosed with cancer as well as their families.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision, concluding 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 advocate submitted that the doctor is of the opinion that his physical/medical impairment is severe. The Appellant's cancer is now at stage 4 and terminal. The Appellant experiences pain and also suffers from explosive diarrhea at least twice a week, leaving him feeling very weak, drained of energy and unable to move about afterwards. His health conditions and treatments make him physically weak with low energy levels, impacting his functioning.

In its reconsideration decision, the Ministry wrote that it considered the Appellant's self-report, the physician's report and the assessor's report. Based on the information provided about the Appellant's physical conditions and whether they affected his physical functioning, the Ministry determined that there was not enough evidence to establish a severe physical impairment.

The Panel's Findings and Decision

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 restricts daily functioning and the ability to manage the daily living activities defined in section 2(2)(b) of the EAPWDR. Such evidence includes evidence from the Appellant as well as from medical or prescribed professionals that the conditions directly and significantly restrict the Appellant's ability to manage the defined daily living activities.

The Appellant stated that he is unable to 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 for qualifying for disability assistance under this province's EAPWD statute.

In this case, the evidence consists of the Appellant's self-reports, reports signed by the oncologist and the assessor's report. Because it is not clear to the Panel who completed the assessor's report and because it is based on one interview with the Appellant, the Panel will consider that report to be similar to another self-report from the Appellant.

The oncologist diagnosed the Appellant with cancer that had spread and metastasized. In the January 2015 statement, which has the most recent medical information about the Appellant, his condition was described as in Stage 4 and terminal. In the physician's report from October 2014, the oncologist indicated "unknown" for the Appellant's physical functioning skills and "don't know" for restrictions to daily living activities. Then, in the January 2015 report, the Appellant is described as experiencing nausea, diarrhea and severe lack of energy to perform daily living activities while undergoing treatment. Also because of episodes of abdominal pain and unpredictable, explosive diarrhea, the Appellant is drained of energy and this significantly restricts his mobility, physical ability and capacity to perform daily living activities by himself. These descriptions of the Appellant's conditions and impairments are consistent with information from the Appellant.

The Panel finds that the evidence establishes that the Appellant's health worsened from September 2014 to when the December 2014 statement was completed. In that December 2014 statement, the Appellant described how during periods of treatments he feels nauseated, very weak, sensitive to cold and light and unable to sleep. The Appellant reported that he gets sharp pains at unpredictable times twice or more a week. Also, when feeling pain on and off on a daily basis, he is unable to attend to his personal care, meal preparation and cooking, and unable to do basic housework or it takes significantly longer. He also keeps purchases light because he cannot lift or carry heavy items. He needs to walk slowly to conserve energy. The Appellant also experiences explosive diarrhea attacks a least twice a week, draining him of energy so that he needs to rest. He stays in bed most of the time. With upcoming treatments he will feel even physically weaker and his immune system will be much weaker.

Based on all of the evidence from the Appellant's oncologist and the Appellant, especially the most recent information, the Panel finds that the Ministry unreasonably determined that there was not enough evidence to establish that the Appellant has a severe physical impairment.

Severe Mental Impairment

The Appellant's position is that his doctor has given her opinion that he has a severe medical condition. The Appellant submitted that he is often depressed, seriously distressed and feeling anxious, and ends up staying home in bed most of the time.

The Ministry wrote that based on the information provided by the oncologist and the social worker, there was not enough evidence to establish a severe mental impairment.

The Panel's Findings

In the October 2014 physician's report, the oncologist provided no diagnoses of any mental health condition or impairment. At that time, the oncologist indicated "unknown" for whether the Appellant had any deficits with cognitive and emotional functioning. In the January 2015 statement, the Appellant is described as being often depressed, seriously distressed, feeling anxious and staying home in bed most of the time because diarrhea recurrences are unpredictable and because of how he suffers during the episodes. He also is described as frequently lacking the energy, motivation, interest or mental clarity to perform and complete daily living activities.

The Appellant described similar symptoms, stating that he feels depressed, worried and anxious most of the time because of the pain and the uncertainties in his life. The Panel finds that all of the evidence demonstrates that these symptoms are described in the reports as arising from the pain the Appellant is experiencing, the severe diarrhea recurrences and the uncertainty of his future, rather than from a diagnosed mental health condition. Also, although there is information in the assessor's report regarding impacts to cognitive and emotional functioning, the assessor noted that the physical symptoms cause marked distress and anxiety. Therefore, the Panel finds that the Ministry reasonably concluded that there was not enough evidence to establish a severe mental impairment.

Restrictions to Daily Living Activities

The Appellant's advocate submitted that in the January 2015 statement, the oncologist answered yes to the question whether the Appellant is significantly restricted in his ability to perform daily living activities and the oncologist also clarified how those activities are restricted.

In its reconsideration decision, the Ministry wrote that it reviewed all aspects of the physician's report and the assessor's report. The Ministry acknowledged that the Appellant has very serious medical issues; however, it determined that there was not enough evidence to confirm that his impairments directly and significantly restrict his ability to perform daily living activities either continuously or periodically for extended periods.

The Panel's Decision

To qualify for PWD designation, the Appellant must provide evidence that he meets the requirements in section 2(2)(b) of the EAPWDA. That section requires a prescribed professional's opinion confirming that the Appellant's severe physical or mental impairment directly and significantly restricts his daily living activities, continuously or periodically for extended periods. However, it is not enough for the prescribed professional to merely state that such activities are restricted to that degree. The prescribed professional must assess the extent of any restrictions and the extent of assistance needed to manage the daily living activities that are defined in section 2(1) of the EAPWDR and listed in the physician's and assessor's reports.

The prescribed professionals in this case are the Appellant's oncologist who completed the October 2014 physician's report and signed the January 2015 statement, as well as the registered social worker who signed the assessor's report. Because it is not clear to the Panel who prepared the assessor's report and because it was based on one interview with the Appellant, for this criterion and the one discussed in the next section, the Panel will give more weight to the information provided by the oncologist. The Panel also considers the January 2015 statement signed by the oncologist as the most recent information about the Appellant's impairment.

In that January 2015 statement signed by the oncologist, there are general descriptions about the effects of the Appellant's impairment, such as being so drained of energy that it significantly restricts his mobility, physical ability and capacity to perform daily living activities by himself. When in pain and feeling depressed, he is described as being unable to, and lacking interest or motivation to attend to personal care, meal preparation, basic housework, grocery shopping and use of public transportation. When he is able to manage these, it takes significantly longer due to his physical conditions and anxiety/depression. These statements describe periodic restrictions that are related to episodes of pain and diarrhea. The Appellant's December 2014 descriptions of his ability to manage daily activities also indicate periodic restrictions brought on by pain, worries or diarrhea attacks.

In the January 2015 report, there is information that the Appellant is likely to undergo further treatment. He will be more physically weak with low energy levels, will experience nausea, sensitivity to light and cold, and may have sleep disturbances that will further significantly restrict his capacity to perform daily living activities. The report states that the Appellant therefore requires significant and continuous help with daily living activities as a direct result of his impairment. This statement about the need for significant and continuous help is not consistent with the descriptions of the periodic restrictions to specific activities in the January 2015 report or even in the Appellant's December 2014 report. The statement seems to describe a future need for such help. Therefore, the Panel finds that, based on the reports from the oncologist, the Ministry reasonably determined that there was not enough evidence to confirm that the Appellant has a severe physical or mental impairment which directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods.

Help With Daily Living Activities

The Appellant's advocate submitted that the Appellant's doctor confirmed that the Appellant requires significant help with daily living activities.

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.

The Panel's Decision

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. In the physician's report, the oncologist did not indicate that any help was needed. In the January 2015 report, there is only the statement that the Appellant requires significant and continuous help with daily living activities as a result of his impairments. As the Panel noted above, it is not clear whether this is a statement of present needs or a future need.

There is also no information clarifying whether such help is needed for all activities or just some, such as the statement from the Appellant that a friend does his cooking. The Panel finds, therefore, that based on the Appellant's doctor's reports and based on the Ministry's determination that the Appellant's daily living activities are not directly and significantly restricted, the Ministry reasonably concluded that the evidence does not establish that the Appellant satisfied the requirements in section 2(2)(b)(ii) of the EAPWDA.

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.