

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 17, 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 appellant did not attend the hearing. The panel received confirmation from the Tribunal that the appellant had been notified of the date, time and location of the hearing. Accordingly, under s. 86(b) of the *Employment Assistance Regulation*, the panel heard the appeal in the appellant's absence.

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 May 26, 2014;
 - b. the Physician Report ("PR") dated June 4, 2014 and prepared by a general practitioner ("the GP") who treated the appellant while he was incarcerated. No indication of the duration or frequency of treatment is provided; and
 - c. the Assessor Report ("AR") dated May 29, 2014 and prepared by a registered nurse ("the RN") who had treated the appellant for 2 years and had seen him between 2 and 10 times in the previous year; and
2. The appellant's Request for Reconsideration ("RFR") dated March 12, 2015 which has attached to it the following:
 - a. two pages of written submissions ("the RFR Submissions") prepared by the appellant and dated March 4, 2015
 - b. A letter dated March 3, 2015 prepared by an Outreach Worker familiar with the appellant;
 - c. A copy of the appellant's medication history dated February 4, 2015 and noted as being "updated March 6, 2015"; and
 - d. A letter dated March 5, 2015 and prepared by the appellant's lawyer from a previous civil litigation matter. This letter encloses a previous letter dated October 20, 2015 prepared by the same lawyer and addressed to a federal penitentiary along with one page of compensation criteria from a court approved claims process.

Diagnoses

In the PR, the appellant is diagnosed by the GP as being positive for Hepatitis C and as suffering from migraine headaches. The GP does not indicate the date of onset for either.

In the AR, the RN lists the appellant's impairments as Hepatitis C (for which he is receiving treatment), migraines and a history of "slashing."

Physical Impairment

In the RFR Submissions, the appellant comments that he has been unemployed for close to 30 years and that he has had and continues to have severe migraine headaches "at least 2 to 3 times per week" and that when they occur it is impossible for him to go to work or participate in any basic daily activities. The appellant agrees that he is not physically impaired for the majority of the week but that when he has migraine headaches he considers his functional and mobility skills to be impaired and prevent him from doing the simplest task. He says that bright lights and increased temperatures trigger his migraines and that he has been treated in the past by emergency personnel. The appellant further notes that he suffers from serious food allergies and that he takes medication for prevention and treatment of migraines.

In the SR, the appellant writes that he has a headache almost every day and migraine headaches 3 to 4 times per week as well as Hepatitis C. He comments that he has no employment skills, no trades, no work history, he did not complete high school and that he has been institutionalized both as an adult and as a youth for approximately 30 years. The appellant goes on to write that he is unable to stay out for long in hot weather and sunlight. He references the price of his medications and notes that reading for long periods of time cause him to experience headaches.

In the PR, the GP indicates that the appellant experiences incapacitating headaches three times per week and that he further experiences fatigue secondary to Hepatitis C. The GP adds that while migraines are “lifelong”, treatment of the appellant’s Hepatitis C may lead to a cure. With respect to functional skills, the appellant is described by the GP as being able to walk 4 or more blocks and climb 5 or more steps unaided although he is noted as experiencing shortness of breath due to his Hepatitis C treatment. The appellant is described as having no limitations lifting or remaining seated.

In the AR, the RN reports that the appellant lives alone and that he is independent with all aspects of mobility and physical ability. The AR provides no further comment with respect to the appellant’s physical impairment.

In the letter prepared by the Outreach Worker, the author notes that she has known the appellant since January 7, 2015 and that on February 25, 2015, she was advised by the appellant that he was experiencing an allergic reaction due to food he had ingested and that he was also experiencing a migraine headache with accompanying nausea and loud, rapid breathing. As a result, the appellant was attended by emergency personnel and transported to a hospital. The Outreach Worker further notes that on review of sign in/sign out records at the appellant’s residence, she has verified that there are many days when the appellant does not leave the building and that he has advised her that those are days when he is having migraine headaches and unable to leave his room or the building.

The appellant’s medication history notes that he takes two different medications daily for migraine prevention, another daily medication for migraine pain as needed, another medication to treat migraines as needed, another medication for heartburn and an injectable medication for allergies. The latter medication appears to have been added to the list in writing along with a note that the appellant has food allergies resulting in anaphylaxis.

Mental Impairment

In the RFR submissions, the appellant indicates that when he was younger he was incarcerated in a youth centre where he experienced both physical and sexual abuse for which he later received treatment. The appellant described these experiences as traumatic in nature with ongoing impacts including heightened anxiety and phobia in closed environments and in large social and public situations as well as distrust for authority figures and people in positions of authority. The appellant says that he continues to receive traditional support to assist him in coping with this trauma.

In the SR, the appellant writes that he experiences stress and that this is due in part to his lack of work history, trades and education.

In the PR, the GP does not diagnose the appellant with a mental condition or impairment and similarly indicates that the appellant does not experience any significant deficits with cognitive and emotional function.

In the AR, the RN notes that the appellant’s ability to hear and speak is good and that his writing and reading are satisfactory. The RN further indicates that the appellant experiences moderate impacts on emotion and attention/concentration and no impact on the remaining 11 aspects of daily functioning but does not indicate the mental condition that the appellant suffers from and which is the source of the noted impacts.

In the March 5, 2015 letter prepared by the appellant’s lawyer, he describes the effects of historical sexual abuse as being devastating on the appellant and that he had previously attended a treatment facility. The appellant’s lawyer comments in his letter that harms due to sexual assault can be devastating and prolonged and he references the compensation criteria for a court approved historical abuse compensation claims process. In the lawyer’s October 20, 2015 letter addressed to the warden of a federal penitentiary, he describes the appellant as experiencing “emotional turmoil” as a result of being sexually assaulted when he

was younger and he requests that the appellant be provided with treatment options while he is incarcerated.

Daily Living Activities (DLA)

In the PR, the GP checks the "No" box in response to the question of whether the appellant's impairment directly restricts his ability to perform DLA but then checks the "Yes" boxes for each of the listed DLA which would indicate that the appellant is restricted in each. However, the GP has not indicated if the restrictions are continuous or periodic in nature, he has not provided any further comments and he has crossed out the sections in which further comments can be made in respect of impacts on the appellant's DLA. The GP has further indicated that the appellant experiences increased fatigue due to his treatment for Hepatitis C which interferes with his ability to perform DLA and that the anticipated duration of this treatment is 9 months.

In the AR, the RN notes that the appellant is independent in all areas of DLA including Personal Care, Basic Housekeeping, Shopping, Meals, Paying Rent and Bills, Medications, Transportation and Social Functioning. The RN further comments that the appellant has no immediate social network and has marginal functioning with his extended social networks.

Need for Help

In the PR, the GP notes that the appellant does not require an assistive device for his impairment and the RN provides no comment in the AR as to the assistance provided for the appellant either by other people or through the use of assistive devices or assistance animals.

In his Notice of Appeal dated March 20, 2015, the appellant writes that there is an error as to how excruciating a migraine headache can be which he experiences 2 to 3 times per week and that this is medical evidence the government is aware of.

Evidence At Hearing

The Ministry

At the hearing, the ministry relied upon the Reconsideration Decision and provided no further submissions or evidence.

In response to questions, the ministry reiterated that the appellant's work history and ability to find employment was not a legislative criterion in the determination of an applicant's PWD status.

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 RN.

Severity of mental impairment

The appellant argues that he was physically and sexually abused as a youth which was traumatic in nature and has left him with ongoing impacts including heightened anxiety and phobia in closed environments and in large social and public situations as well as distrust for authority figures and people in positions of authority. The appellant says that he continues to receive traditional support to assist him in coping with this trauma.

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

Panel Decision

On review of the PR, the GP has not diagnosed the appellant with a mental impairment and specifically comments that the appellant has no deficits with cognitive or emotional function. Similarly, while the RN who completed the AR notes that the appellant experiences moderate impacts on his emotion and attention/concentration, she has not indicated the mental condition that the appellant suffers from and which causes these impacts.

The panel acknowledges the evidence of the appellant concerning the abuse that he experienced as a youth and the ongoing impact associated with it. However, considering the evidence as a whole and in particular that neither the GP nor the RN have diagnosed the appellant as suffering from a mental condition or impairment, 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 reasonable.

Severity of physical impairment

The appellant argues that he suffers from Hepatitis C and ongoing treatment related fatigue as well as migraine headaches two to three times per week which incapacitate him. The appellant has further described experiencing allergic reactions which have necessitated emergency treatment.

The ministry takes the position that the evidence of the appellant's physical condition does not support a finding of a severe physical impairment.

Panel Decision

In the PR, the appellant's GP confirms the diagnosis of Hepatitis C with associated fatigue due to treatment that is anticipated to continue for 9 months. The GP also describes the appellant as suffering from migraine headaches which he describes as "incapacitating." The appellant is described as able to walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, and he has no limitations lifting or remaining seated.

The evidence of the GP and the RN are consistent with that of the appellant with respect to the diagnosis of Hepatitis C and migraine headaches with the latter occurring 2-3 times each week and being incapacitating in nature. However, the appellant notes in the RFR Submissions that he is not physically impaired for the majority of the week and the evidence of the GP and the RN is consistent in that the appellant does not have any restrictions in his functional skills or mobility.

The panel finds that considering the evidence that was before the ministry at reconsideration, the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe physical impairment as provided by section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

The appellant's position is that his impairments directly and significantly restrict his ability to perform DLA. Specifically, he argued that his migraine headaches and the fatigue secondary to his treatment for Hepatitis C limit his ability to perform DLA.

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 RN, provide an opinion that an applicant's severe impairment directly and significantly restricts his 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 DLA, if any, 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.

As noted previously in this decision, in the PR the appellant's GP checked the "No" box in response to the question of whether the appellant's impairment directly restricts his ability to perform DLA. However, he has also checked "Yes" for each of the listed DLA which would indicate that they are restricted which is inconsistent with the previous answer.

The panel notes that for each of the listed DLA, the GP has not indicated whether the restriction is continuous or periodic in nature and the panel further notes that the GP has crossed out the sections which would allow the GP to comment on the nature and degree of the restriction, the assistance needed with DLA and how social functioning is restricted. As previously noted, the GP has also indicated in the PR that the appellant has no limitations with respect to his functional skills.

In the AR, the RN also commented on the appellant's ability to perform DLA. She indicates that the appellant is independent in all aspects of Personal Care, Basic Housekeeping, Shopping, Meals, Paying Rent and Bills, Medications, Transportation and Social Functioning.

The panel notes that the RN has indicated that at the time of her assessment, she had known the appellant for two years and had treated him between two and ten times in the previous 12 months. She further noted that she prepared the AR on the basis of a nursing assessment. In the PR, the GP does not indicate how long the appellant had been his or her patient or how frequently the appellant had been treated. Given that the RN appears to have had more consistent contact with the appellant and given the manner in which the AR was prepared, the panel gives greater weight to the AR than the PR in determining the impact of the appellant's impairment on his ability to perform DLA. This assessment further considers the contradictory and incomplete manner in which the DLA section of the PR was completed as set out above.

However, even if the panel is to interpret the PR in the appellant's favour and assume that the GP intended to confirm that the appellant's ability to perform DLA was in fact restricted in all respects, the panel finds that without indicating whether the restrictions are continuous or periodic in nature as required in the legislation and without any further comment clarifying his or her opinion, the ministry reasonably determined that this evidence did not satisfy section 2(2)(b) of the *EAPWDA*.

Based on the foregoing, the panel finds that the ministry reasonably concluded that the evidence is insufficient to demonstrate that the appellant's DLA are significantly restricted either continuously or periodically for extended periods as provided under section 2(2)(b) of the *EAPWDA*.

Help with DLA

The appellant has not commented as to what if any assistance he requires from others in performing DLA.

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 other words, it is

a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period.

Given the panel's finding that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel further finds that the ministry's conclusion that 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*, was reasonable.

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.