

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of April 10, 2015, which found that the appellant did not meet four of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that:

- in the opinion of a medical practitioner, the appellant’s impairment is likely to continue for at least 2 years;
- 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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 information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report dated December 4, 2014; a physician's report ("PR") signed by the appellant's general medical practitioner (the "physician") dated January 15, 2015, and an assessor's report ("AR") signed by a registered social worker (the "social worker") dated January 5, 2015.
- A letter from the social worker dated February 16, 2015.
- A letter from the appellant's orthopaedic surgeon dated January 29, 2015.
- A letter from the social worker dated March 18, 2015.

Admissibility of Additional Information

In oral testimony the appellant provided information that was substantially reiterative of information that had been before the ministry at the time of reconsideration. This information provided additional detail with respect to issues addressed in the original PWD application and was generally consistent with the original information. Accordingly, the panel has admitted the appellant's oral testimony into evidence as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information.

Duration of Impairment

- In the PR the GP (who had known the appellant for 10 months and had seen him 11 or more times in the past year) responded "No" to the question "Is the impairment likely to continue for two years or more from today?" He then commented "Surgery is [i]mminent to improve pain & function but outcome is uncertain at this stage."
- In his oral testimony the appellant stated that he knows he does not satisfy the two year criterion.

Diagnoses

- In the PR the physician diagnosed the appellant with "degenerative osteoarthritis hip." The physician reported that the appellant had hip replacement surgery which subsequently failed through dislocation. At the time the PR was completed the appellant was awaiting another operation to replace the failed artificial hip.

Physical Impairment

- In terms of functional skills, the physician indicated the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 2 to 5 steps unaided, is limited to lifting 5 to 15 pounds, and can remain seated for less than 1 hour.

- The physician indicated that “pain, aching, stiffness significantly impaired walking & mobility & bending and severely impaired to take up a job.”
- In the AR the social worker, who met the appellant for the first time in order to complete the AR, reported that the appellant independently manages lifting/carrying/holding (“caution must be observed. Increased weight > 25 lbs will increase discomfort”), and takes significantly longer than typical with walking indoors/outdoors and climbing stairs. The social worker commented that the appellant is concerned about increased wear on his other joints as he compensates for his hip, and that the appellant advised he has been immobilized three times over two months for up to 36 hours from pain.
- In his self-report the appellant stated that walking indoors is painful for the first few steps. He indicated that he needs a cane for walking outdoors and can climb one flight of stairs but then the pain becomes bothersome such that he would not want to climb more than one flight at any given time.
- In his letter of January 29, 2015 the orthopaedic surgeon reported that the appellant is unable to work because of symptoms of pain, instability and the risk of further deterioration of his hip. He indicated that the appellant would require six months of convalescence postoperatively.
- In his letter of February 16, 2015 the social worker commented that the appellant is in considerable pain all the time and he is sometimes immobilized when moving in such a way as to aggravate the hip joint severely.
- In his letter of March 18, 2015 (after the appellant’s surgery on March 13, 2015) the social worker wrote that the appellant could now only lift 15 pounds and was recommended to only walk 30 feet and only with a walker. The social worker stated that “At this juncture there is no indication as to what his ability will be in regard to safe ambulation or use of the hip and leg normally...[the appellant] has numerous aids to assist him with ambulation and personal care as well as with body functions. Given his circumstances it is believed that he would fit the criteria for physical disability as well as mental. To the extent that this might be changed is not yet known or understood.”
- In his oral testimony the appellant stated that:
 - Since he cannot afford to travel to see his orthopaedic surgeon, he has not been back to see him to get a prognosis on the outcome of the surgery. In response to a question from the panel the appellant indicated that he has not checked with his physician regarding a prognosis.
 - He has missed several physiotherapy appointments because he has to walk home afterwards and has sometimes become dizzy and fallen.
 - He tried to be proactive by applying for disability assistance early but the process has still taken several months and he is at a point where he has no money left for food after paying his rent.
 - The legislation allows him to earn up to \$200 per month without affecting his income assistance but the ministry has blocked his ability to work by not providing him with a bus pass or gas money. He has had an offer of employment which he had to turn down.
 - His crutches are on loan and will be taken away from him on June 5.

Mental Impairment

- In the PR the physician indicated the appellant has no difficulties with communication, but reported significant deficits with cognitive and emotional function in the areas of emotional

disturbance, motivation, and attention/sustained concentration. The physician commented that “[The appellant] became depressed due to severe pain & limited mobility and takes antidepressants.” He commented additionally that “He is also affected mentally – having developed severe depression & weight gain needing medication.”

- In the AR the social worker reported the appellant’s speaking and writing ability as “satisfactory”, and reading/hearing as “good”.
- The social worker indicated the appellant experiences moderate-to-major impacts in 2 of 14 categories of cognitive and emotional functioning (impulse control and insight/judgment), moderate impacts in 8 categories (bodily functions, consciousness, emotion, attention/concentration, motor activity, psychotic symptoms, learning disabilities, and “other emotional or mental problems.” The social worker reported minimal impacts in the remaining four categories of cognitive and emotional functioning.
- In his self-report the appellant indicated that:
 - He independently manages dressing, grooming and bathing.
 - Regarding transfers he is slow to get to a standing position.
 - He manages housekeeping/laundry by doing one task at a time...he cannot do his entire place at once due to back and hip pain.
 - He makes more frequent shopping trips to avoid having to carry too much at one time.
 - He has a history of impulsivity with money but doesn’t have the same opportunity for impulsiveness now with such limited income.
 - He uses a medication dispenser rather than relying on memory.
 - Regarding use of transportation, he is capable of taking the bus but prefers the independence of having a vehicle.
 - He is estranged from his family, and has a diverse group of friends with whom he makes contact regularly.
- During his oral testimony the appellant stated that his situation is causing him to be depressed and that he is on antidepressants. He became tearful several times during the hearing. He stated that he is not suicidal but that he has thought about it and his other options are becoming more limited.
- In his letter of March 18, 2015 the social worker reported that the appellant’s dosage for antidepressants had been doubled since coming home from the hospital after surgery.

DLA

- In the PR the physician indicated that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA.
- The physician reported that the appellant’s impairment does not restrict his ability to manage the DLA of personal self-care, meal preparation, management of medications, management of finances, or social functioning. He reported that the appellant is continuously restricted with the DLA of basic housework, mobility indoors and outdoors, and use of transportation. The physician stated that the appellant is periodically restricted with the DLA of daily shopping; and explained his use of the term “periodic” by commenting “Has good & bad days. Occasionally severely limited due to hip pain.”
- Regarding the degree of restriction the physician commented “Moderately restricted in terms of DLA.”
- In the AR the social worker reported the appellant independently manages the DLA of meal preparation, use of transportation, personal self-care (though he takes significantly longer than

typical with transfers in/out of bed in the morning and on/off chairs), basic housekeeping (though he compensates by breaking the tasks up), daily shopping (making more frequent trips to reduce the bulk and weight of purchases), and managing medications (using a medications dispenser to stay organized). With respect to the DLA of managing personal finances, the social worker reported that the appellant banks online, but requires continuous assistance with budgeting and paying rent/bills ("long history of impulsive use of money resulting in insufficient funds [and] outstanding bills.")

- In terms of the DLA of social functioning, the social worker reported the appellant requires periodic or continuous support in all aspects except for his ability to independently develop and maintain relationships. The social worker commented "[The appellant] reports to have had been in company that influenced bad choices around drug use. Making more appropriate decisions now. Reports to have a diverse group of friends...Second guesses himself when it comes to judging character...unexpected things can throw him...not easy to ask for help because he has always been so independent." The social worker reported the appellant has very disrupted functioning with both his immediate and extended social networks.
- In his oral testimony the appellant said that he does not have a lot of friends in town.

Help

- In the PR the physician indicated that the appellant requires occasional use of a cane for his impairment.
- In the AR the social worker reported the appellant makes periodic use of a cane when his pain is severe. He indicated that the appellant does not have an assistance animal.
- The social worker reported that the appellant is estranged from his family and that he functions independently in the community. He commented "[The appellant] remains fiercely independent which though respectable may be causing him to apply too much pressure [illegible] on bad hip and other joints."

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of section 2 of the EAPWDA in the circumstances of the appellant. In particular, was the ministry reasonable in determining that

- in the opinion of a medical practitioner, the appellant's impairment is not likely to continue for at least 2 years;
- the evidence does not establish that the appellant has a severe physical or mental impairment;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal?

The relevant legislation is as follows:

EAPWDA:

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.

EAPWDR section 2(1):

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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

Duration of Impairment

The appellant acknowledged that the two-year criterion is not satisfied, but argued that he simply cannot get by on the amount of income he currently receives from income assistance.

The ministry's position is that the physician has not confirmed that the appellant's impairment will continue for two years or more, and that the orthopaedic surgeon expects a six month period of convalescence post surgery.

Panel Decision

The legislation – section 2(2)(a) of the EAPWDA – does not permit the minister to designate an applicant as a PWD unless she is satisfied that, in the opinion of a medical practitioner, the applicant's impairment is likely to continue for at least 2 years. In the appellant's situation his physician has expressed uncertainty regarding the ultimate outcome of the appellant's surgery, but clearly provided his opinion that the impairment is not likely to continue for the required 2 years. His opinion is supported by the orthopaedic surgeon's expectation of a period of post-operative convalescence of six months.

Based on the foregoing evidence, the panel finds that the ministry reasonably determined that this legislative criterion has not been satisfied.

Severe Physical Impairment

The appellant's position is that his hip pain restricts his mobility and constitutes a severe physical impairment.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to establish a severe physical impairment. The ministry argued that the appellant's functional skills as reported by the physician and the social worker are more in keeping with a moderate degree of impairment.

Panel Decision

A diagnosis of a serious medical condition 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. The legislation makes it clear that the determination of severity is at the discretion of the minister. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional.

The appellant's functional skills as described by the physician in the PR are generally in the mid-range of the scale. The social worker subsequently reported that post-surgery the appellant's functional skills were diminished, but his observation has little relevance considering it was given within days of the appellant's hip-replacement surgery. The orthopaedic surgeon indicated a convalescence period of six months.

The ability to work at paid employment is not a statutory criterion. The legislation instead focuses on the ability to manage DLA independently. Paid employment generally requires a higher level of functioning than DLA. As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the appellant's physical condition does not appear to have translated into significant restrictions in his ability to manage his DLA independently.

Accordingly, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant's position is that his depression constitutes a severe mental impairment. His social worker referred to his depression as "severe" and indicated that it has caused numerous impacts and deficits in the appellant's cognitive and emotional functioning.

The ministry's position is that there is not enough evidence to establish a severe mental impairment. The ministry argued that the social worker's evidence differs from the physician's regarding many aspects of cognitive and emotional functioning, making it difficult to develop a clear and cohesive picture of the degree of restrictions experienced by the appellant.

Panel Decision

In terms of mental functional skills, the evidence of the physician in the PR and the social worker in the AR indicates that the appellant's communications skills are satisfactory to good. The physician noted significant deficits in 3 areas of cognitive and emotional function, but he also indicated that the appellant's depression is linked to his pain and limited mobility. In the AR the social worker reported that the appellant has deficits in many more areas of cognitive and emotional function. However, the panel notes that the social worker based his assessment on one office visit with the appellant, and that he relied substantially on the appellant's own description of his functioning. He completed the AR before the physician completed the PR, and did not have any medical reports or other information on which to base his opinion. Because the physician has known the appellant for a longer period of time than the social worker and has had much more contact with him, the physician can be expected to have more knowledge of the appellant's functional level. Accordingly, the panel has given more weight to the physician's evidence where it differs from that of the social worker.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*). The evidence indicates that the appellant is not significantly restricted with respect to decision making in that he independently manages his medications (albeit with the use of a pill dispenser to keep him organized). He also independently manages the decision-making components of the DLA of personal self-care (regulating diet), daily

shopping (making appropriate choices), and meal preparation (meal planning). The social worker indicated that the appellant requires assistance with decision-making aspects of the DLA of managing personal finance (budgeting) and social functioning (making appropriate choices). However, for the reasons noted above the panel has given more weight to the evidence of the physician who has indicated the appellant is not restricted in these DLA.

Considering the evidence that :

- the appellant has good to satisfactory communication skills,
- his decision making and social functioning are not significantly restricted, and
- his depression is secondary to his physical impairment, the prognosis for which has not been clearly established beyond a six month period of convalescence,

the panel concludes that while the appellant clearly does experience impacts with respect to his mental health the ministry reasonably determined that it does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his impairments cause significant restrictions to his ability to manage his DLA. He argued that both his physician and social worker reported that he is restricted in a number of DLA.

The ministry's position is that the evidence shows that there is not enough evidence to establish that the appellant's impairments – in the opinion of a prescribed professional - directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods. The ministry argued that the social worker's post-operative assessment of the appellant's restrictions should be given little weight as such restrictions are to be expected while a person is convalescing from hip surgery.

Panel Decision

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. In circumstances where the evidence indicates that DLA are directly restricted, it is appropriate for the ministry to require evidence as to whether the restriction is continuous or periodic and – if periodic – of how frequently the restriction arises.

The panel notes that the physician described the appellant as being "moderately" restricted in terms of DLA. The panel does not view the physician's opinion as determining the significance of the restrictions since that would amount to a fettering of the panel's discretion, however the panel notes that the physician's and social worker's evidence are reasonably consistent in terms of the significance of restrictions except with respect to social functioning. For the reasons noted above the panel has given more weight to the physician's evidence where the two differ.

The physician noted that the appellant's ability to manage daily shopping is occasionally "severely" limited due to hip pain, but provided no information as to how frequently such a severe restriction may arise.

In the panel's view, for the foregoing reasons the evidence does not present a compelling picture of an individual whose ability to manage his DLA is significantly restricted as contemplated by the legislative scheme. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage his DLA independently is not significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he requires help in the form of a bus pass and more income to manage his DLA.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

The panel notes that there may be situations in which a person may "require" help but not be receiving it. In the panel's view the word "require" indicates a degree of necessity so that it is something that a person cannot reasonably do without. If the person does not get the help he requires, the DLA goes undone either continuously or periodically for extended periods or the DLA takes an unreasonably long time to complete.

In the panel's view there is simply insufficient evidence to show that the appellant's DLA go undone for lack of assistance, that it takes him an inordinate amount of time to perform DLA, or that he relies upon "the significant help or supervision of another person" as required by EAPWDA section 2(3)(b)(ii).

The appellant's occasional use of a cane is not sufficient to demonstrate that the appellant requires "help" with DLA as contemplated by the legislation.

A finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, the panel finds the evidence falls short of satisfying that precondition.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical condition currently affects his ability to function.

However, having reviewed and considered all of the evidence and the relevant legislation and for the foregoing reasons, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.