

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated April 7, 2015 which held that the appellant did not meet 4 of the 5 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 but was not satisfied that:

- a medical practitioner confirmed that the appellant has an impairment that 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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

Evidence before the ministry at reconsideration

- A PWD application comprised of a Self-report (SR) signed by the appellant on October 2, 2014, a Physician Report (PR) completed by an orthopaedic surgeon who had seen the appellant once (“the surgeon”) dated October 27, 2014, and an Assessor Report (AR) completed by the appellant’s general practitioner of three years (“the GP”) dated January 1, 2015.
- The appellant’s 2-page self-report Request for Reconsideration submission.

Additional evidence submitted on appeal and its admissibility

In his Notice of Appeal, the appellant reiterated that his condition had worsened as a result of being struck by a vehicle.

At the hearing, the appellant provided oral testimony and the following documents in support of his assertion at reconsideration that his condition had worsened as a result of having been struck by a car (“the accident”) shortly before he submitted his request for reconsideration:

- 1) April 30, 2015 Medical Report – Employability (“the Medical Report”), completed by the GP who completed the AR;
- 2) March 23, 2015 note from an in-hospital physician;
- 3) April 1, 2015 note from a third physician;
- 4) May 21, 2015 regional health authority Safety Plan (steps to be taken if the appellant has thoughts of hurting himself), and
- 5) 2 pages date stamped April 30, 2015 listing medications prescribed by the GP.

The ministry had no objection to the documents being admitted by the panel.

Section 22(4) of the *Employment and Assistance Act (EAA)* limits the evidence that a panel may admit. Only information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration may be admitted for consideration by the panel. In concert, section 24 of the *EAA* establishes the panel’s decision-making authority, limiting the panel to determining whether the ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the applicable legislation and confirming or rescinding the reconsideration decision, accordingly. Consequently, the panel is without the authority to make a new decision of its own or assume the role of a first-time decision maker by basing its decision on evidence that was not in support of the evidence at reconsideration.

The panel determined that the physicians’ notes, which report the need for time off of work following the car accident, and the information in the Medical Report relating to further impaired physical functioning subsequent to the accident corroborate the appellant’s evidence at reconsideration that he is unable to work during his recovery and that the accident has worsened his pain and are therefore admissible as being in support of the information at reconsideration. However, the panel

determined that the appellant's oral testimony and the information in the Medical Report relating to the new diagnosis of concussion is not in support of the information at reconsideration and therefore not admissible as there was no indication that the appellant had suffered a head injury. The panel admitted the Safety Plan as it corroborates and substantiates the appellant's assertion in his reconsideration submission that he has become extremely depressed; however, it is given little weight as a medical practitioner has not diagnosed depression. The list of medications is admitted as information corroborating the appellant's prior statement that he takes pain medication but is given little weight by the panel as it does not provide information that addresses the criteria in issue – that is, it does not inform as to either the duration of impairment or the level of physical or mental functioning.

Relevant evidence admitted on appeal is included in the summary below.

Summary of relevant evidence

Diagnoses and duration

- The appellant is diagnosed by the surgeon with right leg pain NYD (not yet diagnosed). The surgeon did not tick either the “yes” or “no” box when asked “Is the impairment likely to continue for two years or more from today?” and describes the degree and course of impairment as unknown with a diagnosis still pending. The appellant is awaiting a knee MRI.
- In the Medical Report, the GP identifies the appellant's primary medical condition as “MSK/mechanical leg + back pain” with an onset date corresponding to the date of the accident and the duration of the condition as “unknown.”

Physical Impairment

- Physical functional skills reported in the PR by the surgeon are that the appellant can walk 4+ blocks unaided, climb 5 steps unaided and has no limitations with lifting or remaining seated.
- In the AR, the GP reports that the pain impacts mobility on a day-to-day basis and that the appellant uses a cane for standing and walking indoors and outdoors. The GP notes that the appellant reports having to crawl up stairs and being unable to lift or carry and hold. Additional narrative includes that the appellant is unable to walk at times (struggles to get to washroom) and uses a cane 2-3 times a week.
- In the SR, the appellant writes that his pain is intensified with any activity, he falls down on a regular basis when his leg gives way, and that due to the constant chronic pain, walking from his bedroom to his bathroom causes great pain.
- In his reconsideration submission, the appellant writes that his condition has worsened since his application was completed and he is unable to walk more than a block unaided. The appellant states that 5 days earlier he was struck by a car requiring hospitalization and that he has been bedridden since, barely being able to sit up. He has no idea how long it will take to recover.
- In the Medical Report, the appellant is reported as unable to stand or sit for more than 3 minutes. The appellant's overall medical condition is reported as “moderate” – the form also

gives the options of “mild” and “severe.” The medical condition is not episodic.

- Both physician notes indicate the need for the appellant to take time off of work in the month following the accident.
- At the hearing, the appellant stated that his pain is now constant and that he is one hundred times worse since the accident. Prior to the accident he was working and had a good job that he could do with his previous disability. He would like to be able to work and support himself.

Mental Impairment

- A mental disorder is not diagnosed.
- No difficulties with communication are identified by the surgeon or the GP.
- No deficits with cognitive and emotional function are reported in the PR by the surgeon and in the AR, the GP reports no impact on daily functioning for all listed aspects of cognitive and emotional functioning.
- In the AR, the GP reports that the appellant independently manages all listed cognitive tasks of DLA, including social functioning and that he has good functioning with immediate and extended social networks.
- In the SR, the appellant states that his chronic leg pain has limited him emotionally and that he is extremely depressed due to financial and emotional/physical stress.
- In his reconsideration submission, the appellant writes that his pain is causing him to be extremely depressed and he is still waiting to see a counsellor. Full disability would reduce his stress and ease his recovery process from the recent car accident.
- At the hearing, the appellant stated that he has been seeing a counsellor and reiterated that he is really stressed and has had thoughts of self-harm.

DLA

- In the PR, the surgeon indicates that the appellant has not been prescribed medication or treatments that interfere with his ability to perform DLA and that his impairment does not directly restrict his ability to perform DLA (including mobility inside and outside the home).
- In the AR, the GP reports the use of a cane for:
 - standing and walking (described as 2-3 times a week);
 - one task of the DLA *shopping*, going to and from stores which also requires periodic assistance from friends; and
 - one task of *transportation*, using public transit.
- The GP reports that the appellant independently manages all listed tasks of the DLA *personal care, basic housekeeping, meals, paying rent and bills, medications, and social functioning*, as well as the remaining four tasks of *shopping*, which includes carrying purchases home, and the remaining two tasks of *transportation*, which includes getting in and out of a vehicle.
- The appellant reports that without assistance he cannot do everyday duties necessary to survive and needs assistance to go shopping and that following the recent car accident he cannot independently get to a washroom or eat, do laundry, cook for himself, or brush his teeth.

Need for Help

- The surgeon does not identify the need for assistance from another person or an assistive device.
- The GP reports that the appellant requires a cane for walking, standing, using public transit, and going to and from stores. The frequency of cane use is described as both “regularly” and 2–3 times per week. The appellant also requires the assistance of friends to drive him to and from stores and to appointments.
- In the SR, the appellant reports that he needs rides to and from the store, is unable to go to a store for groceries without help, and that without assistance cannot do everyday duties necessary to survive.
- Since being struck by a car, the appellant reports that he needs assistance to get to a washroom and to eat.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on 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 the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable when concluding it was not satisfied that

- a medical practitioner had confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- a severe physical or mental impairment was established;
- 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 those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, to perform DLA?

Relevant Legislation:

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.

(4) The minister may rescind a designation under subsection (2).

EAPWDR

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Duration of Impairment

The ministry's position is that the surgeon indicates that the course of impairment is unknown and that there is no further information from a medical practitioner to confirm that the appellant's impairment is likely to continue for two years or more.

The appellant does not expressly take a position about the duration of his original impairment and that he does not know how long it will take to recover from the accident.

Panel Decision

The information from the surgeon in the PR, and from the GP in the recent Medical Report, is that the duration of the appellant's impairment or medical condition is unknown. In view of this evidence, the panel finds that the ministry reasonably determined that a medical practitioner has not confirmed that the appellant's impairment will continue for two years or more.

Severe Physical Impairment

The appellant argues that he has a severe physical impairment due to constant pain in his right leg and that the ministry neglected to consider that his condition had worsened by the time of reconsideration due to the accident which worsened older problems and caused new problems.

The ministry's position is that the restrictions to physical functioning reported in the PWD application are not shown to be severe. The ministry also notes that although the GP reports the use of a cane 2-3 times a week, the surgeon reported no limitations and therefore the ministry is unable to establish how much longer the appellant typically takes to complete activities and finds it difficult to establish a severe degree of impairment.

Panel Decision

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the 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 respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

In this case, the medical information available at reconsideration from the surgeon and the GP respecting the appellant's physical functioning is not consistent, and as the ministry argues, makes it difficult to establish a severe degree of impairment. Though noting impairment of mobility due to right

leg pain, the surgeon reports that the appellant's physical functioning is at the high range for all listed aspects - walking, climbing stairs, lifting and remaining seated. The GP, however, indicates that the appellant is unable to walk at times, using a cane 2–3 times a week for walking and standing. Further, the GP provides inconsistent information respecting the appellant's ability to lift and carry/hold as the appellant is reported as both unable to lift and completely independent for carrying purchases home. However, based on the GP's additional narrative that the appellant reports having to crawl up stairs and being unable to lift, carry and hold, the greater level of restriction likely reflects the appellant's self-reported abilities not the GP's assessment.

The appellant's written and oral testimony emphasizes the worsening of his condition after the accident and uncertainty as to how long his recover will take. The appellant's written testimony for reconsideration reflects his functioning less than one week after the accident and both physician notes provided on appeal reflect the need for time off of work within one month of the accident. While the appellant's evidence is that his condition is currently 100 times worse, approximately 10 weeks following the accident, the most recent medical information, the Medical Report, which was based on the appellant's condition less than 6 weeks following the accident, does not support such a significant decline in functioning as it describes the appellant's overall medical condition as moderate with the duration of impairment still unknown.

Based on the above analysis of the information available at reconsideration and the additional information admitted on appeal, the panel finds that the ministry reasonably determined that the evidence does not establish a severe physical impairment.

Severe Mental Impairment

The appellant's position is that he is extremely depressed as a result of his severe chronic right leg pain and the resulting financial stress due to being unable to work.

The ministry's position is that a severe mental impairment has not been established by the evidence that the appellant has no significant deficits to his cognitive or emotional function and his ability to communicate is good.

Panel Decision

The panel finds that although the appellant reports that he is extremely depressed, the appellant was not diagnosed with a mental disorder at the time of reconsideration and neither the surgeon nor the GP identified any problems with cognitive and emotional functioning, communication, decision-making or social functioning in the PWD application. While the Safety Plan supports the appellant's assertion at reconsideration that he has become extremely depressed, there is still no diagnosis by a medical practitioner of depression and no information from a physician of any impact on cognitive and emotional functioning due to depression. Further, the Medical Report, completed only three weeks before the Safety Plan, indicates that the appellant's primary medical condition is a physical condition. Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established.

Restrictions in the ability to perform DLA

The appellant's position is that he is unable to manage necessary everyday duties and specifically, that he requires the use of a cane when walking and assistance from another person to go shopping. Further, following his accident he has been bedridden and unable to make his own meals, do his laundry, get to the washroom or even brush his teeth. He is uncertain as to how long his recovery will take.

The ministry's position is that as the information in the PR contradicts that in the AR, reported restrictions are not supported by medical evidence (NYD), and the leg pain does not affect the appellant's ability to manage the majority of DLA, the information provided does not establish that a severe significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. The evidence of the appellant and others can be considered to provide greater clarity or substantiate the evidence of a prescribed professional, but the legislation is clear that the ministry's decision be primarily based upon the evidence of a prescribed professional.

In this case, the surgeon, the GP, and the physicians who provided both notes are all prescribed professionals.

The surgeon reports that the appellant is not restricted in his ability to manage any DLA and in the AR, the GP reports that, with the exception of requiring the assistance of another person and/or the use of a cane for the DLA *move about indoors and outdoors* and for one task each of the DLA *shopping and transportation*, the appellant independently manages all other DLA tasks. As noted above, the GP appears to reflect the appellant's self-reported inability to lift and carry given that the GP assesses the appellant as independently carrying purchases home. At reconsideration, the appellant writes of his inability to manage even the most minimal DLA tasks; however, this assessment is not corroborated by a prescribed professional. While the Medical Report indicates that the appellant is limited to standing or sitting for 3 minutes, the appellant's overall medical condition is described as moderate. There is evidence of limitations respecting employment both before and after the accident; however, the ability to engage in paid employment is not a legislated criterion for PWD designation and is not a prescribed DLA. Based on the above analysis of the evidence, the panel finds that the ministry reasonably concluded that the information provided does not establish that a severe impairment significantly restricts the appellant's ability to perform DLA, either continuously or periodically for extended periods.

Help to perform DLA

The appellant argues that prior to the accident he was unable to perform everyday duties and that he requires more assistance since the accident, his condition having been made 100 times worse.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that 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. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

As direct and significant restrictions in the ability to perform DLA is a precondition to this criterion, which the panel found was reasonably determined to have not been met, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

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 reasonably supported by the evidence, and therefore confirms the decision.