

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 February 5, 2015 which held that the appellant did not meet 3 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 and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 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 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 an uncompleted Self-report (SR) signed and dated September 2, 2014 by the appellant and a Physician Report (PR) and Assessor Report (AR) completed by the appellant's general practitioner ("the GP") of 3 years and dated November 7, 2014. The panel notes that in the PR the GP writes that consultant reports are enclosed but that none are in the appeal record.
- The appellant's Request for Reconsideration submission dated February 3 [2015] on which the appellant makes notations which the panel understands to mean that he did not complete the SR originally but has done so as part of his Request for Reconsideration submission.

Additional information submitted on appeal and admissibility

Section 22(4) of the *Employment and Assistance Act (EAA)* limits the evidence that a panel may admit to information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration.

The appellant submitted a letter from his GP dated April 23, 2015 ("the letter"). The panel finds that the information from the GP tends to corroborate previous information from the appellant and GP and is therefore admitted by the panel pursuant to section 22(4) of the *EAA*.

The ministry did not provide additional information on appeal.

Summary of relevant evidence

Diagnoses

The GP diagnoses the appellant with Multiple Sclerosis (MS) which is progressive and has no treatment. The appellant reports arthritis in his spine and scoliosis; however, a medical practitioner has not confirmed these diagnoses.

Physical Impairment

- In the PWD application, the GP reports that the appellant has increased lower limb pain and weakness, making walking difficult and that a cane is used for support. The appellant is easily fatigued. The appellant is able to walk less than 1 block unaided (independently walks indoors and uses a cane for walking outdoors and standing), climb 2 to 5 steps unaided (takes significantly longer than typical), and can remain seated for 2 to 3 hours. Lifting limitations are unknown and help is provided by roommates.
- In the SR, the appellant writes that his MS causes constant pain which feels like he is being crushed. He is losing the use of his arms and legs and fine motor control is becoming increasingly difficult. He has already lost the use of his toes and his knees are going. He is tired all the time and without energy to eat for days, or to cook or clean. He also has trouble

sleeping and just lies there exhausted. His condition will only get worse as he becomes a prisoner in his own body.

- In his Request for Reconsideration submission, the appellant writes that he is confined to his bed 70% of the time.
- In the letter, the GP reports increased weakness of both hands and that the appellant “takes an extraordinary time to complete tasks.” The appellant is **NOT** [emphasis included] employable and the GP trusts that the appellant’s disability is recognized and awarded.

Mental Impairment

- A mental disorder is not diagnosed by the GP.
- The GP reports a good ability to communicate is good (speaking, reading, writing, hearing).
- The GP indicates that there are no significant deficits with cognitive and emotional function; however, when asked to indicate impacts on cognitive and emotional functioning resulting from an identified mental impairment or brain injury, the GP reports a minimal impact for emotion noting that the appellant became very depressed when diagnosed but seems to have coped with it.
- The GP reports that the appellant independently manages all aspects of social functioning and has good functioning with immediate and extended social networks.
- In the SR, the appellant writes that MS makes him angry, that he has no ambition and a general feeling of hopelessness, and that his friends have given up on him because he is always too tired.

DLA

- For the DLA, moving about indoors and outdoors, the appellant independently manages walking indoors and requires a cane for walking outdoors and for standing.
- All aspects of the DLA personal care, basic housekeeping, meals, paying rent and bills, medications, transportation, and social functioning are managed independently. For the DLA, shopping, the appellant independently manages reading prices and labels, making appropriate choices, and paying for purchases; continuous assistance from another person is required for the remaining tasks – going to and from stores and carrying purchases home (carrying purchases also requires the use of an assistive device, presumably a cane).
- The appellant reports being without enough energy to go to the store, cook or clean but that when under heavy medication he can grocery shop.

Need for Help

- The GP reports the need for an assistive device (cane) for standing and walking outdoors as well as for carrying purchases home. Carrying purchases home and going to and from stores also requires the continuous assistance of another person.
- The GP notes that “down the road” the appellant may need home care supports and a wheelchair.
- Friends currently provide assistance and the GP responds “not yet” when asked to describe help required but not available.

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 in determining that:

- a severe physical or mental impairment was not established;
- the appellant's daily living activities (DLA) are not, 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 does not require 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.

Severe Impairment

Section 2(2) of the EAPWDA 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", in the ministry PR and AR forms "impairment" is defined 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.

Severe Physical Impairment

The appellant argues that the ministry has misunderstood his MS symptoms, which speak for themselves, and that his condition is getting progressively worse. The appellant suspects that the ministry is trying to starve him to death instead of taking his claim seriously.

The ministry argues that the information respecting the appellant’s physical functional skills and mobility and physical ability are more in keeping with a moderate degree of impairment. The ministry notes that although the appellant requires an assistive device for walking outdoors and standing, he is independent with walking indoors. Further, while climbing stairs, lifting, and carrying and holding take significantly longer, the physician does not indicate how much longer.

Panel Decision

The evidence is that the appellant is diagnosed with a serious progressive medical condition, MS. The evidence also establishes that MS has impaired the appellant’s physical functioning, most notably in terms of walking outdoors, which the GP reports is limited to less than one block unaided and otherwise requires the use of a cane for support. The appellant and the GP also note weakness in both hands resulting in a loss of dexterity and that the appellant is also easily fatigued. The appellant reports that he is bedridden 70% of the time; however, this level of impairment is not supported by the GP’s information. While the GP notes that lifting and carrying/holding take significantly longer, and that carrying also requires the assistance of another person, the GP does not indicate how much longer and reports the appellant’s lifting limitations as “unknown.” As the GP had the option of indicating “no lifting” it appears that the appellant likely independently manages some lifting but, in the absence of further detail, the severity of this limitation cannot be established. The GP reports that the appellant walks indoors and can climb 2 to 5 steps unaided. The panel finds that with the exception of the ability to walk outdoors, the appellant is otherwise reported as independently managing most physical functional skills/abilities and that, although some are reported as taking significantly longer or requiring assistance, there is insufficient description to determine how much longer they take or in what circumstances assistance is required. The GP’s additional evidence confirms the diagnosis of progressive MS causing lower limb and hand weakness and loss of dexterity adding that the appellant “takes an extraordinary time to complete tasks.” While this general comment is suggestive of a significant restriction in physical functioning, the GP also specifically reports that the appellant’s ability to communicate via writing is good and that he independently manages most physical DLA tasks with no noted limitations, including dressing, food preparation, and basic housekeeping.

Based on the above analysis, the panel finds that the ministry reasonably determined that the information has not established a severe physical impairment.

Severe Mental Impairment

The appellant does not directly argue that he has a severe mental impairment but reports feelings of anger and hopelessness and that he has no ambition.

The ministry's position is that a severe mental impairment has not been established by the physician's evidence of no deficits with cognitive and emotional functioning, a minimal impact on emotion, and no difficulties with communication.

Panel Decision

The panel finds that a mental impairment or brain injury is not diagnosed, though the GP notes that the appellant became depressed when diagnosed with MS but has since managed to cope with the diagnosis. Although the appellant reports feelings of anger and hopelessness and having no ambition, there is no evidence of difficulties with social functioning, decision-making, or communication. Based on this evidence, 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 argues that the pain, increasing loss of the use of his arms and legs, and increasing difficulties with fine motor skills have significantly diminished his ability to do things. He is too tired to cook or clean and lies in bed for days and is only able to shop when heavily medicated.

The ministry's position is that the physician's evidence that the appellant independently manages DLA, with the exception of requiring continuous assistance from another person with going to and from stores and carrying purchases home and the use of an assistive device for carrying purchases, does not confirm that the appellant's impairment directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA 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. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In this case, the appellant's GP is the prescribed professional. The GP identifies restrictions in the ability to move about outdoors, one component of the DLA *move about indoors and outdoors*, and with the physical tasks of the DLA *shopping* - going to and from stores and carrying purchases home,

which both require continuous assistance from another person (carrying purchases also requires the use of an assistive device, presumably a cane). As previously discussed, the degree of restriction with lifting cannot be determined in the absence of further information. With the exception of these noted restrictions, the appellant is reported by the GP as independently managing all other tasks of all DLA, including cleaning and cooking which the appellant reports being unable to do due to fatigue. In the letter, the GP notes limited dexterity resulting in the appellant taking an extraordinary time to complete tasks. However, the GP does not identify what tasks and when given an opportunity to identify restrictions in the AR in the ability to perform DLA tasks involving dexterity, such as dressing, food preparation, and cooking, none were identified. The GP also writes that the appellant is not employable. However, employability is neither a legislated criterion for PWD designation nor a prescribed DLA.

Based on the information provided by the GP, the panel finds that the ministry reasonably concluded that the reported level of independence with most DLA does not demonstrate that a severe physical or mental impairment, in the opinion of a prescribed professional, significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Help to perform DLA

The appellant's position is that he is confined to his bed 70% of the time and is too tired to manage cooking, cleaning and shopping. The GP reports the need for a cane for support standing, walking outdoors, and carrying purchases and the assistance of another person for shopping tasks and the possible need for home care support in the future because of the progressive nature of MS.

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.

The evidence of the prescribed professional is that the appellant currently requires the use of a cane when walking outdoors and both a cane and the assistance of another person for some shopping tasks. The GP also notes that in the future, the appellant may require a wheelchair and home care support. In light of the evidence respecting the appellant's current need for assistance, and as the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel acknowledges that the appellant has a serious medical condition that impacts his functioning. However, having reviewed and considered all of the evidence respecting the appellant's current circumstances and the 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.