

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 3 June 2015 determined 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 his impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted his daily living activities (DLA) either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help 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 following evidence was before the ministry at the time of reconsideration:

- A 3 page PWD Application – Applicant Information (self report – SR) dated 5 May 2015, signed by the appellant and a witness indicating that he injured his knee 3 years ago and had surgeries as a result of that injury and subsequently 2 more injuries when he returned to work. He was in constant pain and suffers from severe prolonged osteoarthritis (OA). His condition prevents him from walking more than a block or climbing 2 – 3 stairs before the pain is overwhelming, and as a result he is limited in his DLA. His sleep has also been affected because of pain. He has been off work since the end of 2014 as a result of another knee injury and is certain he will be unable to return to work in the future unless there is a significant improvement in his left leg.
- An 8 page Physician Report (PR) dated 17 February 2015 completed and signed by the appellant's physician (general practitioner - GP) indicated the following:
 - Specific diagnosis: Severe OA at bilateral with onset in April 2013.
 - Health history: Severe bilateral knee pain with multiple significant left knee injuries resulting in severe post traumatic OA of the knee, with pain severe enough to require surgery. Postoperative infection caused ongoing severe pain and limited mobility. Because of compensatory use, previous injury and meniscal surgery, the right knee also developed severe OA and pain.
 - No medication or treatments interfere with the appellant's ability to perform daily activities.
 - The appellant did not require any prostheses or aids for his impairment.
 - The impairment was likely to continue for 2 years or more from that date and the physician explained that ongoing arthritic pain is likely chronic and progressive.
 - In terms of functional skills, the physician indicated that the appellant could walk 1 to 2 blocks unaided, he could climb 2 to 5 steps unaided, he was limited to lifting no more than 7 kg with the mention "limited by pain in knees", he could remain seated 1 to 2 hours and had no difficulties with communication.
 - The GP did not report any significant deficits with cognitive and emotional functions but commented that the appellant was struggling with ongoing depression made worse by chronic knee pain.
 - In terms of general additional comments, the GP mentioned that the appellant had tried multiple times since his knee injury to return to work but each time the knee pain was too bad or he repeatedly re-injured his knees.
 - The appellant had been his patient for 4 years and had seen him 11 or more times during the previous 12 months.
- An 11 page Assessor Report (AR) also dated 17 February 2015, completed and signed by the same GP indicated the following:
 - The appellant lived with family, friends or caregiver.
 - The appellant's mental or physical impairments that impact his ability to manage DLA are: severe bilateral knee pain secondary to severe OA of both knees.
 - The appellant's ability to communicate is good.
 - In terms of mobility and physical ability, he is independent for all areas but takes significantly longer for walking outdoors and climbing stairs (comments that knee pain significantly limits his ability to walk and needs to rest to alleviate pain), for standing (comments that he suffers from severe pain standing for more than 1 hour) and in addition to taking significantly longer, he also needed periodic assistance for lifting (limited to about

- 15 lbs due to knee pain), carrying and holding.
- The GP struck across and wrote N/A on the page about cognitive and emotional functioning.
- In terms of DLA, the appellant was independent for all of the activities with the indication that it took significantly longer for laundry and basic housekeeping (pain and limited mobility would make him take longer than considered normal) and for carrying purchases home with the additional mention that he needed periodic assistance from another person because pain limited his ability to carry purchases. No additional comment was provided and in terms of social functioning, help required to keep the appellant in the community and safety issue, the whole page was struck across with the mention N/A.
- The GP indicated that the appellant's family and friends were providing assistance.
- The appellant did not use an assistive device or an assistance animal.
- The sources of information used by the GP were:
 - Office interview with appellant;
 - File / chart information with no further explanation.
- The GP is the appellant's family physician and had known the appellant for 4 years and saw him 11 or more times in the previous year.
- With his Request for Reconsideration dated 21 June 2015, the appellant provided a letter dated 2 June 2015 from his family physician, the GP who completed the PR and the AR. The letter stated that he supports the appellant's request for reconsideration and that it takes him 3 times longer than normal to walk, climb stairs and carrying things up to 15 lbs and he needed to rest. It also took 3 times more than normal for laundry, housekeeping, carrying purchases or any manual task and he often needed help by another person to do them. Because the appellant is a manual labourer, his ability to work is limited by knee pain and as a result he has lost more than one job and has been unable to stay employed despite trying.
 - With the Request for Reconsideration there is also an Orthopedics Note dated 24 December 2014 indicating the appellant was seen in emergency a few days prior for pain in his knees and was treated.

In his Notice of Appeal dated 16 June 2015, the appellant indicated he suffered from severe prolonged OA, debilitating to the point of disability and joined a series of reports:

- Imaging reports dated 20 June 2012, 8 January 2013, 14 January 2013, 11 December 2013 and 30 January 2014 confirming mild to moderate OA in knees and satisfactory progression in healing at the tibial osteotomy site had occurred.
- A Consult Report dated 12 July 2013 explaining the treatment post tibial osteotomy with the comment that the appellant's leg looks a lot better although he had not been very active.

At the hearing the appellant provided additional oral evidence to the effect that:

- He had to rely on many people, mostly family members, for his daily functioning, including clothing, laundry, bringing food and that he wanted to have access to disability advantages that would be available if he had a PWD designation.
- He was not certain about mental impairment but testified that at times he found his depression debilitating.
- He was usually fairly medicated and did not want to drive and needed a driver most of the time.
- Since January he used a cane about 50% of the time, indoor and outdoor because his knee is so loose that he is afraid it will buckle.

- He expects to have surgery done on his knees in the fall, knowing it will not heal his OA but hopes it will alleviate the pain.
- He is not certain if his condition has deteriorated between the PR/AR in February and the GP's letter of 2 June 2015 but if it did not deteriorate, at least it was stable as he limited his activities.

The panel determined the additional oral and documentary evidence was admissible under s. 22(4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration, providing more context and corroboration to his medical condition in general and his abilities with respect to DLA.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria for designation as a PWD because it was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted his DLA either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA

was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement and that his impairment was likely to continue for at least 2 years had been met.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;

"**health professional**" repealed

"**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 of the EAPWDR provides further clarification:

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.

The ministry acknowledged that the appellant meets 2 of the conditions for PWD designation in that he is at least 18 years of age and that his impairment is likely to continue for at least 2 years. However, the ministry argued that he did not meet the other 3 criteria.

Severity of impairment:

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, in this case the appellant's GP, respecting the nature of the impairment and its impact on daily functioning.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the PR and AR form 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.

Severe physical impairment:

The ministry argued that the evidence was not sufficient to establish a severe physical impairment given that according to the GP the appellant did not require any periodic or continuous assistance to manage any of his physical functioning and did not use any equipment or devices to help compensate for his impairments.

The appellant argued that his condition has deteriorated over time and that he needs the assistance of family members to do most of his tasks, even driving, and that he has to use a cane at least 50% of the time as he is concerned that his knee may buckle under him. He also argued that his physical impairments prevented him from working as he tried a number of times to go back to work but was injured and cannot anymore secure employment in his area of expertise.

Panel decision:

The panel's jurisdiction is stated at s. 24(1) of the EAA and the panel must determine whether the ministry's reconsideration decision was a reasonable application of the legislation or is reasonably supported by the evidence; thus, the panel cannot make a new decision of its own but must limit itself to determining the reasonableness of the ministry's decision. As mentioned above, there is a difference between a severe condition and a medical condition causing a severe impairment and despite the fact that the GP mentioned in the PR that the appellant's diagnosis was a severe OA at bilateral and described his health history as "severe bilateral knee pain with multiple significant left knee injuries resulting in severe post-traumatic [OA] of the knee, with pain severe enough to require surgical intervention", this does not *per se* mean that the test for severe impairment is met.

The panel acknowledges that the appellant faces a number of physical restrictions and limitations because of his medical condition but the evidence from his GP also shows that he does not need assistance for most of his physical functioning (can walk 1 to 2 blocks and climb 2 to 5 steps unaided and can still lift up to 7 kg). The appellant argued that he needed a cane to walk over 50% of the time since January but this is not confirmed by the GP in the AR, where the questions about the need for assistive devices were crossed out, neither in his letter of 2 June. The panel also takes into account the evidence of the GP that the appellant takes 3 times longer to manage his mobility and physical ability but there is no indication from the GP that he requires assistance to manage those tasks.

The panel notes that the GP mentioned in the PR that the appellant tried a number of times to return to work but was prevented because of his medical condition. As well, in his letter of 2 June 2015, the GP wrote, "[the appellant] suffers from significant bilateral knee [OA] which severely limits his ability to be gainfully employed and provide for his family as well as his everyday living" and "...this knee pain limits his ability to work and provide for his family. He has lost more than one job and had been unable to stay employed despite trying as a result of this pain and limitation which puts great financial strain on him and his family". However, employment or the ability to be employed are not legislative criteria that are relevant to a PWD designation.

Given the medical evidence and the circumstances, the panel finds that the ministry's determination that there was not enough information to confirm that the appellant had a severe physical impairment was reasonable.

Severe mental impairment:

The ministry argued that there is not enough evidence of any mental impairment and consequently, it cannot be said that the appellant suffers from a severe mental impairment.

The appellant argued that his physical condition had a significant impact on his mental condition and he got depressed to the extent it is debilitating since he cannot anymore do what he used to do and this is very frustrating.

Panel decision:

The panel notes that the GP did not diagnose a mental illness and he found that there were no significant deficits with cognitive and emotional function but commented that the appellant struggled with depression because of knee pain. S. 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment: making decisions about personal activities, care or finances (decision making) and relating to, communicating or interacting with others effectively (social functioning). In terms of decision making, the GP indicated that the appellant was independent for all those activities (Personal Care, Shopping, Meals, Pay rent and bills, Medications and Transportation), no assistance required. As well, in the AR the GP crossed out the whole sections on mental illnesses and brain injuries: "Cognitive and Emotional Functioning" and "Social Functioning" as not applying.

Given the absence of medical evidence of a mental illness and the evidence that was available at reconsideration concerning the extent to which the appellant is independent in areas where his mental impairment could be expected to impact his daily functioning, 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 s. 2(2) of the EAPWDA was reasonable.

Daily living activities:

The ministry argued that the appellant was independent on all his DLA, even though it could take longer for some and that, while there was evidence that the appellant needed help from other people, it was not clear what assistance was required, for what frequency and what duration. The appellant did not need any mobility or assistive devices to help managing DLA. Thus, the ministry argued there was not enough evidence to establish his impairments directly and significantly restricted DLA continuously or periodically for extended periods.

The appellant argued that he now needed help from other people for most DLA including laundry, to get clothing, and that he could not climb stairs as there were too many to get his food. He also argued he could not drive a vehicle because of his medications and needed someone to drive him to places. He stated he had to use a cane for about 50% of the time and that impacted on his ability to do DLA.

Panel decision:

The panel notes that the evidence is somewhat inconsistent since the GP initially indicated that the appellant was independent in all his DLA, he did not need an assistive device but was taking

significantly longer to perform a number of those DLA and needed help only for lifting, carrying and holding. Later, in his letter of 2 June, the GP reiterated that the appellant was taking significantly longer, about 3 times, than what is considered normal for walking, climbing stairs, carrying things up to 15 lbs, laundry, housekeeping, carrying purchases and any manual tasks but he also added that for the latter 4 activities, he often needed help by another person. The panel notes that the GP does not indicate what help is required, how often and by whom. Further, the evidence presented by the appellant was that he was not aware that his condition had deteriorated between the time that the GP wrote the reports and the letter and consequently, the changes in the GP's assessment remain unexplained.

Given that in the AR the appellant is said to be independent for all his DLA, the panel is satisfied that the evidence shows that he benefits from some help, undetermined, by family members. In those circumstances, the panel concludes that the evidence remains unclear and that the ministry reasonably determined that it was not sufficient to establish that the appellant's impairments directly and significantly restricted DLA continuously or periodically for extended periods

As a result of those restrictions, help required to perform DLA:

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons and that no assistive device is required.

The appellant argued that he needs help from family members for meals, laundry, housekeeping and driving a vehicle and an assistive device, a cane to perform his DLA.

Panel decision:

Given the evidence as described above, the panel finds that while there is evidence the appellant does benefit from the assistance of family members for some daily activities and such assistance makes his life easier, 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 was reasonable.

Conclusion:

The panel acknowledges the appellant's difficulties caused by his medical condition and that it does have an impact on his daily functioning. However, based on the above analysis and evidence, the panel comes to the conclusion that the ministry reasonably determined that the appellant does not have a severe physical or mental impairment and that a prescribed professional did not establish that an impairment directly and significantly restricted his ability to perform DLA either continuously or periodically for extended periods and that, as a result of those restrictions, he requires help to perform those activities under s. 2(2) of the EAPWDA. Consequently, the panel finds the ministry's decision was reasonably supported by the evidence and is a reasonable application of the applicable enactment in the circumstances of the appellant and confirms the decision.