

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of June 12, 2015, which found that the appellant did not meet three 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 and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and 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

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 form dated January 15, 2015 that the appellant chose not to complete ("SR"), a physician's report ("PR") and an assessor's report ("AR"), both completed by the appellant's general practitioner (the "physician") on January 23, 2015
- The appellant's Request for Reconsideration dated May 12, 2015
- Letter from the appellant's physician dated May 22, 2015
- Handwritten letter from the appellant received June 11, 2015

Diagnoses

- In the PR the physician (who had known the appellant for more than 15 years and had seen him two to ten times in the past 12 months) diagnosed the appellant with epilepsy. The physician did not indicate the date of onset of the condition.
- In the AR, the physician states that the appellant's physical or mental impairments that impact his ability to manage DLA are: seizure disorder / unable to work.

Physical Impairment

- In the Health History portion of the PR the physician commented that the appellant suffered a generalized seizure in August 2014 and has been on anti-seizure medications since that time. The physician commented that the appellant is unable to drive or operate machinery and will be off work indefinitely.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 4+ blocks unaided, can climb 5+ stairs unaided, did not indicate any limitations with respect to lifting (noting that he cannot operate equipment) and that he has no limitation with respect to being seated.
- In the AR the physician reported that the appellant independently manages walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding.

The appellant did not complete the SR. However in the appellant's letter he states that he had a seizure at work on August 26, 2014 and has been unable to work or drive since that time. He states that he lives in a small town approximately 100 km away from the next city and has to take many trips to larger cities for medical tests and doctor's appointments. He was diagnosed with epilepsy on November 17, 2014. He states that because he is on income assistance he cannot afford the cost of these trips, his vehicle insurance, gas or child support. The appellant states that he should be reimbursed for the time he has been ill and could not work or drive.

By letter dated May 22, 2015 the physician states that the appellant was unable to work or drive since August 2014 but he has been seizure free for six months while on medication and is now fit to work and can resume driving.

Mental Impairment

- In the PR the physician does not make any diagnosis of mental impairment. The physician indicates that the appellant does not have any difficulties with communication and there are no significant deficits with cognitive or emotional function.
- In the AR the physician reports that the appellant's ability to communicate with speaking and hearing are good. With respect to reading and writing the physician indicates that he is not aware of the appellant's educational level.
- In the AR, for question 4 of section B, Mental or Physical Impairment, the physician states that there is no impact to the appellant's bodily functions, consciousness, impulse control, insight and judgment, attention/concentration, executive, memory, motor activity, language, psychotic symptoms, other neuropsychological symptoms or other emotional or mental problems. The physician reports that there is moderate impact to the appellant's emotion and minimal impact to motivation. The physician reports that the appellant has stress secondary to work loss and seizures and increased anxiety from financial pressure.

In the SR and RFR the appellant does not report any mental impairment but in his handwritten letter he indicates that he has financial difficulties.

DLA

- In the PR the physician indicated that the appellant's impairment does not restrict his ability to perform DLA. Under Additional Comments the physician indicates that the appellant is off work and is not presently employable as he cannot drive or operate equipment.
- The physician indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA but he indicates that the appellant will require long-term medication.
- By letter dated May 22, 2015 the physician states that the appellant was unable to work or drive since August 2014 but he has been seizure free for six months while on medication and is now fit to work and can resume driving.
- In the AR the physician indicates that the appellant is independent with dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers, laundry, basic housekeeping, reading prices and labels, making appropriate choices, paying for purchases, carrying purchases home, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking medications as directed, safe handling and storage of medications and getting in and out of a vehicle.
- The physician reports that the appellant needs continuous assistance with going to and from stores, explaining that he needs rides, as he cannot drive. The physician did not complete the section with respect to the appellant's ability to use public transportation or using transit schedules but explains that they are not available and that the appellant cannot drive.
- The physician states that the appellant is independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. The physician states that the appellant has good functioning with respect to his immediate and extended social networks.

Help

- In the PR the physician indicates that the appellant will require medications long term.
- In the AR the physician states that the appellant needs assistance with rides and transportation and that he gets rides from friends. The physician indicates that assistive

devices are not applicable and he does not have an assistance animal.

- In the additional information section of the AR the physician states that the appellant has a seizure disorder and cannot work or drive until May or June 2015.

Additional information provided

In his Notice of Appeal the appellant states that he disagreed with the reconsideration decision because he had not had a chance to explain himself in front of the board.

At the hearing the appellant provided oral evidence as follows:

- he lives in a small town where there is no public transit and few places to obtain employment
- he had a seizure on August 26, 2014, was diagnosed with epilepsy, and had been off work since
- he will have to take medication on a long-term basis for this life-long condition
- having epilepsy has changed his life, he is scared, and he does not want this disease
- his friends look at him and treat him differently due to his medical condition
- he lives with his mother who has paid for his transportation costs to go to and from the closest cities where he needed to attend for medical appointments and tests
- his mother is elderly and lives on a small pension and cannot afford to support him

The appellant confirmed that he is now able to drive again and his physician has cleared him to return to work but that he has been unable to obtain work because no one will hire him due to his medical condition. The appellant states that he cannot live on the income assistance he receives.

Prior to the hearing, the appellant provided the following documents from a hospital (6 pages):

- 1) Confirmation that the appellant was booked for an EEG at the hospital on October 20, 2014;
- 2) Note from a physician indicating that the appellant was seen on December 29, 2014;
- 3) Patient Appointments List from August 26, 2014 to February 19, 2015 indicating appointments on August 26, September 5, September 19, November 17, and November 28, 2014, and January 22, 2015 (2 pages)
- 4) Letter from the physician dated November 28, 2014 indicating that the appellant is off work indefinitely for medical reasons, is unable to work for the next 6 months, has been diagnosed with Epilepsy and is waiting an appointment with a neurologist;
- 5) Medical Certificate dated September 5, 2014 indicating that the appellant will be unfit for work from September 5 to November 28, 2014.

Admissibility of New Information

The ministry did not object to the admissibility of the new information. The panel has admitted the appellant's oral testimony and additional documentation into evidence as it is in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information supports the information provided from the appellant regarding the various doctor's appointments and tests he had to attend and further confirms his inability to work for a period of time due to his epilepsy.

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 the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

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.

Severe Physical Impairment

The appellant's position is that he has a life long medical condition for which he is required to take medications and that because of this condition he is unable to obtain employment even though his physician has cleared him to return to work and he is now able to drive again. The appellant's position is that his mother had to pay for his transportation expenses to travel to and from other cities for medical tests and appointments and he should be reimbursed for those costs. The appellant is seeking PWD designation as that would increase his monthly income amount and make it easier to live, as he cannot meet his monthly expenses on income assistance.

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. The ministry argued that the physician indicates that the appellant is independent in his ability to manage all areas of mobility and physical ability. The ministry states that although the physician reports that the appellant is unable to operate equipment, no information is provided regarding his ability to lift. The ministry's position is that the information provided is not evidence of a severe physical 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, taking into account all of the evidence. 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 physician.

Although the physician indicates that the appellant is unable to operate equipment, the physician has indicated that the appellant is independent in his ability to manage all areas of mobility and physical ability. In particular, the physician indicates in the PR that the appellant can walk 4+ blocks unaided, can climb 5+ stairs unaided and has no limitations with respect to being seated. The physician did not complete the section with respect to lifting, noting that the appellant cannot operate equipment but did not provide any further information indicating that the appellant has any limitations with respect to lifting.

In determining eligibility for PWD designation the legislation an applicant's employability is not a criterion. However, while the physician indicated that the appellant was unable to work at the time the PR was completed, his letter dated May 22, 2015 indicates that the appellant had been seizure free for six months, is fit to work and can resume driving.

The appellant's evidence is that he is physically capable of his DLA and he did not report any limitations or pain. The appellant's evidence is that he is seeking PWD designation so that his monthly assistance is higher as he cannot live on the monthly income assistance he currently receives.

Although the appellant has been diagnosed with epilepsy, he has been seizure free for six months and there is no evidence of any ongoing functional impairment, so the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that he has a severe physical impairment as contemplated by the legislation.

Severe Mental Impairment

The appellant stated that having epilepsy scares him and he is frustrated that he cannot work and that people look at him differently. The appellant states that he has lost friends because of his medical condition and that some people feel sorry for him and others think he is strange. The appellant has lost hope about his future and does not know how he can survive on the current income assistance he receives.

The ministry's position is that the appellant's physician did not report any deficits to the appellant's cognitive and emotional functioning. The physician reports that there is moderate impact to the appellant's emotion and a minimal impact to his motivation but that there is no impact in all other areas of cognitive and emotional functioning. The ministry's position is that there is not enough information to establish a severe mental impairment.

Panel Decision:

In the PR, the physician did not diagnosis the appellant with a mental impairment. The physician also indicates that there are no significant deficits with cognitive and emotional function and that the appellant does not have any difficulties with communication. In the AR however, the physician

indicates that there is moderate impact to the appellant's emotion and minimal impact to the appellant's motivation. The physician also notes that the appellant has stress secondary to his work loss and seizures and anxiety due to financial pressures. However, the physician reports that there is no impact to any of the remaining items listed in the AR with respect to cognitive and emotional functioning, namely: bodily functions, consciousness, impulse control, insight and judgment, attention/concentration, executive, memory, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems.

As there is no diagnosis of mental impairment and only two impacts to cognitive and emotional functioning, the panel finds that the ministry reasonably determined that the information provided does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that he has a serious lifelong illness that is preventing him from obtaining employment as when he completes an employment application and checks off the box indicating that he has epilepsy as a medical condition, no employers will hire him.

The ministry's position is that although the physician indicates that the appellant requires continuous assistance with going to and from stores, noting that the appellant needs rides because he cannot drive, the physician indicates that the appellant is independently able to manage all other areas of daily living including personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, transportation, and social functioning. The ministry also notes that the physician indicates that the appellant has good functioning with both his immediate and extended social networks. In addition, the ministry notes that although the appellant was unable to drive and was unable to work as confirmed by the physician, the ability to drive does not establish a severe impairment and employability is not a criteria of the PWD designation. The ministry's position is that as the majority of DLA are performed independently or require little help from others, the information from the physician does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision:

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that in the opinion of a prescribed professional, a severe mental or physical 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. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one, which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

In the appellant's circumstances, the PR indicates that the appellant's impairment does not directly

restrict the appellant's ability to perform DLA. In the AR, the physician reports that the appellant is independent with all aspects of personal care, basic housekeeping, meals, paying rent and bills, and transportation. With respect to shopping, the physician indicates that the appellant is independent with reading prices and labels, making appropriate choices, paying for purchase and carrying purchases home but requires continuous assistance going to and from stores as he cannot drive and needs rides. With respect to transportation, the physician indicates that the appellant is independent with getting in and out of a vehicle but he cannot drive and there is no public transport available, so he needs rides.

In his letter dated May 22, 2015 the physician indicated that the appellant had been unable to work or drive since August 2014 but as he has been seizure free for over six months he is now fit to work and can resume driving.

As noted above, employability is not a criterion of the PWD designation and while it is unfortunate that the appellant may be having difficulty obtaining employment because employers may not want to hire him given his medical condition of epilepsy there is little information indicating that the appellant's DLA are restricted either continuously or periodically for extended periods. In addition the appellant confirmed that he is now able to drive and any limitations with respect to driving now relate to limited financial resources for the cost of insurance and fuel.

In the panel's view, the ministry reasonably determined that the information provided by the physician does not demonstrate that the appellant satisfies the legislative criteria, namely that he has a severe impairment which directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he requires financial assistance, as he cannot live on the monthly income assistance he currently receives.

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

Panel Decision

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 necessary precondition has not been satisfied in this case.

Although the physician, in the AR, indicated that the appellant requires assistance with transportation and going to and from stores as he could not drive, the subsequent letter from the physician dated May 22, 2015 indicates that the appellant had been seizure free for six months and could resume driving. There is no other information indicating that the appellant requires help with DLA.

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

Having reviewed and considered all of the evidence and the relevant legislation, 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.