

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated June 18, 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. However, the ministry was not satisfied that his impairment is likely to continue for at least two years, that the appellant has a severe physical or mental impairment or that his daily living activities (DLA's) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry also found that it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform his DLA's.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), s. 2 (2)
Employment and Assistance for Persons with Disabilities Regulation, (EAPWDR), s. 2

PART E – Summary of Facts

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

- A form titled Persons with Disabilities Designation Application completed by the appellant dated April 7, 2015.
- A Physician's Report (PR) completed by the appellant's urologist dated April 10, 2015. The urologist reports he has seen the appellant 11 or more times since July 10, 2014.
- An Assessor's Report (AR) completed by the appellant's family physician dated April 23, 2015. The physician reports he has seen the appellant 2-10 times in the past year and has acted as the appellant's physician for 20 years.
- A 2-page personal statement written by the appellant undated.

Diagnosis

The appellant's urologist diagnoses the appellant with prostate cancer and describes the cancer as "life-threatening malignancy." The urologist writes that the expected duration for the cancer is indeterminate. Other diagnoses in the report include depression, spina bifida, and urinary incontinence. In the AR the appellant's physician noted that the appellant "may need radiation. Not told prognosis."

Physical Impairment

In the PR, the appellant's urologist reported that:

- The appellant can walk 1-2 blocks, climb 5+ steps unaided, and has no limitations to lifting.
- The appellant can function independently in mobility inside and outside his home.

In the AR, the appellant's physician indicated that:

- The appellant is independent walking indoors and outdoors, standing, lifting up to 40 pounds, carrying and holding.
- The appellant requires periodic assistance from another person to climb more than 2 sets of stairs.
- The appellant does not require an assistive device or the assistance of an assistance animal.
- In the additional comments, the physician wrote, "steady dribbling of urine, poor control."

In the appellant's self-report and application, he wrote that:

- Due to the medications he is taking he is going through, "male menopause," he gets headaches, and nausea.
- He has trouble sleeping and is always tired.
- He has severe incontinence that may have been caused by his spina bifida and wears incontinence pads. Due to the incontinence he can leave the house for only 2 hours or less.
- He will have to be on medications for the rest of his life.
- He is out of breath after one flight of stairs.
- He can walk only 1 block before he gets a pain in his lower back that lasts for hours.

Mental Impairment

In the PR, the appellant's urologist reported that:

- The appellant has no difficulties with communication and no significant deficits with cognitive and emotional function.

In the AR, the physician indicated that:

- The appellant has a good ability to communicate in speaking and hearing.
- The appellant has a moderate impact on his daily functioning in the area of emotion, more specifically, depression due to his cancer.
- In the additional comments, the physician wrote, “depression-frustration.”

In the appellant’s self-report and application, he wrote that:

- His medical conditions have caused him a great deal of stress. He has become depressed and is taking medication for depression.
- His lack of sleep makes it difficult to concentrate.

Daily Living Activities (DLA)

In the PR, the urologist indicated that:

- The appellant has not been prescribed any medication and/or treatment that interfere with his daily living activities.
- The appellant is independent in performing personal care, meal preparation, management of medication, basic house keeping, daily shopping, use of transportation, management of finances, and social functioning.

In the AR, the physician indicated that:

- The appellant’s physical impairment that impacts his ability to manage his DLA’s is incontinence and depression is the mental impairment that impacts his ability to manage his DLA’s.
- The appellant is independent in performing all aspects of personal care, basic housekeeping, shopping, meals, paying rent/bills, medications and getting in and out of a vehicle. The physician notes that the appellant needs to use the toilet often.
- The appellant receives assistance from his roommate at home however no detail about what assistance he receives or how often he receives it is noted.

In the appellant’s self-report and application, he wrote that:

- He is unable to leave the house for more than 2 hours due to incontinence.

Need for Help

The physician reported in the AR that the appellant receives assistance from his roommate at home however there is no detail about what or how often he receives assistance. The section of the report indicating assistance provided through the use of assistive devices is not completed.

In his Notice of Appeal, the appellant expressed his disagreement with the ministry’s reconsideration decision and wrote that with his medical condition has worsened. He wrote that he would provide up-to-date information.

At the hearing, the appellant stated that:

- He is suffering through urinary incontinence and the side effects of his prostate cancer.
- He is on medications that affect his hormone levels as well as his ability to concentrate, sleep, and perform his DLA's.
- He suffers from depression due to the stress in his life.
- After climbing one flight of stairs he needs to rest to catch his breath.
- He has not shopped for himself for more than 2 years because of his incontinence and fatigue from walking.
- He disagrees with how his physician reports his limitations in the AR saying the physician was not aware of the extent of assistance he needs to perform his DLA's.

At the Hearing

At the hearing the appellant submitted a letter from his urologist as new evidence for the panel to consider. In the letter dated June 25, 2015 the urologist writes:

- The appellant is unable to work for the foreseeable future and requires medical disability.
- The appellant is completely incontinent.
- The appellant has a high-grade metastatic cancer that is life threatening.
- The appellant is on medications that affect his ability to work.

This letter was admitted as evidence as per the Employment and Assistance Act section 22 (4). The panel found that the evidence contained in the document is in support of evidence that was before the ministry at the time of the reconsideration. The letter was accepted because it corroborates information the physician and the urologist included in the PR and the AR. At the hearing the ministry had no objections to the letter being accepted as evidence.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that it has not been established that his impairment is likely to continue for at least two years, the appellant does not have a severe mental or physical impairment and that his 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 that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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.

Duration of Impairment

EAPWDA s. 2(2) requires that the person have a severe physical or mental impairment that, in the opinion of a medical professional, is likely to last for at least 2 years. In the AR the appellant's urologist does not indicate that the appellant's impairment is likely to continue for more than 2 years and writes that the duration of the impairment is "indeterminate." In the AR the physician does not offer an estimate of the duration of the appellant's impairment.

Based on the information provided by the urologist the panel finds the ministry was reasonable to determine that it could not establish if the appellant's impairment is likely to continue for more than 2 years.

Severe Impairment

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. "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. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

At the hearing the ministry told the panel that the ministry relies on the information provided in the AR and the PR to assess an applicant's eligibility for PWD status and this information does not support that the appellant has a severe impairment.

Physical Impairment

The appellant's urologist diagnoses him with cancer and spina bifida resulting in pain and urinary incontinence. The urologist reports that he is independent walking indoors and outdoors, standing, lifting up to 40 pounds, carrying and holding and that he requires periodic assistance from another person to climb more than 2 sets of stairs. In the AR the appellant's physician reports the appellant is independent in all his DLA's and that he receives some unspecified assistance from his roommate. The appellant stated at the hearing that he cannot shop for himself and, due to his incontinence, he cannot leave the house for more than 2 hours.

While the panel acknowledges the appellant's self reported limitations, based on the evidence provided by both his urologist and physician regarding his physical abilities, the panel finds that the ministry reasonably determined that the evidence does not establish that the appellant has a severe physical impairment and was reasonable to determine that the criterion had not been met.

Mental Impairment

Both the appellant's urologist and physician diagnose him with depression. The appellant reports that he has severe depression and that he is taking medication to treat the symptoms of his depression. In the AR the urologist reports the depression causes the appellant emotional disturbance but that the appellant's depression has no effect on his ability to communicate, social functioning, or DLA's. In the PR the appellant's physician indicates the appellant's depression has a moderate impact on his emotion, he is independent in all aspects of social functioning, and he has marginal functioning with both his immediate social network as well as his extended social network.

As noted above, 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. Based on the evidence provided by his urologist and physician regarding the impacts reported to mental or social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that he is restricted in several of his DLA's including shopping, mobility outside the home, and climbing stairs. The appellant stated at the hearing that he cannot shop for himself and, due to his incontinence, he cannot leave the house for more than 2 hours.

The ministry told the panel that although the appellant reports his medical conditions cause a more significant effect and restriction than described in the AR and PR, the EAPWDA s. 2(2) requires that extent of any restrictions caused by his mental or physical impairment be in the opinion of his medical professional.

In the PR the urologist writes that the appellant is unrestricted in all areas of DLA's, can walk 1-2 blocks, climb 5+ steps unaided, and has no limitations to lifting.

In the AR the appellant's physician reports the appellant is independent in all his DLA's and that he receives some unspecified assistance from his roommate. The physician notes the appellant is "mostly" able to deal appropriately with unexpected demands.

The panel considered that both of the prescribed professionals report that the appellant is generally unrestricted in his DLA's. The panel finds that the ministry reasonably concluded that there is insufficient evidence from the prescribed professionals to establish that the appellant's impairments directly and significantly restricts his ability to manage his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that he requires the significant assistance of another person to perform DLA's. The appellant told the panel that he cannot shop for himself due to his incontinence and the fatigue he feels when he walks therefore he needs someone to deliver anything he needs.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry argued that the physician indicated that the appellant does not require any assistive devices.

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 physician, as a prescribed professional, is that the appellant receives help with DLA's from his roommate and that no assistive devices are required. The panel considered that the physician does not specify what help the roommate provides and that the physician has not indicated any DLA's that require the significant assistance of another person. The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, determining that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and therefore confirms the decision.