



PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 31, 2015 which found that the appellant did not meet all of the 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 he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established 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 these restrictions, 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.

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 appellant did not attend the hearing. The panel confirmed that the appellant had been notified of the date, time and location of the hearing and accordingly, under section 86(b) of the *Employment and Assistance Regulation*, the panel heard the appeal in the appellant's absence.

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's PWD Application comprised of:

- The Applicant Information and Self-report ("SR") prepared by the appellant and dated May 4, 2015; and
- The Physician Report ("PR") and Assessor Report ("AR"), dated April 24 and April 22, 2015 respectively and both prepared by the appellant's general practitioner ("the GP") of over 10 years; and

2. The appellant's Request for Reconsideration ("RFR") dated August 7, 2015 to which is attached:

- A letter dated August 7, 2015 and prepared by the appellant's counsellor ("the Counsellor Letter"); and
- A "Medical Report – Employability" completed by the appellant's GP and dated February 3, 2015 ("the Medical Report").

Diagnoses

In the PR, the appellant is diagnosed by the GP as follows:

1. Myofascial back pain;
2. Chronic deafness;
3. Chronic alcoholism; and
4. Hypothyroidism with date of onset as 2014.

In the Medical Report, the GP indicates that the appellant's primary medical condition is "profound hypothyroidism." While it is difficult to read the GP's handwriting, he appears to indicate in the Medical Report that the appellant's secondary medical condition is "neuropathy related to [decreased] T4" which would indicate the thoracic spine.

In the Counsellor Letter the appellant's counsellor writes that the appellant suffers from "severe and persistent chronic alcoholism, major depression and anxiety." The counsellor also writes that it is her belief that the appellant suffers from Post-Traumatic Stress Disorder ("PTSD").

Physical Impairment

In the Medical Report, the GP indicates that the appellant's overall medical condition is moderate in nature with an expected duration of 12-18 months. He goes on to write that the appellant experiences "generalized weakness and imbalance secondary to neuropathy."

In the SR, the appellant writes that 2-3 times each week, it takes him 15-20 minutes to get out of bed due to back pain and stiffness which continues for the first 2-3 hours of the day after which it loosens up leaving the appellant with moderate pain for the remainder of the day. The appellant writes that he is unable to sit, stand or lay down for extended periods and that he must get up, bend and loosen joints in his hips and back.

The appellant writes in the SR that he requires a hearing aid for his right ear and that he should probably have one in his left ear. He notes that he misses a lot of conversation if he is not looking at a person speaking and that he must have the television turned up to hear it.

The appellant describes himself in the SR as being back to "about 60%" with respect to his thyroid and that this

causes him to do almost everything much slower and requires him to pace himself.

In the PR, the GP sets out the appellant's health history. He writes that the appellant suffers from the following:

1. Back pain related to myofascial dysfunction. Trouble lifting, carrying and prolonged walking.
2. Mortar accident while in military. Now [illegible] impairs conversational hearing.
3. Chronic alcoholism causes poor judgement, poor memory, poor decision making and difficulties with constructive socialization.
4. Low thyroid causes fatigue, low energy and lack of motivation.

The GP indicates that with respect to functional skills, the appellant can walk 4 or more blocks and climb 5 or more stairs unaided, he has no limitations lifting, he can remain seated for 1-2 hours and he has poor hearing.

In the AR, the GP reports that the appellant lives alone and that his speaking and hearing are poor due to losing part of his tongue and deafness respectively. The GP indicates that the appellant is independent with all aspects of mobility and physical ability.

Mental Impairment

In the Counsellor Letter, the counsellor writes that the appellant's severe and persistent chronic alcoholism affects his social and mental functioning on a daily basis. The counsellor writes that the appellant suffers from major sleep disturbance leaving him feeling groggy and confused during the day and that his major depression and anxiety prevents him from doing positive activities. The counsellor comments that the appellant suffers from a lack of impulse control as well as a lack of insight and judgement and that his motor activity is impacted in the context of goal-oriented activities. The appellant is described as having speech problems depending on his mood, nightmares and disorganized thinking.

In the PR, the GP does not diagnose the appellant with depression or a mental disorder but notes that the appellant's chronic alcoholism causes poor judgment, memory and decision making and impacts his social life. The GP notes that the appellant suffers from significant deficits with cognitive and emotional function including executive, memory, motivation and attention or sustained concentration and that each of these are significantly interfered with by the appellant's alcoholism. The GP also comments that the appellant struggles with day to day functions including decision making and executive function due to erratic behaviour induced by alcoholism and that his pain and hearing loss impair his coping skills.

In the AR, the GP comments that alcoholism has been a big barrier for the appellant's executive function and socialization and that it has a major impact on the appellant's impulse control, executive, memory and motivation while having a moderate impact on the appellant's emotion and attention/concentration. The GP notes that there is no impact on the appellant's bodily functions, consciousness, insight and judgement, motor activity, language, psychotic symptoms or other neuropsychological problems.

Daily Living Activities (DLA)

In the AR, the GP reports that the appellant is independent in all aspects of his DLA including Personal Care, Basic Housekeeping, Shopping, Meals, Paying Rent and Bills, Medications and Transportation.

With respect to social functioning, the GP has indicated that the appellant requires continuous support when making appropriate social decisions and periodic support/supervision when dealing with unexpected demands but that he is independent developing and maintaining relationships, interacting appropriately with and securing assistance from others. The GP comments that the appellant's mental impairment has caused him to have marginal functioning with his immediate and extended social networks.

Need for Help

In the PR, the GP did not indicate that the appellant requires an assistive device. In the AR, the GP indicates that the appellant receives help from friends and some financial assistance from his sister and comments further that the appellant could use help when he is fatigued. The GP does not indicate in the AR that the appellant requires assistance through the use of assistive devices or assistance animals.

Evidence On Appeal

Ministry's Evidence At Hearing

At the hearing, the ministry adopted and relied on the Reconsideration Decision.

In response to questions, the ministry stated that when looking at whether the appellant suffers from a severe physical or mental impairment, it is necessary to look at all of the factors as a whole.

The appellant writes in his Notice of Appeal dated September 21, 2015 that he is in the process of seeing “a shrink” to determine if he suffers from PTSD and that he requires assistance when his back pain is not tolerable.

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) under section 2 of the *EAPWDA*, 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 the appellant met the age requirement and that he has an impairment that 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,
- as a result of these restrictions, 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 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.

Severity of impairment

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions 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. 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 prescribed professionals – in this case, the GP.

Severity of mental impairment

The appellant's position as set out in the Notice of Appeal is that he is in the process of seeing a specialist to determine if he suffers from PTSD. He has provided the Counsellor Letter in support of his argument that he suffers from chronic, persistent and severe cognitive and emotional functioning.

The ministry's position is that the evidence available at reconsideration does not support a finding that the appellant has a severe mental impairment.

Panel Decision

While the GP has not diagnosed the appellant with depression or any other specific mental disorder, the counsellor indicates in the Counsellor Letter that the appellant suffers from major depression and PTSD. However, the panel notes that the counsellor is not a "prescribed professional" as defined by section 2(2) of the *EAPWDR*, nor as the ministry notes, has she provided any evidence of the duration or frequency of her professional relationship with the appellant or the basis on which she has reached her conclusions. Given that the GP is a prescribed professional who has treated the appellant for more than 10 years, the panel gives more weight to the GP's evidence as it relates to diagnosis and the severity of the appellant's mental

impairment.

In the PR and the AR, the GP indicates that the appellant's alcoholism impacts on the appellant's cognitive and emotional function in a number of ways. In the PR he notes that he has poor judgment, memory and decision making, as well as impacts on executive function, motivation and attention or sustained concentration. The GP adds the comment that the appellant's alcoholism interferes significantly with this functioning. In the AR, the GP notes that the appellant's mental impairment has a major impact on his impulse control, executive, memory and motivation, a moderate impact on emotion and attention/concentration and no impact on bodily functions, consciousness, insight and judgement, motor activity, language, psychotic symptoms and other neuropsychological problems.

The panel notes that section 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). The GP's evidence in the AR indicates that the appellant is not significantly restricted with respect to decision making in that he independently manages all of the decision making aspects of the DLA of personal care as well as management of medications and finances. The appellant is noted as being independent with the management of his personal medication and management of personal finances (banking, budgeting and paying rent and bills).

With respect to social functioning, the GP notes that the appellant is independent in his ability to develop and maintain relationships, interacting appropriately with others and securing assistance from others but that he requires periodic supervision/support dealing appropriately with unexpected demands and that he requires continuous support/supervision making appropriate social decision. Lastly, the GP indicates that the appellant's mental impairment has caused him to experience marginal functioning in his immediate and extended social networks.

While the evidence of the GP is that the appellant faces varying degrees of mental impairment largely flowing from his alcoholism, the appellant is independent in all aspects of his DLA that require the ability to plan, organize and execute. Given 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 section 2(2) of the *EAPWDA* was reasonable.

Severity of physical impairment

The appellant's position as set out in the Notice of Appeal is that he requires assistance when his back pain is not tolerable. The Counsellor Letter describes the appellant's alcoholism as severe and persistent in nature.

The ministry takes the position that the appellant's physical conditions do not constitute a severe physical impairment.

Panel Decision

The appellant writes in the SR that he suffers from back pain, hearing impairment and reduced function to his thyroid. He writes that his back is stiff and painful causing him to take longer to get out of bed in the morning and that as it loosens up, he is left with moderate pain for the remainder of the day. He writes that he requires hearing aids for both ears and that his thyroid is functioning at "about 60%" causing him fatigue.

In the PR, the GP describes the appellant as suffering from back pain related to "myofascial dysfunction" resulting in trouble lifting, carrying and prolonged walking. The GP further indicates that the appellant's

conversational hearing is impaired due to a prior accident. With respect to the appellant's alcoholism, the GP describes that condition as chronic in nature and he also indicates that the appellant's low thyroid causes fatigue, low energy and lack of motivation.

The GP indicates that with respect to functional skills, the appellant can walk 4 or more blocks and climb 5 or more stairs unaided, he has no limitations lifting, he can remain seated for 1-2 hours and he has poor hearing.

In the AR, the GP reports that the appellant lives alone and that his speaking and hearing are poor due to losing part of his tongue and deafness respectively. The GP indicates that the appellant is independent with all aspects of mobility and physical ability and that for those DLA that are of a physical nature such as personal self-care, meal preparation, basic housework and mobility inside and outside the home, the GP notes that the appellant is independent with all activities.

In the Medical Report written approximately two months prior to the PR and AR, the GP describes the appellant's overall medical condition as moderate in nature with his primary medical condition as "profound hypothyroidism" and his secondary medical condition as "neuropathy related to [decreased] T4" which relates to the appellant's back pain. The panel notes that the GP does not refer in the Medical Report to the appellant's alcoholism or hearing impairment.

While the GP confirms in the PR and AR the conditions described by the appellant in the SR, the GP further indicates that the appellant is functionally independent and able to perform all physical tasks of DLA independently. Further, the GP describes the appellant's overall medical condition in the Medical Report as moderate in nature. Given the entire body of evidence, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that she suffers from a severe physical impairment as provided by section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

The appellant's position as set out in the Counsellor Letter is that his sleep disturbance which, combined with pain management issues causes him to have difficulty coping with daily activities.

The ministry's position is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by her physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional, in this case the GP, provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods.

DLA are defined in section 2(1) of the *EAPWDR* and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

The appellant's GP of more than 10 years has described him as independent in all DLA including all tasks of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications and transportation.

While the appellant requires continuous support when making appropriate social decisions and periodic

support/supervision when dealing with unexpected demands, he is described by the GP as being independent developing and maintaining relationships, interacting appropriately with and securing assistance from others. The GP comments that the appellant's mental impairment has caused him to have marginal functioning with his immediate and extended social networks.

The evidence of the GP is that while the appellant does experience difficulty in some aspects of his socialization, he is independent in all tasks of DLA. Based on the foregoing, the panel finds that the ministry reasonably concluded that the evidence is insufficient to demonstrate that the appellant's DLA are significantly restricted either continuously or periodically for extended periods as provided under section 2(2)(b) of the *EAPWDA*.

Help with DLA

The appellant's position as set out in the Notice of Appeal is that he requires assistance when his back pain is not tolerable.

The ministry's position in the reconsideration decision is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant 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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period.

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, as defined by section 2(3)(b) of the *EAPWDA*, was reasonable.

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 under section 2 of the *EAPWDA* was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.