

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 26 August 2015 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, while the ministry was satisfied that the appellant has a severe physical impairment, though not a severe mental impairment, the information provided did not establish that in the opinion of a prescribed professional his impairment

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 13 May 2015. The Application contained:
 - A Physician Report (PR) dated 25 May 2015, completed by the appellant's general practitioner (GP) who has known the appellant for 8 years and seen him 2 - 10 times over the past year
 - An Assessor Report (AR) dated 25 May 2015, completed by the same GP.
 - A Self Report (SR) completed by the appellant.
2. The appellant's Request for Reconsideration, dated 20 August 2015, to which was attached an undated letter from his GP.

In the PR, the GP lists the following diagnoses related to the appellant's impairment: COPD (onset 2007); asthma (onset 1957); OA: LS spine, leg, hip and knee (onset 2008); plantar fasciitis, torn cartilage leg & knee (onset 1984); and alcohol dependency (attended detox 4 times, takes antabuse).

The panel will first summarize the evidence from the PR and AR and the GP's letter relating to the PWD criteria at issue.

Mental impairment

PR:

The GP indicated that the appellant has no difficulties with communication.

The GP indicated that the appellant has no significant deficits with cognitive and emotional function.

AR:

Regarding the degree of how the appellant's mental impairment restricts functioning, the GP reported no impact in all listed areas.

For social functioning restrictions, the GP marked "N/A."

Ability to perform DLA

In his letter submitted at reconsideration, the GP wrote:

"I have reassessed this patient and have found that his disability is more pronounced than I had previously indicated.

He is unable to walk 10 yards to his car nor climb any stairs. He is unable to lift 2 kg. With respect to para 3 page 17, his impairments require him to take three times as long to complete items under mobility and physical ability."

[Panel note: this refers to walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding.]

AR:

The GP reports that the appellant lives with his elderly mother.

The GP assesses the appellant as independent for all aspects of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications transportation.



Help provided/required

PR:

The GP indicates that the appellant requires a foot brace on his right ankle to compensate for his fasciitis.

AR:

Under assistive devices, the GP indicates that the appellant routinely uses a foot brace on his right ankle.

Self report

In his Self Report, the appellant reviews his health history. He writes that he has been diagnosed with COPD, stemming from childhood asthma. As a result his physical activity is very limited and when he becomes out of breath he has to stop and use his inhaler.

He explains that he was employed in heavy industrial work for many years. Around 2008 he noticed his body aching in several places more frequently. He changed jobs to one requiring less physical effort. Shortly thereafter he noticed a slow onset of aches and pains, mostly in his knee, hip and back. Eventually he was referred to a rheumatologist, and was diagnosed with severe arthritis in his lower back and left hip, and with severe osteoarthritis in his left knee.

He also explains that he had an industrial accident in 1984, injuring his left knee, with torn ligaments and cartilage. Now he can't even walk 3 blocks without stopping to rest. He concludes by listing the medications he has been prescribed for his COPD and his arthritis.

Information submitted on appeal

Before the hearing, the appellant submitted a letter from his GP, dated 22 September 2015. In his letter, the GP confirmed his assessments as to the appellant's restrictions for mobility and physical ability as he provided in his letter submitted at reconsideration. The GP goes on to write:

“To clarify, this level of physical restriction has a direct and significant impact on [the appellant's] ability to independently complete daily living activities that require any form of physical mobility. The information provided in his initial application reflects the assistance he *actually receives*, as he does not have access to the continual support he requires. Inability to access sufficient assistance is ultimately exacerbating his condition, and contributing to his decline in physical health.”

The GP goes on to summarize the restrictions he faces completing the following DLA: shopping, meal preparation and cooking, basic housekeeping, banking and transportation.

For example, for meal preparation and cooking, the GP writes that the appellant cannot stand for more than 2 – 4 minutes without pain in hips, limiting his ability to prepare, cook, and clean-up after meals, and he cannot bend over to collect pots, ingredients or any other necessary supplies for preparation and cooking. Ultimately, meal preparation and cooking takes 3 times longer because of restrictions.

The GP concludes by writing:

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“It is my professional opinion that the appellant is significantly restricted in his ability to independently complete daily living activities, and that his health would significantly benefit from daily assistance.”

The hearing

At the hearing, the appellant reviewed his medical history, along the lines described in his Self Report. In answer to a question, he described how his medical conditions restrict his daily living, explain that he lives with his elderly mother and tries his best to help her around the home. With most everything he does, from preparing meals to shopping or changing the sheets on his bed, anytime he stands or walks for a couple of minutes, his hip starts to “burn” and he must sit or lean on something to take the weight off the hip before he can carry on. The pain is so bad that when taking the garbage out he will sometimes put it in his van and drive down the laneway to put it by the curb rather than carrying it down. He feels that he needs help around the house or his health will further deteriorate.

The ministry stood by its position at reconsideration. The ministry representative stated that if the information in the GP’s letter of 22 September 2015 had been before the ministry at reconsideration, the appellant’s request for PWD designation may have been approved.

Admissibility of new Information

The ministry did not object to the new information in the GP’s letter of 22 September 2015. Despite the ministry’s position, the panel must be guided by section 22(4) of the *Employment and Assistance Act*, which states:

- 22(4)** In a hearing referred to in subsection (3), a panel may admit as evidence only
- (a) the information and records that were before the minister when the decision being appealed was made, and
 - (b) oral or written testimony in support of the information and records referred to in paragraph (a).

Section 22(4)(b) is designed to strike a balance between a pure appeal on the record of the ministry decision and a hearing *de novo* (a completely new hearing). It contemplates that while a party may wish to submit additional evidence to the panel on the appeal, the panel is only empowered to admit (i.e. take into account in making its decision) “oral or written testimony in support of” the record of the ministry decision; it provides appellants with a limited opportunity to augment their evidence on appeal but it does not provide them with a hearing *de novo*, as the panel is tasked with assessing the reasonableness of the ministry’s decision. If the additional evidence substantiates or corroborates the information and records before the minister at the reconsideration stage, the evidence should be admitted; if it does not, then it does not meet the test of admissibility under s. 22(4)(b) of the *Employment and Assistance Act* and should not be admitted.

The panel finds that the information regarding restrictions in the appellant’s ability to perform specific DLA in the GP’s letter of 22 September 2015 and in the appellant’s testimony at the hearing is not in support of the information and records before the ministry at reconsideration. The restrictions described cannot be said to corroborate or substantiate the assessments before the ministry at reconsideration: the GP assessed the appellant as independent in all aspects of all DLA applicable to a person with a physical or mental impairment, without any notation or comment that he takes longer or requires help; the appellant did not address any restrictions in his ability to perform DLA in his Self Report, except to mention that he must stop to rest after walking 3 blocks. The panel therefore does not admit this information as evidence.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet two of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that, in the opinion of a medical practitioner, his impairment is likely to continue for at least two years. The ministry was also satisfied that the appellant has a severe physical impairment, though not a severe mental impairment. However, the ministry was not satisfied that the evidence establishes that the appellant's impairment:

- directly and significantly restricted his ability to perform DLA 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 following section of the *EAPWDA* applies to this appeal:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily DVDs that require any form of physical mobility. The information provided in his initial application reflects the assistance he, as he does not have access to the continual support requires, as he does not have access to the continual support he requires. In a beautiful 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.

The following section of the *EAPWDR* applies to this appeal:

- 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;

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- (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.

Severity of impairment

Mental impairment

In the reconsideration decision, the ministry found that the information provided satisfied the ministry that the appellant has a severe physical impairment. This means that the appellant has met the "severe impairment" criterion. For completeness, the ministry also canvassed the possibility that the appellant has a severe mental impairment, and determined that the information provided did not establish the he has such an impairment.

While the GP has diagnosed the appellant with alcohol dependency, he has not assessed the appellant with any difficulties with communications, any cognitive or emotional deficits, any impacts of such deficits on daily functioning or any restrictions to social functioning. Given the absence of any evidence to the contrary, the panel finds that the ministry was reasonable in determining that a severe mental impairment had not been established.

Direct and significant restrictions in the ability to perform DLA.

The position of the ministry, as set out in the reconsideration decision, is that the information provided does not establish the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods.

The appellant's position is that the available evidence clearly demonstrates his medical conditions directly and significantly restricted his ability to perform DLA

Panel findings

According to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion that has been established in this appeal. This DLA criterion must also be considered in terms of the preceding legislative language of section 2 of the *EAPWDA*, which provides that the minister may designate a person as a person with disabilities "if the minister is satisfied that" the criteria are met, including this one. In exercising the discretion conferred by the legislation, it is reasonable that the minister would expect that the opinion of a prescribed professional be substantiated by information from the prescribed professional that would satisfy the minister that there are direct and significant restrictions in the ability to perform DLA, either continuously or periodically for extended periods, by presenting a clear and complete picture of the nature and extent of these restrictions.

In the letter submitted at reconsideration, the GP assessed the appellant as being unable to walk 10 yards to his car or climb any stairs. The panel considers this sufficient evidence that the appellant is significantly restricted in the DLA of moving about indoors and outdoors. However, for the other DLA applicable to a person with a severe physical impairment (personal care, basic housekeeping, etc.), the admissible evidence is that the GP has assessed the appellant as independent in all aspects of all these DLA, without any notation or comment that he takes significantly longer than typical or requires assistance. In his letter at reconsideration the GP states that the appellant cannot lift 2 kg. and that walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding take 3 times longer than typical. However, the panel does not consider it reasonable to expect the ministry to deduce from this information any assessments of the nature and degree of any restrictions in the appellant's ability to perform these DLA different from those provided by the GP. The panel therefore finds that the ministry was reasonable in determining the information provided did not establish that, overall, in the opinion of the prescribed professional the appellant's severe physical impairment directly and significantly restricts his ability to perform DLA, either continuously or for extended periods, as required under section 2(2)(b)(i) of the *EAPWDA*.

Help with DLA

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.

The position of the appellant is that, though he does not receive any help at the present time, he requires someone to come in and help him around the home and do errands, otherwise his health will continue to deteriorate.

Panel findings

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. Since it has not been established that DLA are directly

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and significantly restricted, the panel finds that the ministry was reasonable in finding that it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the *EAPWDA*.

Conclusion

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