

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated September 23, 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 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") dated May 24, 2015; and
- The Physician Report ("PR") and Assessor Report ("AR") both dated May 1, 2015 and prepared by the appellant's general practitioner ("GP") of 22 years.

2. The appellant's Request for Reconsideration ("RFR") dated August 28, 2015 to which is attached written submissions prepared by the appellant's advocate and dated September 1, 2015 ("RFR Submissions").

Admissibility of Additional Evidence

Documents

On October 21, 2015 the appellant submitted additional documentary evidence in support of his appeal. That evidence includes as follows:

- An Outpatient Clinical Note dated November 8, 2013;
- An Outpatient Clinical Note dated December 18, 2013;
- An Outpatient Clinical Note dated January 29, 2014;
- An Outpatient Clinical Note dated September 17, 2014;
- An Operative Report dated April 29, 2015; and
- Information relating to three medications being taken by the appellant.

These documents had not been submitted to the ministry previously. The four Outpatient Clinical Notes and the Operative Report were prepared by the GP and reference surgical procedures in the form of injections undertaken by the appellant in relation to his back injury. Collectively, these are referred to as "the New Records."

The appellant argues that the subject matter of four notes and the operative report was referred to in the PR as was his use of medications to manage pain and therefore the New Records are in support of the evidence found in the original PWD application. The ministry did not object to the admissibility of the New Records.

Considering the evidence and the submissions of the appellant and the ministry, the panel finds that the New Records are admissible as written testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the *Employment and Assistance Act* ("EAA").

Oral Evidence

The appellant gave oral evidence at the hearing. His evidence included comments on his physical and mental conditions and the impact that they have had on him, the treatment he has received and the frequency and impact of flare-ups of back pain he experiences.

The panel notes that in the SR, the appellant refers to the fact that he is "now on medications and injections to help with the back pain." As such, the panel finds that the appellant's oral evidence is admissible as it is in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the *EAA*.

Diagnoses

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In the PR, the appellant is diagnosed by the GP with the following:

1. Mood disorder – depression;
2. Chronic severe mechanical low back pain; and
3. Chronic insomnia.

The date of onset for each of these conditions is noted by the GP as September 2010.

Physical Impairment

In the RFR Submissions, the advocate re-states the findings of the GP in the PR and AR, writing that the appellant can walk 1-2 blocks, climb 2-5 steps, lift between 5-15 lbs and independently walk indoors, outdoors, stand, lift carry and hold items although the panel notes that the GP has in fact indicated that the appellant requires continuous assistance from another person or is unable to lift, carry and hold items. The advocate further references the comments of the GP in the PR that the appellant has chronic mechanical back pain “which is a continuous and severe condition causing him significant disability.”

Attached to the SR is a four page document which sets out various information concerning the appellant. In response to the question “Please describe your disability” the document states “I have a severe physical impairment that will last more than two years. My disability affects me continuously.” The document goes on to note that the appellant suffered injuries in a motor vehicle accident in September 2010 which cause him to “have a major struggle getting around due to the constant severe back and overall body pain.” The document notes further that the appellant receives medications and injections due to pain and that he does not sleep properly as a result of pain.

In the PR, the GP comments that the appellant has chronic mechanical back pain which is “a continuous and severe condition causing him significant disability” and that his condition is chronic and unremitting, incurable and with a guarded prognosis. With respect to functional capacity he is described as being able to walk 1-2 blocks and climb 2-5 steps unaided, lift 5-15 lbs and remain seated for less than 1 hour.

In the AR, the GP comments that the appellant’s chronic pain affects his mobility. The GP notes that the appellant is independent with all aspects of communication (speaking, writing, reading and hearing) and that he is independent walking indoors and outdoors and standing while requiring periodic assistance climbing stairs and continuous assistance lifting, carrying and holding although the GP does not provide any further information as to the frequency or duration of assistance that is required.

Mental Impairment

In the RFR Submissions, the advocate refers to the comments of the GP in the PR in which he writes that the appellant’s depression and insomnia are associated with his chronic pain.

In the PR, the GP comments that the appellant uses pain medications which cause cognitive side effects and notes that the appellant suffers significant deficits with cognitive and emotional function in the area of emotional disturbance.

In the AR, the GP comments that the appellant’s chronic pain interrupts his cognitive ability to focus and concentrate. Further, the GP notes the various impacts of the appellant’s mental impairment on his functioning as follows (underlined words in parentheses): moderate impact on bodily functions (sleep disturbance), emotion (depression), attention/concentration (concentration), motivation and motor activity, and minimal impact on consciousness, impulse control, insight and judgment, executive, memory, language and other emotional or mental problems.

Daily Living Activities (DLA)

In the PR, the GP notes that the appellant is continuously restricted with basic housework, mobility outside of the home and transportation and periodically restricted with mobility inside the home depending on the severity of his pain flare symptoms. Where the appellant is continuously restricted, the GP has added the comment that this is due to severe pain. The GP notes that the appellant is not restricted with personal self care or management of medicines and that the appellant's ability to perform tasks of meal preparation, daily shopping, management of finances and social functioning are unknown.

In the AR, the GP reports that the appellant's ability to manage DLA is impacted by chronic pain.

More specifically, for the tasks of DLA relating to personal care, the appellant is noted as able to independently toilet, feed himself and regulate his diet but requires periodic assistance with dressing, grooming, bathing and transfers in and out of bed and on and off of chairs. No further comments are provided by the GP.

For tasks of basic housekeeping, the appellant is described as requiring continuous assistance with laundry and basic housekeeping. No further comments are provided by the GP.

For tasks of shopping, the GP describes the appellant as independent reading prices and labels, making appropriate choices and paying for purchases but that he requires continuous assistance from another person or is unable to go to and from stores and carrying purchases home. No further comments are provided by the GP.

For tasks relating to meals, the appellant is noted as independent in meal planning and safe storage of food but requires periodic assistance with food preparation and cooking. No further comments are provided by the GP.

The appellant is described by the GP as independent with all tasks of paying rent and bills (banking, budgeting, paying rent and bills) and medications (filling/refilling prescriptions, taking as directed and safe handling and storage), and while the appellant is independent using transit schedules and arranging transportation, he requires periodic assistance getting in and out of a vehicle and using public transit.

With respect to social functioning, the GP has indicated that the appellant is independent making appropriate social decisions, developing and maintaining relationships and interacting appropriately with others but requires periodic support and/or supervision dealing appropriately with unexpected demands and securing assistance from others. The GP notes that the appellant's mental impairment has caused him to have marginal functioning with his immediate social network ("secondary to mood issues") and extended social network.

Need for Help

In the PR, the GP notes that the appellant does not require any prostheses or aides for his impairment but that he requires the assistance from his family and friends with mobility, transportation and maintaining his home. In the AR, the GP indicates that the appellant receives help from family and friends and that the appellant does not require assistance through the use of assistive devices or assistance animals.

Evidence On Appeal

Appellant's Evidence At Hearing

At the hearing, the appellant discussed the surgical procedures that he has undergone and which are

documented in the New Records. He stated that in the six weeks prior to the procedure, he is in severe pain and he is forced to increase his medication to manage that. He added that for the six weeks following the procedure, he continues to be in pain and is bedridden. The procedures take place twice each year and the appellant stated that he is in pain between them with random flare-ups which can be triggered by different DLA. The appellant gave evidence that he requires periodic or continuous assistance with different DLA from family and friends. Specifically, he noted that he requires help with lifting, showering, meal preparation and other chores and that he cannot sit for longer than 45 minutes or walk without taking breaks. He said that the majority of his independence has been taken away but that he did not divulge this to the GP when he discussed his PWD application over the phone. The appellant described his difficulties with sleep disturbance and in particular, insomnia which is a constant problem. The appellant stated that he is in constant pain.

Ministry's Evidence At Hearing

At the hearing, the ministry stated that it relied on the reconsideration decision and that more specifically, the GP did not provide sufficient information which would allow it to make a determination that the appellant had met the legislative criteria for the PWD designation. The ministry stated that the evidence available at reconsideration did not support a finding of a severe physical or mental impairment.

In response to questions, the ministry stated that while there is some information as to impairment, there was not enough to satisfy the legislative criteria that the physical or mental impairment was severe in nature.

The appellant writes in his Notice of Appeal dated October 2, 2015 that his physical condition is such that he does not agree with the reconsideration decision.

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

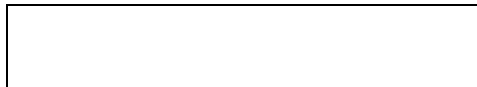
(iii) the services of an assistance animal.

(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 and the psychologist.

Severity of mental impairment

The appellant argues that he has a severe mental impairment evidenced by depression and a variety of cognitive impairments secondary to depression and chronic pain.

The ministry's position is that there is insufficient evidence to support a finding that the appellant has a severe mental impairment.

Panel Decision

In the PR, the appellant has been diagnosed by his GP with depression which is associated with chronic pain and that the pain medication that the appellant takes causes "cognitive side effects." The GP notes that the appellant experiences significant deficits with cognitive and emotional function in the area of emotional disturbance.

On review of the AR however, the GP notes different impacts on the appellant's cognitive and emotional functioning that were not included in the PR. For example, in the AR, the GP notes that the appellant experiences moderate impact on bodily functions ("sleep disturbance"), emotion ("depression"),

attention/concentration (“concentration”), motivation and motor activity. In the PR however, the GP has not indicated any deficits for the appellant in concentration, motor activity or motivation. Similarly, while the GP has noted in the AR that the appellant experiences minimal impact with consciousness, impulse control, insight and judgment, executive, memory, language and other emotional or mental problems, there is no similar notation with respect to consciousness, executive, language or memory in the PR.

Having noted this inconsistency between the PR and the AR, the panel further 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 PR is that the appellant experiences no restrictions with personal self care or management of medications and that the impact on social functioning is unknown. In the AR, the GP indicates that the appellant independently manages all of the decision making aspects of the DLA of personal care as well as management of medications and finances.

While the panel notes the inconsistent nature of the PR and the AR, the panel finds further that while the appellant does suffer from a confirmed diagnosis of depression, section 2(2) of the *EAPWDA* requires that the minister be satisfied that the person have a severe mental impairment. 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 is that his constant, chronic pain constitutes a severe physical impairment.

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

Panel Decision

In the PR, the GP describes the appellant as suffering from chronic severe mechanical back pain which he refers to as a “continuous and severe condition causing him significant disability.” The GP indicates that with respect to functional skills, the appellant can walk 1-2 blocks unaided and climb 2-5 stairs unaided. The appellant is described by the GP as being able to lift items that are between 5 and 15 lbs in weight and remain seated for less than 1 hour.

In the AR, the GP reports that the appellant’s chronic pain affects his mobility and ability to care for himself. The GP indicates that the appellant is independent walking indoors and outdoors and while standing, that he requires periodic assistance climbing stairs and continuous assistance with lifting, carrying and holding.

The New Records indicate that between August 2013 and April 2015, the appellant underwent five surgical procedures intended to control his pain symptoms. The panel notes that the September 17, 2014 report notes that in the nine months following his previous procedure, he had “relatively consistent pain relief with respect to his low back pain” and that he was able to “wean himself off his medications, and overall increase his activity and function.”

While the evidence from the GP indicates that the appellant’s functional capacity is diminished in some respects due to his back pain, the panel refers to the legislation which requires a finding that an applicant establish a severe “impairment” rather than a severe “condition.” Further, the panel notes that while the GP has made reference to the appellant experiencing “flare-ups”, the GP has not provided information as to their frequency and duration. After considering the evidence as a whole, the panel finds that the ministry was

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reasonable in its determination that the evidence did not support a finding that he 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 is that he is unable to perform many of his DLA due to his mental and physical impairments.

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 his 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 provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence of the challenges that he faces with DLA both in the SR and through his direct evidence, the legislation is clear to satisfy the criteria the evidence must come from a prescribed professional, in this case, the GP.

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.

In the PR, the appellant's GP has described him as requiring continuous assistance with basic housework, mobility outside the home and transportation due to continuous severe pain. He further notes that the appellant requires periodic assistance with mobility inside the home depending on the severity of pain flare-ups. The appellant is described as having no restrictions with personal self care or management of medications while restrictions on meal preparation, daily shopping, management of finances and social functioning are noted as "unknown."

Turning to the AR, the panel notes however that, the GP describes the appellant as requiring periodic assistance with all aspects of personal care other than toileting and feeding himself which is inconsistent with the GP's evidence in the PR as set out above. Further, while the GP notes in the PR that the appellant's restrictions with daily shopping, management of finances and social functioning are unknown, the evidence in the AR differs. For example, for tasks of shopping, the GP notes in the AR that the appellant is independent reading prices and labels, making appropriate choices and paying for purchases while he requires continuous assistance going to and from stores and carrying purchases home although no comments are provided to explain the type and amount of assistance required. Further, the appellant is described in the AR as being independent in all aspects of paying rent and bills as well as medications.

The panel does note that the appellant is described as requiring continuous assistance with laundry and basic housekeeping (which is consistent with the PR) but no further comments are provided by the GP as to the type and amount of assistance required. The panel considers this evidence while at the same time noting that the GP reports the appellant's functional capacity as including the ability to lift between 5 and 15 lbs and climb 2 to 5 steps and, as noted above, the GP has not provided specifics as to the duration and frequency of the appellant's flare-ups.

The panel finds that the evidence concerning the appellant's ability to perform DLA as between the PR and the

AR is inconsistent in many respects. Overall, the panel finds that the ministry was reasonable in its determination that overall, the evidence of the prescribed professional indicates that the appellant is largely independent in his ability to perform DLA and therefore, 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 is that he requires assistance with DLA due to his physical and mental impairments.

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.

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.



PART G – Order