

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of August 6, 2015, which found that the appellant did not meet two of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement, that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years, and that the appellant has a severe physical / mental impairment. However, the ministry was not satisfied that:

- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

PART E – Summary of Facts

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

- The appellant's PWD application form consisting of the appellant's self-report form dated April 15, 2015 ("SR"), a physician's report ("PR") completed by the appellant's psychiatrist (the "physician") on April 23, 2015, and an assessor's report ("AR") completed by the physician on April 23, 2014 [although the panel notes that the reference to 2014 not 2015 is likely a typographical error].
- The appellant's Request for Reconsideration dated July 20, 2015 stating that the decision that the appellant did not suffer from a physical impairment did not acknowledge the migraine disorder that severely limits his physical wellbeing and his ability to consistently meet the DLA. (the "RFR")

Diagnoses

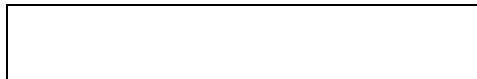
- In the PR the physician (who has been the appellant's physician since April 2013 and had seen the appellant two to ten times in the past 12 months) reports that the appellant has panic depression (onset 2010), disorder with agoraphobia (onset 2011) and migraine headache (onset 2011).
- In the AR, the physician also indicates that he has known the appellant since April 2013 and has seen him two to 10 times in the last year. The physician reports that the appellant's physical or mental impairments that impact his ability to manage DLA are: anxiety – agoraphobia, panic attacks, depression and frequent migraine headache.

Physical Impairment

- In the Health History portion of the PR the physician indicates that the appellant has had migraine headaches since 2011, at times daily, often associated with nausea and photophobia. The physician notes that the appellant has had neurological consultation and tried many medications with limited success. The physician also notes that the appellant has obesity. He indicates that his height is 177 cm and weight is 149 kg.
- In terms of physical functioning, the physician reported in the PR that the appellant can walk 4+ blocks unaided, can climb 5+ steps unaided, has no limitations with respect to lifting, and no limitations remaining seated.
- In the AR the physician reported that the appellant is independent with walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding.
- The physician states that the appellant's migraines have proved refractory to various medications but the appellant is currently taking a medication for headaches.

Mental Impairment

- In the PR the physician reports that the appellant's anxiety disorder is chronic and may not improve without intensive treatment. He notes that the appellant takes medication.
- In the PR the physician indicates that the appellant does not have difficulties with communication due to cognitive problems.
- In the PR the physician indicated that the appellant has significant deficits in two of twelve



categories of cognitive and emotional function being emotional disturbance and motivation.

- In Part F – Additional Comments, the physician states that the appellant has significant stresses in his family, which exacerbate his anxiety and depression.
- In the AR the physician indicates that the appellant's ability to communicate with speaking, reading, writing and hearing is good.
- For question 4 of section B, Mental or Physical Impairment, the physician indicates that the appellant's mental impairment has major impact to the appellant's emotion and motivation, moderate impact to bodily functions, attention/concentration and motor activity, minimal impact to consciousness, impulse control, insight and judgment, executive, and memory and no impact to the remaining areas of language, psychotic symptoms, other neuropsychological problems or other emotional or mental problems. The physician comments that the appellant has anxiety which restricts activities and travel, that the appellant avoids crowds, novel situations, and that he avoids going far from home unless in the company of a family member. The physician notes that the appellant has low mood, low self-esteem, reduced interest in activities, social isolation and occasional suicidal thoughts. He states that the appellant has migraine headaches several times weekly during which he may stay in bed for three hours or more and that he requires assistance with ADL's during these episodes.

DLA

- In the PR the physician indicated that the appellant has not been prescribed medication or treatment that interferes with his ability to perform DLA.
- In the PR the physician reports that the appellant has continuous restrictions with DLA of mobility outside the home, use of transportation and social functioning, and periodic restrictions with personal self-care and daily shopping. The appellant's DLA of management of medications and mobility inside the home are not restricted. The physician has not provided any information indicating whether the appellant's DLA of meal preparation, basic housework, or management of finances are restricted. With respect to social functioning the physician explains that the appellant's agoraphobia impairs his ability to have a normal social network and to interact with others even in mundane settings.
- In the AR, for aspects of personal care, the physician reports that the appellant is independent with dressing, toileting, feeding self, regulating diet and transfers (in/out of bed) and transfers (on/off of chair) but requires periodic assistance with grooming and bathing, explaining that he requires prompting from his parents. For basic housekeeping the physician indicates that the appellant requires periodic assistance with laundry and basic housekeeping as he requires prompts. For shopping, the physician indicates that the appellant is independent with reading prices and labels, making appropriate choices and carrying purchases home but requires periodic assistance going to and from stores and paying for purchase, noting that the appellant often asks to be accompanied to unfamiliar places, and has a narrow region he is comfortable circulating in. For meals the physician indicates that the appellant is independent with food preparation and safe storage of food but requires periodic assistance with meal planning and cooking, noting that the appellant can prepare simple meals but avoids using the gas stove as it causes him anxiety. The physician indicates that the appellant requires periodic assistance with banking, budgeting and paying rent and bills and that his parents handle the household expenses. The physician indicates that the appellant is independent with all aspects of medications. The physician indicates that the appellant is independent with getting in and out of a vehicle but requires periodic assistance using public transit and using transit schedules and arranging transportation, and that he often asks for accompaniment on transit because of

anxiety.

- In the AR the physician indicates that the appellant requires periodic support/supervision with all noted aspects of social functioning, being appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others, noting that he avoids unfamiliar social situations as he feels observed or judged by others.
- In the AR the physician indicates that the appellant has marginal functioning with respect to his immediate social networks and very disrupted functioning with extended social networks, noting that the appellant spends most of his time alone, often in his room.

In the SR the appellant states that his disability is agoraphobia, severe anxiety coupled with severe migraine disease and that these conditions leave him housebound, often for long stretches of time. He states that these conditions prevent him from seeking gainful employment. He also states that his disability inhibits his ability to get out of bed most days and makes self-care and basic functions of daily living extremely difficult.

In the RFR the appellant states that his impairments severely limits his physical wellbeing and his ability to consistently meet the DLA. He states that he is unable to shop, prepare food and manage independently. He states that he is willing to provide further information and medical documentation of the length and severity of his migraines.

Help

- In the PR the physician reports that when the appellant is incapacitated by migraine headaches, he requires support for food preparation, household tasks and self-care.
- In the AR the physician indicates that the appellant's headaches cause periods of incapacitation and agoraphobia and that he requires assistance at any time for DLA's. The physician indicates that the appellant's parents provide support in prompting for DLA's, preparing food and maintaining the household. The appellant does not require any assistive devices and does not have an assistance animal.

Additional information provided

In his Notice of Appeal the appellant states that he believes there was insufficient consideration given to the overlapping effects and inter-connectedness of his migraine disorder and mental health issues and the ongoing level of debilitation they cause.

At the hearing the appellant described his impairments and limitations. He provided oral evidence indicating that he is seeing a headache specialist regarding his headache disorder and that he has tried upwards of 15 different medications, which have provided little or no help. He stated that he has been on his current medication for eight months and while it is better than any previous medications it still has minimal impact to his headaches. He states that some weeks he is unable to get out of bed, often in bed with the lights out and earplugs in to avoid outside stimuli. The appellant states that in the last three months he has spent 20 days out of each month in bed, often in bed for 12 hours out of each day. The appellant states that migraine disease can wear on all family members.

The appellant's mother attended the hearing with him. She described that light and sound are triggers for the appellant's headaches, which then trigger his agoraphobia. She stated that the

appellant suffers from migraines, agoraphobia and anxiety and she cannot imagine what his life would be like if he was living on his own.

Admissibility of New Information

The ministry did not object to the admissibility of the oral testimony.

The panel has admitted the appellant's oral testimony and the appellant's mother's oral testimony as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information substantiates the information at reconsideration respecting the appellant's impairments, ability to perform DLA, and help needed.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

EAPWDR section 2(1):

[]

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

Physical or Mental Impairment

The appellant's position is that the evidence establishes that the combination of his anxiety, depression, agoraphobia, and migraine headaches are interconnected resulting in a severe physical and mental impairment.

The ministry's position, as set out in the reconsideration decision, is that the information provided does not establish that the appellant has a severe physical impairment or a severe mental impairment. However, the reconsideration decision states that based on the information provided, the combination of the appellant's migraines, panic disorder with agoraphobia and major depression establish that the appellant has a severe physical / mental impairment.

As the reconsideration decision indicates that the ministry accepts that the appellant has a severe physical / mental impairment the panel will not review that aspect of the reconsideration decision.

Significant Restrictions to DLA

The appellant's position is that the evidence establishes that his anxiety, depression, agoraphobia and migraine headaches are interconnected and cause him significant disability and inability to perform DLA. The appellant's position is that his impairments leave him housebound, inhibit his ability to get out of bed and makes self-care and basic functions of DLA extremely difficult.

The appellant's position is that the ministry overlooked certain aspects of the PWD application, and appears to have given consideration in some areas but not others. For example the appellant stated that he does not understand why the functional skills reported in the PR appears to be given more weight than the evidence regarding how his pain impacts his DLA. He also stated that he does not

[]

understand why the communication skills section of the PR appears to be more important than the significant deficits with cognitive and emotional function that impact him in the areas of emotional disturbance and motivation.

The appellant stated that he was unable to obtain a report from his headaches specialist (a neurologist) as the neurologist was away during the summer and it is difficult for the appellant to get to the neurologist's office. The appellant stated that without more information regarding his headache disorder he does not believe that the ministry is appreciating the complete picture, as it is difficult to quantify his pain. The appellant states that he is not sure that the physician understands the severity of his needs and the help provided by his parents.

The ministry's position is that it is not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform DLA. The ministry notes that in the PR, the physician indicates that the appellant's ability to manage mobility outside the home and use of transportation are continuously restricted and his ability to manage personal self care and daily shopping is periodically restricted. The ministry notes that the PR indicates that the appellant has headaches that occur several times weekly, that he has chronic anxiety and occasional panic attacks. The ministry also notes that the physician states that when the appellant is acutely incapacitated by a migraine he requires support for food preparation, household tasks and self-care.

The ministry notes that in the AR the physician indicates that the appellant requires periodic assistance with grooming, bathing and laundry (requiring prompts from his parents); basic housekeeping; going to and from stores (often asking to be accompanied to unfamiliar places and has a narrow region where he is comfortable circulating in); paying for purchases, meal planning, cooking (can prepare simple meals but avoids the gas stove as it causes anxiety), banking, budgeting and paying rent and bills (parents handle household expenses), using public transit, and using transit schedules and arranging transportation (often asks for accompaniment on transit because of anxiety). The ministry notes that in the AR the physician indicates that all other aspects of DLA's are managed independently including: dressing, toileting, feeding self; regulating diet, transferring in and out of bed, transferring on and off a chair, reading prices and labels and making appropriate choices when shopping, carrying purchases home, food preparation, safe storage of food, filling/refilling prescriptions, taking medications as directed, safe handling and storage of medications and getting in and out of a vehicle.

The ministry acknowledges that the appellant has certain limitations resulting from migraines and anxiety but the frequency and duration of these periods are not described in order to determine if they represent a significant restriction to the appellant's overall level of functioning.

The ministry's position is that it relies on the medical opinion and expertise of the physician to determine whether the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods but takes all the information provided into account in making its decision. The reconsideration decision states that it is reasonable to expect that the appellant would encounter some restrictions to his ability to perform DLA and require assistance as a result. However, the ministry finds there is not enough evidence to confirm that the appellant's impairment significantly restricts his ability to perform DLA continuously or periodically for extended periods, so the legislative criteria has not been met.

Panel Decision:

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

In the PR the physician indicates that the appellant has continuous restrictions with mobility outside the home, use of transportation, and social functioning yet in the AR the same physician does not indicate that the appellant requires continuous assistance from another person with respect to any aspects of DLA's.

In the PR the physician indicates that the appellant has periodic restrictions with respect to personal self-care and daily shopping noting that his headaches occur several times weekly and that he has chronic anxiety but occasional panic attacks.

In the AR the physician indicates that the appellant requires periodic assistance with grooming, bathing and laundry (requiring prompts from his parents); basic housekeeping; going to and from stores (often asking to be accompanied to unfamiliar places and has a narrow region where he is comfortable circulating in); paying for purchases, meal planning, cooking (can prepare simple meals but avoids the gas stove as it causes anxiety), banking, budgeting and paying rent and bills (parents handle household expenses), using public transit, and using transit schedules and arranging transportation (often asks for accompaniment on transit because of anxiety).

The physician indicates that all other aspects of DLA's are managed independently including: dressing, toileting, feeling self; regulating diet, transferring in and out of bed, transferring on and off a chair, reading prices and labels and making appropriate choices when shopping, carrying purchases home, food preparation, safe storage of food, filling/refilling prescriptions, taking medications as directed, safe handling and storage of medications and getting in and out of a vehicle.

While the physician has provided some information regarding the nature of the periodic restrictions, in that he states that the appellant's headaches occur several times weekly, that he has occasional panic attacks and that he requires support for food preparation, household tasks and self care when he is acutely incapacitated by a migraine headache, there is no further information to explain how often the incapacitating migraine headaches occur and how often they last. The physician does not explain if the headaches that occur several times weekly are incapacitating or not.

In the AR the physician describes that the appellant requires prompting from his parents for grooming, bathing, laundry and basic housekeeping but there is no description of the frequency or duration of the prompting that is required. The physician indicates that the appellant often asks to be accompanied to unfamiliar places when going to and from stores or on transit and that his anxiety restricts his activities and travel but there is no further description of what is meant by the word “often” to explain if the help is required on a daily basis, several times each week or several times each month.

In addition, there are inconsistencies between the PR and the AR in that in the PR the physician has not provided any information indicating whether the appellant’s DLA of meal preparation, basic housework, or management of finances are restricted, yet in the AR the physician indicates that the appellant is independent with some aspects of these tasks such as food preparation and safe storage of food, but requires periodic assistance with other aspects of these DLA’s such as basic housework and laundry and paying rent and bills.

While the appellant states that he is often bedbound for long stretches of time and the physician indicates that the appellant often isolates and spends much time at home, there is no information provided from the physician supporting the appellant’s assertion that he is bedbound, or the frequency or duration of being bedbound. In the RFR the appellant stated that he is willing to provide further information and medical documentation regarding the length and severity of his migraine headaches but he has not done so. The appellant explained that he was unable to get a report from the neurologist as the neurologist was away during the summer and it is hard for the appellant to get to his office. However, without further information regarding his migraine disorder, the information provided by the physician does not assist to describe the frequency or duration of assistance needed with respect to his headaches.

It is hard to get a clear picture of the appellant’s restrictions as the information reported in section D of the PR, in which the physician notes that the appellant can walk 4+ blocks unaided, can climb 5+ stairs and has no lifting limitations and no limitation with remaining seated, indicates that the appellant has good physical functioning. Although the appellant questions why the functional skills section appears to have been given more weight than other parts of the PR and AR, the panel finds that although the AR indicates that there is some assistance required with some aspects of DLA, the AR indicates that the appellant is independent with the majority of DLA which appears consistent with the functional skills reported in the PR.

While both the PR and AR note restrictions with the appellant’s social functioning they both also note that the appellant’s communication in all areas is good.

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

Help with DLA

The appellant’s position is that he requires help because his interconnected disabilities of anxiety, agoraphobia and migraine headaches leave him housebound and often bedbound for long stretches

of time and make it extremely difficult to perform self-care and basic functions of DLA.

The appellant's position is that his headaches occur regularly and he requires significant help from his family, that the information provided on the AR confirms his need for help, yet it appears that the ministry has not taken the information provided into account.

The ministry's position is that there is not enough information to establish that DLA are significantly restricted so it cannot be determined that significant help is required from other people. The ministry also states that the appellant does not require the services of an assistance animal.

Panel Decision

The physician indicates in both the PR and the AR that the appellant requires some assistance and support with food preparation, household tasks, self care, prompting for personal care, laundry and basic housekeeping and often requests accompaniment when going to and from stores and taking transit. However, a finding that a severe impairment directly and significantly restricts a person's ability to manage DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, the necessary precondition has not been satisfied in this case.

Accordingly, the panel finds that the ministry reasonably concluded that it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions affect his ability to function and that he has some restrictions to his DLA requiring some assistance. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's reconsideration decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.