

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 02 October 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, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(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 19 September 2014, completed by the appellant's general practitioner (GP) who has known the appellant since January 2013 and seen him 2-10 times over the past year
 - An Assessor Report (AR) dated 14 April 2015, completed by a specialist in physical medicine and rehabilitation (physiatrist) who has known the appellant since November 2012 and seen him once in the past year.
 - A Self Report (SR) completed by the appellant.
 - Consultation reports by the physiatrist dated 29 October 2013 and 14 April 2015.
2. The appellant's Request for Reconsideration, dated 26 August 2015, to which was attached a letter from the appellant's GP dated 03 September 2015 and 3 x-ray images.

In the PR, the GP lists the following diagnosis related to the appellant's impairment: cervical cord/spine compression. In the AR, the physiatrist describes the appellant's impairment as severe headaches and neck pain.

The panel will first summarize the evidence from the PR and AR relating to the appellant's impairments as it relates to the PWD criteria at issue.

Severity/health history

Physical impairment

PR:

Under Health history, the GP writes: "[The appellant] was in an accident that resulted in C-3 compression fracture of his neck. This resulted in neck pain. Pain is constant and severe."

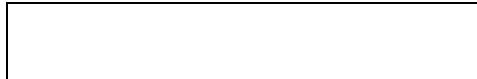
Under Additional comments, the GP writes: "[The appellant] is incapacitated by the chronic neck pain."

As to functional skills, the GP reports that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, can lift 5 to 15 lbs. and it is unknown how long he can remain seated.

The GP does not indicate whether that the appellant has been prescribed any medication and/or treatments that interfere with his ability to perform DLA. The GP also does not indicate whether the appellant requires any prostheses or aids for his impairment.

AR:

The physiatrist writes: "[The appellant] has constant headache & head pressure. Cannot comfortably move head. Pain is worsening in neck."



Mental impairment

PR:

The GP assesses the appellant as having no difficulties with communications.

The GP indicates that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance and motivation, commenting that “This neck fracture/pain has resulted in a complete change to his life – unable to work.”

Ability to perform DLA

PR:

The GP reports that the appellant is restricted in the DLA of basic housework and daily shopping, with no indication as to whether the restrictions are continuous or periodic. The GP indicates that the appellant is not restricted in performing the other listed DLA requiring physical effort. No assessment is provided regarding social functioning.

AR:

The physiatrist reports that the appellant lives with family or friends.

The physiatrist assesses the appellant's ability to communicate as good for speaking and hearing (tinnitus) and satisfactory for reading (affected by headaches) and writing (affected by tremors).

Regarding mobility and physical ability, the physiatrist assesses the appellant as independent in all listed areas: walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding.

The physiatrist assesses the assistance required for managing DLA as follows (the physiatrist's comments in parentheses):

- Personal care: independent in all aspects.
- Basic housekeeping: independent in all aspects
- Shopping: independent in all aspects.
- Meals: independent in all aspects (for cooking, can be affected by pain).
- Paying rent and bills: independent in all aspects.
- Medications: independent in all aspects.
- Transportation: independent in all aspects.

Regarding cognitive and emotional functioning, the physiatrist indicates that the appellant's mental impairment restricts or impacts his functioning as follows:

- Major impact – none.
- Moderate impact – attention/concentration.
- Minimal impact – executive.
- No impact – bodily functions, consciousness, impulse control, insight and judgment, memory, motivation, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems.

The physiatrist comments that the appellant is affected by pain and headaches.

With respect to social functioning, the physiatrist assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others.

The physiatrist does not assess the impact of the appellant's impairment on his immediate and extended social networks.

Help provided/required

PR:

The GP does not indicate whether the appellant requires any prostheses or aids for her impairment

AR:

The physiatrist indicates "N/A" regarding whether the appellant routinely uses any of the listed assistive devices.

Physiatrist consultation reports

In his report of 29 October 2013, the physiatrist notes that he had first seen the appellant on 15 November 2012. The appellant presented with a two year and two month history of pain with stiffness in the neck and head and a loss of range. These symptoms dated from two work injuries that had occurred in September 2010. The history and physical findings were consistent with an injury to the upper cervical spine and an aggravation of pre-existing degenerative changes in the cervical spine. Since that visit, the appellant had approximately 10 upper cervical adjustments performed by a chiropractor. These did not make a difference with mechanical adjustment. The appellant has since stopped going to the chiropractor and finds that he gets the most relief when he smokes marijuana. The physiatrist remains of the opinion that the best way to treat him would be to put him on the medical cannabis program, stipulating that the cannabis should be used as a topical cream or fresh in a juice at night to help with sleep.

In his report of 14 April 2015, the physiatrist again reviewed appellant's treatment history, commenting that over the past 1½ years the appellant had barely survived. He now lives with his parents and helps clean their home but is limited by pain. He has tried using cannabis when he can afford it and finds that it does decrease the pain to some extent by distracting him but it is not yet a complete pain reliever. At the time of his visit, the appellant was in extreme pain. He pushes himself to do physical work (such as gardening) but at a great expense of pain. He has constant headaches, extreme head pressure and difficulty moving his head. On examination, the appellant had great difficulty moving his head through full ranges. His movements were jerky and he was in constant pain. Palpitation of the muscle structures over the skull and down both sides of the back and across the shoulders revealed tightness, hypertonicity and pain response to palpitation. In the physiatrist's opinion, the appellant is incapable of any type of sustainable employment. He has a high pain tolerance and pushes himself to try and do small tasks around the house, but is even limited doing these tasks by the nature of severity of his pain. He remains independent in activities of daily living, and is limited only by the fact that he can't always hold his

head in one upright position by virtue of the pain.

Self report

In his SR, the appellant describes a head butt compression injury, with the result being a 4° offset at the C-1 neck-to-head connection. He hears crunch and snap noises when moving his head. He also has intense nerve pain, with feelings like electrocution at the base of the brain and ringing in his head. He writes that it is difficult to do more than small tasks due to pain affecting his concentration and sleep. Increasing headaches and the electrocution sensation due to degenerative injury makes all activity more difficult. The 4° offset affects his balance as his head is not connected properly to his body.

He writes that he is living with his elderly parents and is having a hard time managing their property. He could no longer cut the neighbour's grass this year as bouncing on the riding mower hurt his neck. He is cooking and cleaning his parent's house and that is about all he can do. When it is raining it seems to give him tremors.

Request for Reconsideration

Under Reasons, the appellant writes that he is in extreme chronic neuropathic pain through his brain stem. He has a very high pain threshold and has been trying to do too much. He refers to attached x-ray images that show a 4° C-1 offset. This also affects his balance, as his inner ear is no longer connected properly to his body. This means his vision becomes his means of balance and when pain increases his balance is off all the time. He explains that initially, five years ago after his accident, spinal headaches felt like low voltage electrocution through the brainstem. Since then, the voltage has been progressively increasing. He has tremors of the head when holding it erect and his hands and all his body shake at times. He asked his physiatrist about his patients with similar injuries and he replied that all experience similar increases in pain and disability. "Across the board, all experience decline and have problems dealing with pain." The appellant goes on to write that that brain neuropathic pain makes concentration and reading difficult. Sleep is also difficult as the neck comes apart slightly and pain increases.

Attached to his Request for Reconsideration is a letter from the appellant's GP dated 03 September 2015. The GP writes:

"[The appellant] suffered a fracture on his neck (C-1) in 2010, that did not heal properly and as such he has severe, chronic, debilitating pain in his neck. Despite his desire to work, the level of pain and neurological problems arising from this fracture make it impossible for him to do any type of employment."

Notice of Appeal

The appellant's Notice of Appeal is dated 15 October 2015. Under Reasons, he writes:

- living with parents as needed help.
- increasing pain and tremors making it more difficult
- elderly parents helping by cooking, etc.
- ability to drive decreasing."

The hearing

At the hearing, the appellant submitted a letter from his GP dated 02 November 2015. The GP wrote:

“[The appellant] as a cervical fracture that is causing deterioration in his functional capacity. He currently has significant arm tremor, which affects considerably his ability to read and write and difficult working outdoors. He now has significant and constant problems climbing stairs, standing for prolonged times and carrying or lifting objects. He is currently suffering from major depression which affects many aspects of his personal and daily life.

Although he currently drives I suspect he may have to stop that in the near future.”

The appellant reviewed the nature of his chronic and severe pain: an electrocution-type feeling at the base of his skull, constant headaches and topical pain on the top of his head. He stated that the cannabis treatment recommended by his psychiatrist would cost \$40/day, an amount he cannot afford.

He explained that when he went to see his psychiatrist in April 2015 to have the AR completed, it must have been a good day, and the assessments of being independent in performing DLA were at that time fair. However, since then, his condition has severely deteriorated – something that the psychiatrist warned would happen when he said “Across the board, all experience decline and have problems dealing with pain.” Now, his pain is more extreme and he suffers from constant and violent tremors throughout his whole body. These tremors are so bad and so visible that when he recently had to take his father to the ER at the local hospital, while he was waiting a nurse came up to him to ask whether he was there to be admitted for treatment. He gets similar reactions from others when out in public, as they are uncomfortable or concerned when they see how much he shakes.

He described how he keeps dropping things because of the tremors, and is losing his motor skills. He explained that when his chronic pain first started, it was an “invisible condition,” and he was in denial as to how serious it was. Now, with the constant and visible tremors, he has to accept that he can never work again, as even an office job would be impossible, not being able to write or work on a keyboard. He described his situation as having “a horrible quality of life,” and he is very depressed, to the point of having suicidal ideation. He stated that he spends usually about six hours a day sitting at a picnic table looking at the birds. While he managed to drive to the hearing, he feels that he will soon be unable to drive because his tremors extend to his feet, making it difficult for him to maintain a constant speed on the road.

In answer to questions, he stated that as a result of his balance difficulties he now relies on grab bars in the shower; due to the tremors he has difficulties buttoning his shirt; while he can do some limited vacuuming in his small space, the pain in his back prevents him from bending down to wash the bathroom floor; and because of the tremors he cannot peel or chop vegetables.

In conclusion, the appellant stated that while he was able to look after himself and help his elderly parents at the time the PWD designation application was completed, his condition has deteriorated to the point where he will soon need help around the home.

The ministry stood by its position at reconsideration.

Admissibility of new information

The ministry did not object to the new information in the GP's letter of 22 September 2015. Notwithstanding the ministry's position, the panel must be guided by section 22(4) of the *Employment and Assistance Act (EAA)*, 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 GP's diagnosis that the appellant now suffers from major depression and the appellant's testimony regarding his current restrictions in his ability to perform certain DLA are not in support of the information before the ministry at reconsideration. The diagnosis of major depression is a new diagnosis not provided by either of his medical practitioners in the PR or AR and the appellant's testimony regarding his restrictions cannot be considered to corroborate the assessments before the ministry at reconsideration. Pursuant to section 22(4) of the *EAA*, the panel therefore does not admit this new 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. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's 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 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 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 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;

(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

Physical Impairment

The position of the appellant is that his medical condition has greatly deteriorated over the past few months since his physiatrist assessed him in April 2015. His pain is much more intense and he now suffers from constant, strong and visible tremors throughout his whole body. He is losing his fine motor skills. He will soon need help around the home for such activities as cleaning and meal preparation. He will also soon be unable to drive and will need help with transportation. He asks the panel to take these changed circumstances into account and find that he a severe physical impairment.

In setting out its position in the reconsideration decision, the ministry reviewed the evidence, noting that the GP has indicated that the appellant is able to walk 4+ blocks unaided, climb 5+ steps unaided, lift 5-15 lbs. and it is unknown how long he is able to remain seated. In assessing mobility and physical ability, the physiatrist indicated that the appellant was independently able to manage all areas, including walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding. Noting that the physiatrist has commented that the appellant has constant headaches and head pressure, thereby making it uncomfortable to move his head and is having worsening pain in his neck, the ministry acknowledged that as a result of his medical condition the appellant experiences pain. However, the position of the ministry is that it is not satisfied that the information provided in his application establishes a severe physical impairment.

Panel decision

The panel acknowledges the appellant's position that his medical condition has deteriorated significantly since his psychiatrist assessed him in April 2015. However, and as explained above under admissibility of new evidence, the panel's jurisdiction is limited to determining the reasonableness of the ministry's decision based on the information it had before it – the panel does not have the authority to make its own determination based on new information or changed circumstances.

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. An "impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner and a prescribed professional – in this case, the appellant's GP.

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

While the evidence from the GP, the psychiatrist and the appellant is that he suffers from worsening, chronic, constant and severe pain from his cervical fracture, as noted by the ministry the appellant's GP reported that the appellant is able to walk 4+ blocks unaided, climb 5+ steps unaided, lift 5-15 lbs. and it is unknown how long he is able to remain seated, and the psychiatrist assessed the appellant as independent in all aspects of mobility and physical ability. Further, the two medical practitioners provided little information that the appellant's medical condition resulted in any significant restrictions in his ability to perform any of the other prescribed DLA requiring physical effort (see also below under direct and significant restrictions in the ability to perform DLA). And while both the GP and the psychiatrist assess the appellant as being unable to work, employability is not a criterion for PWD designation. Given this evidence, the panel finds that the ministry was reasonable in determining that the information provided did not establish a severe physical impairment.

Mental impairment

The position of the appellant is that his GP has now diagnosed him with major depression, thereby establishing a severe mental impairment.

The ministry's position set out in the reconsideration decision is that, after reviewing the evidence and acknowledging that as a result of his headache and pain the appellant experiences some effects to cognitive and emotional functioning, it is not satisfied that the information provided is evidence of a severe mental impairment.

Panel decision

The panel notes that there was no formal diagnosis of a mental health condition provided by either GP or the psychiatrist in the information before the ministry at reconsideration. As noted by the ministry, the GP reported that the appellant has significant deficits to cognitive and emotional functioning in the areas of emotional disturbance and motivation and in assessing the impacts of cognitive and emotional functioning on daily living, the psychiatrist assessed a moderate impact on attention/concentration and a minor impact on executive, but no major impacts. As to communications, the GP indicated that the appellant had no difficulty, while the psychiatrist reported that the appellant's ability to read and write is satisfactory and his ability to speak and hear is good. The panel also notes that neither the GP nor the psychiatrist reported any restrictions to social functioning. As no mental health diagnosis was before the ministry at reconsideration, and given that no major impacts to cognitive or emotional functioning or restrictions to social functioning were reported, 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 appellant is that with the severe and constant pain he experiences, along with the constant tremors throughout his body and resulting loss of his motor skills, he is no longer able to look after himself, let alone his elderly parents, in such DLA as meal preparation, housekeeping and transportation.

The position of the ministry is that, as the psychiatrist has assessed the appellant as independent in performing the majority of his DLA, the information provided from his prescribed professionals does not establish that the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods.

Panel decision

The panel notes that, 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 not been established in this appeal. The legislation – section 2(2)(b)(i) of the *EAPWDA* – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP and psychiatrist. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professionals' evidence is fundamental to the ministry's determination as to whether it is "satisfied".

In the PR, the GP indicated that the appellant was restricted in 2 DLA – basic housework and daily shopping – without any indication as to whether this was continuous or periodic, and without any further commentary. In the AR, psychiatrist assesses the appellant as independent, for all DLA applicable to a person with a physical or mental impairment. Regarding the cooking aspect of the DLA meals, the psychiatrist noted, "can be affected by pain." In his consultation report of 14 April 2015, the psychiatrist reported that the appellant remains independent in his activities of daily living, limited only by the fact that he can't always hold his head in one upright position by virtue of the pain.

As to the DLA applicable to a person with severe mental impairment – make decisions about personal activities, care or finances; and relate to, communicate or interact with others effectively – in the PR the GP provides no assessment regarding restrictions to social functioning and in the AR the psychiatrist assesses the appellant as independent in making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing with unexpected demands and securing assistance from others. He provides no assessment regarding relationships with immediate and extended social networks.

As the appellant has testified, the PR and AR were completed some months before the appellant argues that his condition deteriorated to where it is currently. The panel acknowledges that neither prescribed professional was therefore in a position to provide the kind of detailed information regarding restrictions to the appellant's current ability to perform DLA along the (inadmissible) lines offered by the appellant in his testimony at the hearing.

Considering that a severe impairment has not been established and taking into account that the psychiatrist has assessed the appellant as independent in all DLA, the panel finds the ministry was reasonable in determining that there was not enough evidence to establish that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

Help with DLA

The position of the appellant is that he requires the use of assistive devices around the home and the help of his parents and someone else to come in and help him manage around the home.

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.

Panel decision

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 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.