

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of September 18, 2015, which found that the appellant did not meet three 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 and that 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 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 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

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 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 dated April 23, 2015; a physician's report ("PR") signed by the appellant's general medical practitioner (the "physician") dated May 11, 2015, and an assessor's report ("AR") signed by a chiropractor dated May 29, 2015.
- The appellant's Request for Reconsideration dated August 30, 2015.

Admissibility of Additional Information

In a written statement submitted as part of his Notice of Appeal on September 28, 2015, the appellant provided information that was substantially reiterative of information that had been before the ministry at the time of reconsideration. At the hearing, the appellant added that a recent ENT [ear, nose, throat] test indicated that his problems with dizziness are a result of interruptions in the pathways in his ears. He clarified that the frequency of his "bad days" depends on how much he does, for example, he might cook a meal and do the dishes and then will not be able to do much more. This information was generally consistent with the information before the ministry on reconsideration. Accordingly, the panel has admitted the appellant's written statement and oral clarifications into evidence in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information other than to clarify that the word "anxiety" used with reference to the appellant's diagnosis was a typographical error for the word "activity."

Diagnoses

- In the PR the physician diagnosed the appellant with "chronic neck and upper back pain" and "recurrent dizziness with activity."

Physical Impairment

- In terms of functional skills, the physician indicated in the PR that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, remain seated less than 1 hour, and limitations in lifting are unknown. In the AR the chiropractor reported that the appellant independently manages walking indoors and climbing stairs and requires periodic assistance with walking outdoors, referring to problems "over rocky trails," and with standing, lifting and carrying and holding, referring to "numbness and tingling."
- In his written statement submitted with his Notice of Appeal the appellant reported that he has a nerve impingement in his upper back and neck area, which is why his pain is so bad to the point at times that he "just want(s) to curl up in a ball and die."

Mental Impairment

- In the PR the physician indicated the appellant has no difficulties with communication and no

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significant deficits with cognitive and emotional function. The physician referred to anti-depressant medications that interfere with the appellant's daily living activities (DLA), but had not diagnosed a mental disorder.

- In the AR the chiropractor reported the appellant's ability to communicate is satisfactory in all respects. He reported moderate impacts in 2 of 14 categories of cognitive and emotional functioning (motivation and other neuropsychological problems), and no impact in the remaining 12 categories.
- In his written statement submitted with his Notice of Appeal the appellant reported that he does not suffer from anxiety. He also wrote that he has attempted suicide several times due to his physical pain.

DLA

- In the PR the physician indicated that the appellant has been prescribed medications that interfere with his ability to perform DLA.
- The physician reported that the appellant's impairment does not restrict his ability to manage the DLA of personal self-care, meal preparation, management of medications, mobility inside the home, management of finances, or social functioning. She indicated that four DLA are directly and periodically restricted: basic housework, daily shopping, mobility outside the home and use of transportation. Regarding "periodic", the physician commented: "depends on how much neck and back are affected. Has bad days where he feels unbalanced and not able to do much."
- In the AR the chiropractor indicated that the appellant independently manages all tasks related to the DLA of personal self-care, meals, managing personal finances (pay rent and bills), and managing medications. Regarding the DLA of basic housekeeping and two tasks of the DLA shopping, he reported that the appellant requires periodic support with no description of what this entails. The appellant requires continuous assistance with carrying purchases home when shopping, described as "limit how much stuff and will not carry it far." One task of the DLA transportation takes the appellant significantly longer than typical, with an explanation that he "will not take it due to it being way more painful."
- In his self-report the appellant wrote that it is hard for him to do laundry and doing dishes is the same. It is hard to shop for groceries as it "bugs" his arms. Standing in lines becomes unbearable.

Help

- In the PR the physician indicated that the appellant does not require any prostheses or aids for his impairment, and in the AR the chiropractor confirmed that he does not have an assistance animal or use an assistive device.
- In the PR and AR the physician and chiropractor indicated that the appellant receives help with DLA from family. The physician wrote that his family assists with house cleaning, cooking and laundry.

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 section 2 of the EAPWDA in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the evidence does not establish that

- the appellant has a severe physical or mental impairment;
- the appellant's DLA are not, 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 does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal?

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.

(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.

Severe Physical Impairment

The appellant 's position is that his chronic neck and upper back pain constitute a severe physical impairment as a result of the extreme nerve pain and numbness and tingling he experiences.

The ministry's position is that a severe impairment of physical functioning has not been established, as the physician referred to "problems over rocky trails" and "numbness and tingling" but otherwise did not provide information to describe the degree and frequency of the periodic assistance required to manage some mobility and physical abilities.

Panel Decision

A diagnosis of a serious medical condition 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 as evidenced by functional skill limitations and the degree to which performing DLA is restricted.

The appellant's functional skills as described by the physician in the PR are at the high end of the scale. In the AR the chiropractor also reported that the appellant independently manages walking indoors and climbing stairs. While the appellant requires periodic assistance with walking outdoors and with standing, lifting and carrying and holding, having problems "over rocky trails," and with "numbness and tingling" does not provide sufficient detail to support a finding of significant restrictions in these areas.

As discussed in more detail below under the heading Significant Restrictions to DLA , the appellant's physical condition does not appear to have translated into significant restrictions in his ability to manage his DLA independently.

Accordingly, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant did not advance an argument with respect to a severe mental impairment.

The ministry's position is that there is not enough evidence to establish a severe mental impairment.

Panel Decision

In terms of mental functional skills, the evidence of the physician and the chiropractor in the PR and AR indicates that the appellant's communications skills are satisfactory in all respects. The physician did not diagnose a mental disorder and reported no significant deficits with cognitive and emotional function. Although the physician indicated that the appellant takes anti-depressant medications that interfere with his DLA and the appellant wrote that he has attempted suicide several times due to his physical pain, there was no further explanatory information available from the physician or a mental health specialist. With respect to social functioning, the chiropractor indicated the appellant is independent in all aspects and he has good functioning with respect to both his immediate and

extended social networks. The panel concludes that the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his impairments cause significant restrictions to his ability to manage his DLA.

The ministry's position is that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislation requires that a severe 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. In circumstances where the evidence indicates that DLA are directly restricted, it is appropriate for the ministry to require evidence as to whether the restriction is continuous or periodic and – if periodic – of how frequently the restriction arises.

In the PR the physician indicated that the appellant's impairments directly and periodically restrict his ability to manage four DLA independently – basic housework, daily shopping, the outdoors aspect of the "move about indoors and outdoors" DLA and use of transportation. The physician reported, with respect to the periodic restrictions, that this "depends on how much neck and back affected. Has bad days when he feels unbalanced and not able to do much." At the hearing, the appellant stated that the frequency of his "bad days" depends on how much he does.

The AR provides a somewhat more detailed breakdown of the DLA into discrete tasks which provide some evidence of the significance of the restrictions from the chiropractor's perspective. In the AR, the chiropractor reported restrictions to and the need for periodic assistance with some tasks and continuous assistance with one task related to only two DLA – basic housekeeping and shopping. With respect to the need for continuous assistance with carrying purchases home, he commented that the appellant "limit[s] how much stuff and will not carry it far." There were no comments about the other tasks from which the ministry could determine whether the periodic assistance is required for extended periods.

Considering the foregoing, while the appellant experiences some restrictions due to pain, the evidence does not present a compelling picture of an individual whose ability to manage his DLA is significantly restricted as contemplated by the legislative scheme. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage his DLA independently is not significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he requires help for house cleaning, cooking and laundry from his family. With respect to assistive devices, he said he uses trekking poles to help him navigate uneven surfaces.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

A finding that a severe impairment directly and significantly restricts a person's ability to manage his 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 panel finds the evidence falls short of satisfying that precondition.

Accordingly, the panel finds that the ministry reasonably concluded 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 condition currently affects his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation and for the foregoing reasons, the panel finds that the ministry's 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.