

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“Ministry”) reconsideration decision dated October 7, 2015 in which the Ministry found that the Appellant was not eligible for designation as a Person With Disabilities (“PWD”) because he did not meet all of the requirements for PWD designation in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The Ministry was satisfied that the Appellant has reached 18 years of age; however, based on the information provided in the PWD Designation Application (“PWD application”) and Request for Reconsideration, the Ministry was not satisfied that:

- The Appellant has a severe mental or physical impairment; and
- A physician has provided an opinion that the Appellant’s impairment is likely to continue for at least 2 years; and
- The impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- As a result of these restrictions, the Appellant requires help to perform those activities through an assistive device, the significant help or supervision of another person, 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 evidence before the Ministry at the reconsideration included the following:

1. A Request for Reconsideration signed by the Appellant on September 11, 2015 in which he stated that:
 - His impairment will be with him until he dies.
 - It affects his walking as he lives on a hill.
 - His aneurysm is two and a half times the size of the aorta and it has to grow one mm before he has surgery.

The Appellant also stated his argument for the reconsideration, which the panel will address in *Part F-Reasons*.

2. A PWD application comprised of the Applicant Information and Self-report completed by the Appellant on March 10, 2015, a Physician Report (“PR”) dated March 10, 2015, completed by the Appellant’s family physician (“Dr. W.”), and an Assessor Report (“AR”), dated May 27, 2015, completed by the Appellant’s chiropractor. In the PR, Dr. W. indicated the Appellant has been his patient since 2013 and he has seen the Appellant two to ten times in the past twelve months. In the AR, the chiropractor indicated that he completed the form by way of an office interview, and this was his first contact with the Appellant.

The PWD application included the following information:

Diagnoses:

- In the PR, the Appellant was diagnosed with the following conditions: Asthma, onset “question mark”; Coarctation of the aorta, multiple surgeries, onset since birth; Thoracic aortic aneurysm *ongoing and monitored, may need surgical repair in the future*, onset “question mark”; and Vocal cord dysfunction, onset “question mark”.
- In the AR, the chiropractor wrote that aneurysm, difficulty breathing, and a history of lung problems and heart surgeries are the *mental or physical impairments that impact* (the Appellant’s) *ability to manage Daily Living Activities*.
- In his self-report, the Appellant reported the following conditions:
 - Heart problems since birth requiring multiple surgeries. He has been waiting 8 years for surgery for his aortic aneurysm. He was told there is a 5% chance he will be crippled or have a stroke during surgery. This goes up by 5% per year so there is now a 40% chance of these things happening, which stresses him out.
 - Lung problems due to being born premature, which cause shortness of breath with physical exertion.
 - Diverticular disease throughout his colon, which presents a problem sometimes.
 - Knee, shoulder, arm, hand, and joint problems.

Physical or Mental Impairment

In the PR, under *Health History*, Dr. W. reported that the Appellant's asthma is mild and well-controlled, and likely contributes slightly to "sub-optimal exertional abilities." The thoracic aneurysm precludes significant lifting or physical work, and vocal cord dysfunction results in "substantial limited vocal abilities".

Degree and Course of Impairment

Dr. W. did not check mark Yes or No to indicate whether the impairment is likely to continue for two years or more. Under *Please explain*, he wrote, "N/A".

Functional Skills

PR

• Dr. W. checked that the Appellant is able to walk 4+ blocks unaided on a flat surface and; climb 5 or more steps unaided. He has limitations in lifting (under 5 lbs.) and no limitation in remaining seated. Dr. W. reported that the Appellant has motor difficulties with communication with the comment "vocal cord dysfunction, he has a very strained/ hoarse voice". He check marked *No* regarding any significant deficits with cognitive and emotional function. He did not provide any information under Additional Comments.

AR

- The chiropractor check marked "Good" for all areas of *Ability to Communicate*, except Speaking, for which he checked "Satisfactory" with the comment, "difficulty with breathing".
- The chiropractor provided the following information for *Mobility and Physical Ability*:
 - The Appellant is independent in Walking indoors, and Standing.
 - He takes significantly longer than typical with Walking outdoors with the comment, "ok on level ground. Hills increase time by 30%".
 - He also takes significantly longer in Climbing stairs with the comment, "same as hills".
 - For Lifting and Carrying and holding, the chiropractor did not check mark any boxes but provided the comment, "told by doctor not to lift".
 - Under Comments, the chiropractor wrote, "Extra effort climbing stairs, hills, has inability to breathe due to lung issues. MD told that he is not to lift or carry. Exercise such as snow shoveling takes 3x as long".
- Under *Cognitive and Emotional Functioning*, the chiropractor did not provide any information and under Comments he wrote, "N/A".

Self-report

• The Appellant wrote that he has shortness of breath from physical exercise and when he walks to the mailbox he gets out of breath after walking one third of the way back (about three blocks uphill). His left knee goes stiff when he gets up from a sitting position and due to problems in his shoulders

he cannot lift himself using his arms. When he wakes up in the morning his hands are numb and sore in all the joints. It is also getting harder to grip things with his hands.

Daily Living Activities (DLA):

PR

- Dr. W. check marked *No* the Appellant has not been prescribed medication/treatment that interferes with his ability to perform DLA.

AR

- Under *Daily Living Activities*, the chiropractor checked that the Appellant is independent in all areas of Personal care, with a comment for Dressing, “Bending over can’t breathe”.
- The chiropractor checked that the Appellant is independent in all areas of Basic housekeeping, Shopping, Meals, Pay rent and bills, Medications, and Transportation.
- The chiropractor did not provide any information for Social Functioning and left that page of the AR blank.

Self-report

- The Appellant wrote that his lungs affect his life skills. It takes him three days to shovel a path down his driveway as he has to rest every ten minutes for a couple of hours. He gets out of breath walking uphill and light-headed when he bends over to do housework. When he gets dressed and stretches out his arms, he gets sharp knuckle pain that lasts all day. All his joints are sensitive and they hurt when they hit against something. He has pain and numbness in his baby finger when it hits or rubs on the side of the sink while doing dishes and scooping anything off the counter.

Need for Help:

PR

- Dr. W. check marked *No* regarding any prostheses or aids required for the Appellant’s impairment.

AR

- The chiropractor checked that the Appellant lives alone.
- Under *Assistance provided for applicant*, the chiropractor left the page blank, with the comment, “Doesn’t need assistance”.

Self-report

- The Appellant did not comment on his need for assistance.

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3. A Medical Certificate dated November 6, 2007, signed by a family physician ("Dr. H."). He stated the Appellant has aortic aneurysm and will be undergoing surgery in the near future. He is to avoid heavy lifting.

4. A letter to Dr. H. from a cardiovascular surgeon dated January 24, 2012. The surgeon stated that the Appellant's proximal descending thoracic aorta is unchanged or minimally increased. Given the Appellant's previous coarctation and bicuspid aortic valve, current guidelines reflect a more aggressive approach.

5. Two Radiological Consultation reports, exam dates April 8, 2011 and May 16, 2012. Results for an angiogram of the chest, abdomen and pelvis were described. Findings included satisfactory appearance of the ascending aortic arch, peri-aortic valve, and aortic valve repair. The descending thoracic aortic aneurysm is unchanged. Other structures and organs are unremarkable, unchanged, or show minor conditions or small abnormalities. There is diverticular disease throughout the colon that could not be adequately assessed.

Additional submissions

Subsequent to the reconsideration decision, the Appellant filed a Notice of Appeal, signed on October 20, 2015. In which he stated that he still gets out of breath while walking to the mailbox.

Oral testimony

The Appellant testified that when doing housework he has to sit down after one move, and anything where he has to exert himself therefore takes longer. Although he cannot lift, he uses a small spade to shovel snow, a small amount at a time. After his surgery he had to get someone to pour milk for him as he could not lift the four liter carton.

Dr. W. has been his physician since 2013 and he had another doctor for fifteen years when he lived in another community. He had a pacemaker and heart valve put in, in 1998, and since then he had two other pacemakers as well as surgeries on his knee and throat. He had his most recent surgery in 2012. He stated that he wakes up in the middle of the night unable to breathe due to asthma. His high blood pressure medication causes a cough in his throat, then his sinuses drain and he is unable to breathe.

The Ministry summarized the reconsideration record and did not introduce any new evidence.

Admissibility

The panel finds that the testimony is admissible as evidence in support of the reconsideration record, corroborating the Appellant's health history and reported limitations which were before the minister at the reconsideration. The panel admits the testimony under section 22(4)(b) of the *Employment and Assistance Act* as evidence in support of the information and records that were before the minister at the time the decision being appealed was made.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision of October 7, 2015, which found that the Appellant is not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. Based on the information provided in the PWD application, the Ministry was not satisfied that the following criteria in EAPWDA section 2(2) were met: the Appellant has a severe mental or physical impairment; a physician has confirmed that the impairment is likely to continue for at least two years; in the opinion of a prescribed professional, the impairment directly and significantly restricts the Appellant's ability to perform DLA either continuously or periodically for extended periods; and, as a result of these restrictions, the Appellant requires help to perform those activities.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

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

- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

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

(a) a person who has a severe mental impairment includes a person with a mental disorder, and
(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

- (i) an assistive device,
- (ii) the significant help or supervision of another person, or
- (iii) the services of an assistance animal.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in section 2 of the EAPWDR as:

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.

Duration of impairment

The Ministry noted that Dr. W. did not indicate the impairment is likely to continue for at least two years and submitted at the hearing that where information is missing from the PWD application, the Ministry had to find that the criteria were not met. The Appellant submitted that even though his doctor said "N/A" to the duration of his condition, it is going to continue for the rest of his life. He has had multiple surgeries and has been waiting eight years for a further heart surgery.

Panel's decision

Subsection 2(2)(a) of the EAPWDA requires a medical practitioner to provide the opinion that the client's impairment is likely to continue for at least two years. Given that Dr. W. did not provide such opinion (he wrote "N/A" for the *estimated duration of the impairment*), the panel finds that the Ministry reasonably determined that the duration criterion in subsection 2(2)(a) was not met. The panel notes as well, that the letters from Dr. H. and the surgeon, and the contents of the radiology reports, do not expressly confirm that the Appellant's impairment will continue for at least two years.

Severe mental or physical impairment

The Ministry was not satisfied that the information provided establishes a severe impairment. The Ministry argued that the functional skills limitations described by Dr. W. and the chiropractor are more in keeping with a moderate degree of physical impairment. The Ministry noted that the Appellant's main functional restriction is for lifting and he takes significantly longer with walking on inclines. The Ministry noted that although the Appellant has a strained/hoarse voice due to vocal cord dysfunction, his ability to speak is satisfactory, he is independent with DLA, and there was no information regarding a severe mental impairment.

The Appellant argued that the Ministry did not understand what his problems are. He has had multiple surgeries, gets out of breath with minimal exertion and takes longer to do DLA due to problems with his knee, shoulder, and hands. He has a 40% chance of being crippled or having a stroke with his next surgery, and if these things happen it will be too late to apply for PWD.

Panel's decision

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or provide evidence of a severe impairment. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how, and the extent to which, a medical condition restricts daily functioning must be considered. This includes the evidence from the Appellant and from a prescribed professional regarding the nature of the impairment and its impact on the Appellant's ability to manage the DLA listed in section 2(1) of the EAPWDR. However, section 2(2)(b) of the EAPWDA clearly sets out that the fundamental basis for the analysis of restrictions is the evidence from a prescribed professional - in this case, the Appellant's physician and chiropractor.

While the Appellant has heart problems requiring multiple surgeries, there is no evidence in any of the reports or letters that these conditions significantly affect his function except in the areas of lifting and walking on inclines. Dr. W. reported no restrictions in walking on a flat surface, climbing stairs, and remaining seated. The letter from the surgeon and radiology reports, while dated, indicated that the Appellant's condition was stable, and the Appellant testified that he is still waiting for further

surgery. Moreover, while the chiropractor reported that the Appellant requires extra effort on stairs and hills, he indicated no restrictions in any physical DLA and commented that the Appellant is relatively independent.

While the Appellant reported knee, shoulder, and hand problems that cause him significant pain and stiffness, these are not confirmed in any medical reports and there was no evidence that they are related to his heart condition. Further, there was no evidence that he uses any assistive devices or requires significant help with DLA due to any of his symptoms.

While the Appellant reported significant shortness of breath, upon exertion and also in the middle of the night, Dr. W. reported that the Appellant's asthma is "mild and well-controlled". Dr. W. acknowledged "sub-optimal exertional abilities", and the chiropractor indicated "impairment of breathing" and breathing difficulties when speaking and getting dressed. However, no other impacts were reported, and there is no medical evidence in the record to confirm that the Appellant's asthma or lung and breathing problems are severe.

Dr. W. reported that the Appellant has a very strained/hoarse voice that causes him "substantial limited vocal abilities" and motor difficulties with communication. However, the chiropractor indicated that the Appellant's ability to speak is satisfactory. Further, as noted by the Ministry, there was no evidence of any mental impairment, and the panel notes that Appellant did not claim to have a mental impairment.

Given the above analysis of the evidence, the panel finds that the Ministry reasonably determined that the information provided does not establish a severe mental or physical impairment. The panel therefore finds that the Ministry reasonably determined that the criterion under EAPWDA section 2(2) was not met.

Restrictions in the ability to perform DLA

The Ministry submitted that this criterion was not met because Dr. W. and the chiropractor indicated that the Appellant is able to independently manage all of his DLA and he does not require the use of prostheses or aids or require help from other people. The Appellant argued that due to his asthma and heart condition, he is restricted in activities that involve walking uphill and lifting, and is further restricted in housework due to pain and stiffness in his hands.

Panel's decision

Section 2(2)(b)(i) of the EAPWDA requires that the Ministry is satisfied that in the opinion of a prescribed professional an applicant's severe impairment directly and significantly restricts DLA, continuously or periodically for extended periods. In this case, Dr. W. and the chiropractor are the prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods.

Accordingly, neither the Ministry nor the panel can give weight to the Appellant's self-reported restrictions unless these are confirmed by a prescribed professional, in this case Dr. W. and the chiropractor. In the PR, Dr. W. indicated that the Appellant is not taking any medications or

treatments that interfere with his ability to perform DLA, nor does the Appellant require prostheses or aids for his impairment. In the AR, the chiropractor indicated that the Appellant is independent in all physical DLA and as noted by the Ministry, there was no information for social functioning.

While the chiropractor reported that the Appellant was advised not to lift or carry, he reported no corresponding restrictions in DLA involving lifting or carrying such as shopping and housework, and the Appellant reported he has managed to adapt activities to his level of ability such as shoveling small amounts of snow with a light weight spade. The chiropractor stated that snow shoveling takes the Appellant three times longer than typical; however, with the exception of walking uphill (Mobility – outdoors), neither Dr. W. nor the chiropractor indicated that any of the DLA listed in the PWD medical reports take the Appellant significantly longer.

Given the above analysis of the evidence, the panel finds that the Ministry reasonably determined that the Appellant's impairments do not directly and significantly affect his ability to perform DLA either continually or periodically for extended periods. The panel therefore finds that the Ministry reasonably concluded that this criterion in EAPWDA subsection 2(2)(b)(i) was not met.

Help to perform DLA

The Ministry argued that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The Appellant did not indicate that he requires any help to perform DLA.

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. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the PR, Dr. W. indicated that the Appellant does not require any prostheses or aids, and in the AR, the chiropractor wrote that the Appellant is “relatively independent” and “does not need assistance” from other people. Given this evidence, the panel find that the Ministry reasonably determined that the criterion is EAPWDA subsection 2(2)(b)(ii) was not met.

Conclusion

The panel finds that the Ministry reconsideration decision, denying the Appellant PWD designation under section 2 of the EAPWDA, was reasonably supported by the evidence. The panel therefore confirms the reconsideration decision.