

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated October 13, 2015 which found that the appellant did not meet all of the statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a Person With Disabilities (PWD). The ministry found that the appellant met the age requirement and that he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or physical impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – Summary of Facts

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment Assistance Act*.

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:
 - The Applicant Information and Self-report ("SR") completed by the appellant and dated March 25, 2015;
 - The Physician Report ("PR") dated May 5, 2015 and prepared by the appellant's general practitioner ("GP") who has treated the appellant since 2010 and once in the 12 months preceding the PR; and
 - The Assessor Report ("AR") dated May 19, 2015 and prepared by a social worker ("SW") who met the appellant for the first time on the day the AR was completed; and
2. The appellant's Request for Reconsideration ("RFR") dated September 2, 2015 and amended on October 8, 2015.

Diagnoses

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

1. Chronic ETOH abuse – unknown date of onset; and
2. Chronic back pain – unknown date of onset.

Physical Impairment

In the SR, the appellant writes that he has chronic back pain and that he experiences numbness in his feet. He writes that he is limited in how far he can walk – 3 to 4 blocks before requiring a rest - and in his ability to lift, bend and carry. He writes that he gets cramps and stiffness and that he is often fatigued or short of breath and that he lacks energy.

In the PR, the GP comments that the appellant experiences loss of energy and chronic back pain, all of which are likely related to his long-standing severe ETOH ("alcohol") abuse.

With respect to functional skills, the GP notes in the PR that the appellant can walk 1-2 blocks unaided on a flat surface, climb 5 or more steps unaided, lift 5 to 15 lbs, remain seated for less than 1 hour and that he has no difficulties with communication other than a lack of fluency in English.

The GP adds the comment that the appellant's "main alleged disability consists of moderately severe [lower back pain] as well as loss of energy and stamina, anxiety, panic attacks and sleep disturbance. Additional complaints include pain and paresthesia of feet. All complaints except for back pain likely related to alcohol abuse."

In the AR, the SW comments that the appellant's physical health includes chronic substance addiction disorder, depressed mood, anxiety, panic attacks, chronic back pain, numbness in feet (from spine) and 4 surgeries for a hernia. The SW notes that the appellant's ability to communicate by speaking, reading and writing are poor due to poor concentration and recall and that the appellant's hearing is satisfactory. The SW notes that the appellant takes significantly longer than typical with all aspects of mobility and physical ability including walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding. The SW adds the comment that "all moving about takes at least 3-4 times longer due to severe pain, fatigue, shortness of breath, numbness, cramps and stiffness."

Mental Impairment

In the SR, the appellant writes that he often feels stressed out and that he does not manage well. He writes that he has a history of alcohol use to help him cope with his life and that he can experience memory lapses, poor impulse control and often has a depressed mood.

In the PR, the GP comments that the appellant experiences panic attacks which is likely related to his longstanding severe alcohol abuse. The GP has not indicated that the appellant has any significant deficits with cognitive and emotional function. The GP comments further that the appellant experiences anxiety, panic attacks and sleep disturbance.

In the AR, the SW notes the various impacts of the appellant's mental impairment on his functioning as follows: major impact on bodily functions, emotion, impulse control, insight and judgment, attention/concentration, executive, memory and motivation, and no impact on consciousness, motor activity, language, psychotic symptoms, other neuropsychological problems or other emotional or mental problems. The SW adds the comment that the appellant suffers from major depression and that he lost his family due to a divorce. The SW adds that the appellant has no family support and that he has been self-medicating with alcohol to address his depression and chronic pain for many years. The SW writes that the appellant has sleep problems and cognitive impairments related to chronic pain and alcohol dependency and that he lacks coping skills to deal with stress.

Daily Living Activities (DLA)

In the SR, the appellant writes that he is restricted in a number of DLA including:

- Personal care – takes longer than normal to dress due to pain and stiffness;
- Meal preparation – has a very poor diet and often misses meals;
- Basic housework – struggles with housework – often puts it off;
- Daily shopping – limited in how much he can carry due to pain and weakness;
- Outdoor mobility – can only walk about 3 or 4 blocks before having to rest;
- Transportation – not always able to walk to bus stops in timely manner if more than a few blocks away;
- Finances – in trouble financially and not able to pay bills; and
- Social functioning – sometimes very hard to make the best decisions.

In the PR, the GP indicates that it is unknown whether the appellant's impairment restricts his ability to perform DLA. The GP further notes that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA.

In the AR, the SW comments on the assistance required by the appellant related to the impairment that directly restricts his ability to manage his DLA as follows:

Personal Care: The appellant takes significantly longer than typical while dressing, grooming, bathing, toileting and transfers in and out of bed and on and off of chairs. For those tasks other than transfers, the SW adds the comment "lacks motivation neglects." The SW further notes that the appellant requires periodic assistance from another person with feeding himself and regulating his diet and comments that he needs prompts/reminders.

Basic Housekeeping: The SW notes that the appellant requires periodic assistance help from another person and needs ongoing help with laundry and basic housekeeping and that each of these tasks take significantly longer than typical.

Shopping: The SW notes that the appellant requires periodic assistance from another person and needs ongoing help going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home. The SW further notes that each of these tasks take the appellant significantly longer than typical and that personal care and household tasks, including basic needs, are often neglected due to the appellant's conditions.

Meals: The SW notes that the appellant requires periodic assistance from another person and takes significantly longer than typical with meal planning, food preparation and cooking all of which he often neglects and needs help with. The SW indicates that the appellant takes significantly longer than typical with safe storage of food.

Paying Rent and Bills: The SW notes that the appellant requires periodic assistance from another person and takes significantly longer than typical with banking, budgeting and paying rent and bills and the SW comments further "poor financial mgmt" for each task.

Medications: The SW indicates that the appellant takes significantly longer than typical when filling and re-filling prescriptions, taking medications as directed and safe handling and storage. The SW does not indicate whether the appellant is independent or if he requires assistance with these tasks.

Transportation: The SW notes that the appellant takes significantly longer than typical getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation. The SW adds that the appellant uses an assistive device, described in the AR as "needs a seat" when using transit.

Social Functioning: The SW notes that the appellant requires continuous assistance from another person or is unable to make appropriate social decisions ("self-medicates with alcohol"), developing and maintaining relationships ("depressed and withdrawn"), dealing appropriately with unexpected demands ("poor coping skills") and securing assistance from others ("needs help getting help"). The SW adds that the appellant requires periodic assistance from another person while interacting appropriately with others ("socially isolated").

The SW further notes that the appellant experiences very disrupted functioning in his immediate and extended social networks, adding that the appellant has lost his family due to self-medicating his pain with depression and alcohol and that he experiences severe social isolation.

Need for Help

In the PR, the GP notes that the appellant does not require any prostheses or aides for his impairment. In the AR, the SW indicates that others in his house as well as a few friends do the majority of household tasks and that he needs supported housing to overcome his addiction to alcohol and develop better coping mechanisms for chronic pain and depression. The SW added that the appellant's alcohol abuse is a safety issue for which he needs a comprehensive treatment program.

The ministry relied on the Reconsideration Decision as its submission on the appeal.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's Reconsideration Decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD) under section 2 of the *EAPWDA*, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe mental or physical impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the *EAPWDA* as follows:

Persons with disabilities

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the *EAPWDR* defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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



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

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

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

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

Positions of the Parties

In the appellant's amended RFR, he provides that when the SR and the AR are reviewed, it can be determined that he has a severe impairment that significantly restricts his ability to perform DLA so that he needs ongoing help.

In his Notice of Appeal dated October 23, 2015, the appellant writes that he needs to get more information from his doctor and that the doctor did not provide enough. No further documents or submissions were provided by the appellant.

The ministry takes the position that the appellant is ineligible for designation as a Person With Disabilities as set out in the Reconsideration Decision.

Severity of impairment

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning. In making its determination, the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the GP and the SW.

Severity of mental impairment

In the reconsideration decision, the ministry acknowledges that the appellant experiences limitations to his cognitive and emotional functioning resulting from the effects of his alcohol abuse but that the information provided by appellant and by the GP and the SW do not establish that he has a severe impairment of his

mental functioning.

Panel Decision

The appellant self-reports that he often feels stressed out, that he does not manage well, that he has a history of alcohol use to help him cope with his life and that he can experience memory lapses, poor impulse control and often has a depressed mood.

In the PR, the GP has diagnosed the appellant as suffering from chronic alcohol abuse. The panel notes that under “Diagnostic Codes”, the PR includes “substance-related disorders” under “Mental Disorders.” Further, while the panel notes that the GP has not indicated whether the appellant experiences any significant deficits with cognitive and emotional function, the GP comments that the appellant experiences panic attacks, anxiety and sleep disturbance.

In the AR, the SW indicates that the appellant suffers from chronic substance addiction disorder, major depression, anxiety and panic attacks and that he experiences a major impact in on his cognitive and emotional functioning with bodily functions, emotion, impulse control, insight and judgment, attention/concentration, executive, memory and motivation.

The panel finds that in determining whether the appellant suffers from a severe mental impairment, greater weight should be placed on the GP’s opinion in the PR as opposed to that of the SW in the AR. While not a sole determinative factor, the GP does have a more extensive history with the appellant than the SW. But further, the panel finds that the appellant’s comments in the SR are largely consistent with the findings of the GP in the PR. The GP has acknowledged that the appellant suffers from alcohol addiction and that he experiences panic attacks, anxiety and sleep disturbance but he does not indicate that these are “significant deficits with cognitive and emotional function” as provided in the PR. The GP reported that the appellant has no difficulties with communication while the social worker assessed a poor ability to communicate in speaking, reading and writing after only one visit with the appellant.

Conversely, the SW has determined that the appellant suffers from major depression among other things and that he further suffers from a number of major impacts on his cognitive and emotional function. As the SW indicates in the AR that her opinion is based on the GP’s assessment and one office interview with the appellant, the panel is unable to determine the facts upon which the SW has formed her opinion, particularly with respect to her diagnosis of major depression.

For the reasons stated above, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe physical impairment as provided by section 2(2) of the *EAPWDA*.

Severity of physical impairment

In the reconsideration decision, the ministry takes the position that the evidence of the appellant, the GP and the SW is supportive of a finding that the appellant has a moderate, rather than a severe impairment of his physical functioning.

Panel Decision

The evidence of the appellant, the GP and the SW is consistent in respect of the appellant’s chronic low back pain. The evidence is less consistent however with respect to the degree of the appellant’s condition as well as his functional capacity. The appellant writes in the SR that he can walk 3-4 blocks before needing to rest and that he is generally limited in his ability to lift, bend and carry and that he experiences cramps, stiffness, fatigue, shortness of breath and lack of energy.

The GP has been the appellant's physician since 2010 and saw the appellant once in the 12 months preceding the completion of the PR. In it, the GP indicates that the appellant can walk 1-2 blocks and climb 5 or more steps unaided while being able to lift between 5 and 15 lbs and remaining seated for less than an hour. He describes the appellant's low back pain as "moderately severe" and that he does not require an aid for his impairment.

In the AR, the SW does not indicate whether the appellant is independent or if he requires assistance with mobility and physical ability. Rather, the SW has simply noted that for each of the listed tasks, the appellant takes 3-4 times longer than typical due to severe pain, fatigue, shortness of breath, numbness, cramps and stiffness.

After having reviewed the evidence as described above, the panel finds that the ministry was reasonable in its determination that the appellant's impairment of his physical functioning is moderate in nature. The panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe physical impairment as provided by section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

The ministry's position is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by his physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence in the SR of the challenges that he faces with DLA, the legislation is clear to satisfy the criteria the evidence must come from a prescribed professional. In the present case, this evidence has been provided by two prescribed professionals - the GP and the SW.

DLA are defined in section 2(1) of the *EAPWDR* and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

It is not uncommon that two different prescribed professionals completing the PR and the AR make inconsistent, or in some cases, wholly opposite findings. Where such a situation arises, the panel may determine that one should be preferred over another dependent on the evidence but it must be remembered that the panel in this case is not tasked with replacing the ministry's reconsideration with its own. Rather, the panel must determine whether, after reviewing all of the evidence, the reconsideration decision is reasonably supported by the evidence or alternatively, a reasonable application of the applicable enactment in the circumstances of the appellant.

In the PR, the appellant's GP has indicated that it is unknown whether the appellant's impairment restricts his ability to perform DLA. No further comments are provided by the GP and the section which lists the various DLA has been crossed out. The panel finds that this is an indication that the GP has considered the issue.

Turning to the AR, the SW has assessed the appellant differently than the GP. The SW has found the

appellant to require periodic assistance for many tasks of DLA with the vast majority taking significantly longer than typical. For example, for each of the tasks of DLA for basic housekeeping and shopping, the appellant requires periodic assistance from another person and takes significantly longer than typical. The SW describes the appellant as needing “ongoing help” with each of these tasks but does not explain how this is “periodic” and therefore distinct from continuous assistance. This is also the case for all tasks of meals, for which he “needs help”, other than safe storage of food. The SW described the appellant’s need for periodic assistance with all tasks of DLA relating to the payment of rent and bills as “poor financial management.”

Returning to the legislation, section 2(2)(b) of the *EAPWDA* requires that a person seeking the PWD designation demonstrate through the opinion of a prescribed professional that the person’s impairment “directly and significantly restricts the person’s ability to perform DLA either continuously or periodically for extended periods.” The SW has not indicated that the appellant requires continuous assistance with any of his DLA but rather, that he requires periodic assistance for many tasks which take significantly longer to complete. For all tasks of basic housekeeping and shopping, the SW comments that the appellant needs “ongoing help” and for three of the four tasks related to meals, the SW comments that the appellant “needs help.”

The ministry argues that this description does not meet the legislative requirement of section 2 of the *EAPWDA*. It argues that without further details of how much longer each of the tasks takes, it cannot be determined whether the appellant is significantly restricted and that describing the appellant as needing “help” or “ongoing help” or “poor financial management” similarly does not assist in determining whether the assistance required is for extended periods as required under the *Act*.

As noted above, the inconsistency between the PR and the AR in the context of the appellant’s ability to perform tasks of DLA is notable. Given the panel’s findings that the ministry reasonably determined that the SW’s comments with respect to the significance, duration and frequency of the restrictions does not address the requirements of the *Act*, the panel finds that the ministry reasonably concluded that the evidence is insufficient to demonstrate that the appellant’s DLA are significantly restricted either continuously or periodically for extended periods as provided under section 2(2)(b) of the *EAPWDA*.

Help with DLA

The ministry’s position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person’s ability to manage his or her DLA either continuously or periodically for an extended period.

Given the panel’s finding that the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established, the panel further finds that the ministry’s conclusion that it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the *EAPWDA*, was reasonable.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry’s



Reconsideration Decision which determined that the appellant was not eligible for PWD designation under section 2 of the *EAPWDA* was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.