

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 9, 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

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

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 May 11, 2015; a physician's report ("PR") signed by the appellant's general medical practitioner (the "physician") dated January 20, 2014 (sic), in which the physician indicated the appellant had been a patient for 2 ½ months, and an assessor's report ("AR") also signed by the physician and dated May 4, 2015, in which the physician reported the appellant had been a patient for 8 months. The ministry noted that it is likely the PR was completed in January 2015, and there was a typographical error in the date.
- The appellant's Request for Reconsideration dated September 11, 2015.

Additional Information

Prior to the hearing, the appellant provided the following additional documents:

- An undated letter from his physician in response to the ministry's reconsideration decision.
- Written submission by the appellant dated October 30, 2015.

Admissibility of Additional Information

The ministry did not raise an objection to the admissibility of the additional information. The panel finds that the additional documentation submitted after the reconsideration was generally consistent with the original information, with the exception of the reference to the appellant's hospitalization due to infections, which was not before the ministry at reconsideration. Accordingly, the panel has admitted all but the information regarding the infection into evidence, in accordance with s. 22(4)(b) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information.

Diagnoses

- In the PR the physician diagnosed the appellant with cerebrovascular disease with an onset of 2012 and causing weakness, poor balance and a slow gait; low back and pelvic pain since a fracture in 1990; cardiovascular disease since 1985 and depression (no date of onset provided). The physician referred to these medical conditions as "severe, as indicated in the following sections."
- In the undated letter, the physician wrote that the appellant suffered two separate and severe strokes that left him with considerable mobility impairments, caused by significant weakness on his left side. The appellant's previous injuries from an MVA [motor vehicle accident] were severe and significant enough to keep him hospitalized for 7 months followed by 2 years of physiotherapy, leaving him with constant lower back and sciatica pain for over 20 years. The pain from these injuries is chronic and severe.

Physical Impairment

- In terms of functional skills, the physician indicated in the PR that the appellant can walk 1 to 2 blocks unaided on a flat surface, cannot climb any steps unaided, can lift 7 to 16 kg (15 to 35 lbs.) and remain seated less than 1 hour. The appellant requires a cane as an aid for his impairment. In the AR the physician reported that the appellant requires periodic assistance with walking indoors (“support assistance”), standing, lifting and carrying and holding. The appellant requires continuous assistance with walking outdoors and climbing stairs (“always someone beside him”).
- In his self-report, the appellant wrote that he has several ongoing disabilities as well as many residual ailments from strokes, motor vehicle accidents, stabbings, heart attacks and the like.
- In his letter dated October 30, 2015, the appellant wrote that he was transferred between facilities because he was unable to ambulate from his unit to the dining hall and he was declared disabled for institutional purposes. His health has deteriorated since then.
- In the undated letter, the physician wrote that while he previously reported that the appellant is able to walk a block or two, these walks are always completed with the assistance of others and by relying on the use of a cane to maintain balance and support strength, or by having those supports close “in case needed.” The physician reported that the appellant is a large man and stated that he is able to lift/carry 15 to 20 lbs. when unpacking groceries and has no difficulty taking items from his “granny cart.”
- In the undated letter, the physician wrote that the appellant remains at an increased risk for further strokes or heart attack incidents and can only ambulate safely now using a cane. In his opinion, all medical conditions reported in the application are severe in nature.

Mental Impairment

- In the PR the physician indicated the appellant has cognitive difficulties with communication “residual from stroke, memory poor, dizzy at times”. The appellant has significant deficits with cognitive and emotional function in 6 of the 11 listed areas, specifically: consciousness, executive, memory, emotional disturbance, motivation and attention or sustained concentration. The physician did not provide further comments regarding these deficits.
- In the AR the physician reported the appellant’s ability to communicate is good for speaking, reading and hearing and poor for writing, with no further comments. The physician reported moderate impacts in 4 of 12 assessed areas of cognitive and emotional functioning (insight and judgment, attention/concentration, executive, and memory), and minimal impacts in the remaining 8 areas. The physician wrote: “left-sided weakness significantly causes frustration; one time he can manage, another four times, fail.”
- In the undated letter, the physician wrote that the appellant’s level of cognitive and emotional functioning is impaired from the more than 15 years imprisonment he endured. His lengthy period of incarceration and institutionalization is likely the direct cause for his history of making poor choices. He must be monitored by others and interrupted when necessary for his thinking errors and behaviors to be controlled effectively.
- In the undated letter, the physician wrote that in his opinion, all medical conditions reported in the application are severe in nature.

DLA

- In the PR the physician did not indicate whether the appellant has been prescribed medication and/or treatments that interfere with his ability to perform DLA.
- The physician reported in the PR that the appellant's impairment does not restrict his ability to manage the DLA of use of transportation and he is not restricted with mobility inside the home. The appellant is continuously restricted with personal self-care, meal preparation, management of medications, basic housework, daily shopping, management of finances, and social functioning. The physician indicated that mobility outside the home is periodically restricted and, regarding "periodic", the physician commented: "2 to 3 times per week." For social functioning, the physician commented: "currently broke and homeless" and "many incarcerations."
- In the AR the physician indicated that the appellant independently manages all tasks related to the DLA of personal self-care and basic housekeeping, and the DLA of meals, managing personal finances (pay rent and bills), managing medications and transportation are "N/A" or not applicable to the appellant. Regarding the DLA of daily shopping, the physician reported that the appellant requires periodic assistance with 4 of 5 tasks (going to and from stores, reading prices and labels, making appropriate choices, and carrying purchases home) with no description of what this entails.
- In his self-report the appellant wrote that he relies on his friend for assistance with all basic daily living tasks.
- In the undated letter, the physician wrote that in his opinion, all medical conditions reported in the application are severe in nature and they significantly impair and restrict mobility and will not improve in the future.

Help

- In the PR the physician indicated that the appellant requires a cane as an aid for his impairment, and in the AR the physician confirmed that he does not have an assistance animal or use an assistive device other than a cane.
- In the PR and AR the physician indicated that the appellant receives "daily ongoing assistance from friends" as well as help with DLA from family and volunteers.
- In the undated letter, the physician wrote that the appellant needs assistance to carry out all activities of daily living now.

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 previous strokes due to cerebrovascular disease and his previous injuries from a MVA constitute a severe physical impairment as a result of the considerable mobility restrictions, caused by significant weakness on his left side, and the chronic and severe lower back and sciatica pain. The appellant argued in his October 30, 2015 submission that the physician confirms in the letter provided for the appeal that all medical conditions reported in his application are severe in nature and they significantly impair and restrict his mobility.

The ministry's position is that a severe impairment of physical functioning has not been established, as the physician indicated that periodic assistance is required with walking indoors, standing, lifting carrying and holding but did not describe the nature, frequency or duration of the periodic assistance required to manage restrictions to mobility and physical activities. The ministry acknowledged limitations in physical functioning but found that they indicate a moderate rather than a severe degree of physical impairment.

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 are mixed. While the appellant's walks are "always completed with the assistance of others and by relying on the use of a cane", his mobility is, at the same time, periodically assisted by these supports (i.e. having close "in case needed"). In the PR, the physician reported that the appellant is periodically restricted in mobility outside the home "2 to 3 times per week." Although the appellant cannot climb any stairs unaided and is restricted with remaining seated, his physical ability remains in the higher range, as he is able to independently lift 15 to 20 lbs. and perform physical tasks such as unpacking groceries with "no difficulty." In the AR the physician also reported that the appellant requires periodic assistance with walking indoors, standing, lifting and carrying and holding; however, the comment "support assistance" does not provide sufficient detail to support a finding of significant restrictions in these areas. While the physician wrote in his letter that it is his opinion that all medical conditions reported in the application are severe in nature, the panel finds that the ministry reasonably required consistent information of significant restrictions in order to be satisfied of a severe physical impairment.

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 finds 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's position is that he has a severe mental impairment due to his depression causing

poor memory and “left-sided weakness significantly causes frustration; one time he can manage, another four times, fail.”

The ministry’s position is that there is not enough evidence to establish a severe mental impairment. The ministry noted that despite limitations due to depression and frustration around diminished physical functioning, the physician assessed moderate and minimal impacts to cognitive and emotional functioning and independent social functioning.

Panel Decision

In terms of mental functional skills, the evidence of the physician in the PR and AR indicates that the appellant has depression and that his left-sided weakness as a result of his strokes causes frustration as “one time he can manage, another four times, fail.” The physician reported significant deficits with cognitive and emotional function in several areas, with no major impacts to daily functioning and moderate impacts in 4 areas, specifically insight and judgment, attention/concentration, executive, and memory. In the undated letter, the physician wrote that the appellant’s level of cognitive and emotional functioning is impaired from the more than 15 years imprisonment he endured and that his lengthy period of incarceration and institutionalization is likely the direct cause for his history of making poor choices. While the appellant’s lengthy incarceration tends to support the noted impacts to the appellant’s insight and judgment, the physician’s additional comments also make it difficult to distinguish the cause of the impacts as being from the diagnosed mental disorder of depression or from the appellant’s frustration as a result of his physical limitations, or as a result of his being incarcerated.

With respect to social functioning, the physician indicated the appellant is continuously restricted, and described him as “currently broke and homeless” and “many incarcerations,” although he remains independent in all aspects of social functioning as assessed in the AR, including making appropriate social decisions. As the physician crossed out several sections in the AR that provide a more detailed breakdown of the discrete tasks of DLA, including meals, paying rent and bills, medications and transportation, there is little information regarding the appellant’s ability to perform the decision-making aspects of his DLA. The physician indicated that the appellant has cognitive difficulties with communication “...residual from stroke, memory poor, dizzy at times.” However, in the AR, the physician assessed the appellant’s ability to communicate as good in all areas with the exception of writing, and no further explanation is provided.

Due to these inconsistencies, and insufficient information provided regarding the impact on the decision-making DLA, 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 – how frequently the restriction arises.

In the PR the physician indicated that the appellant's impairments directly and continuously restrict his ability to manage six DLA independently – personal self care, meal preparation, management of medications, basic housework, daily shopping, and management of finances. The appellant is periodically restricted in the outdoors aspect only of the "move about indoors and outdoors" DLA and the physician wrote "2 to 3 times per week."

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 physician's perspective. In the AR, the physician reported restrictions related to one DLA only – shopping, and the need for periodic assistance with most shopping tasks. There were no comments provided about the tasks from which the ministry could determine whether the periodic assistance is required for extended periods. Personal care and basic housekeeping are performed independently and no assessment was provided for the remaining DLA as the physician left these sections blank. In the physician's letter, he wrote that the appellant needs assistance to carry out all activities of daily living now, but does not provide any additional detail. Although the appellant wrote in his self-report that he relies on his friend for assistance with all basic daily living tasks, the assessment by the physician does not provide detail regarding the extent of assistance required.

Considering the foregoing, while the appellant has restrictions to several DLA, there is little evidence of a corresponding need for assistance with the various tasks of DLA or the extent of the assistance needed. 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 from his friend with all basic daily living tasks. With respect to assistive devices, the appellant requires a cane "as needed."

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

In the PR and AR the physician indicated that the appellant receives "daily ongoing assistance from friends" as well as help with DLA from family and volunteers. 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 that the ministry reasonably determined 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 section 2 of the EAPWDA in the circumstances of the appellant. The panel therefore confirms the ministry's decision.