

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 16 November 2015 determined that the appellant did not meet 3 of the 5 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 was likely to continue for at least 2 years. However, the ministry was not satisfied that

- the appellant had a severe mental or physical impairment;
- the appellant’s mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLA) either continuously or periodically for extended periods and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

PART D – Relevant Legislation

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

PART E – Summary of Facts

The ministry was not in attendance at the hearing. After confirming that the ministry was notified, the hearing proceeded under s. 86 (b) of the Employment and Assistance Regulation (EAR).

The following evidence was before the ministry at the time of reconsideration:

A PWD Application, divided in 3 sections: 1 Self Report (SR), 2 Physician Report (PR) and 3 Assessor Report (AR) as follows:

- Section 1 – Applicant Information (SR) completed and signed by the appellant on 16 June 2015. He indicated he suffers from headaches, neck pain, left shoulder and hand weakness, ringing in both ears, upset stomach, tired, balance is a big issue if he wants to return to his line of employment, noise / light sensitivity. He indicated he needed speech therapy, memory treatment and re-training for his line of employment. Friends help cleaning his place or he pays a neighbour to go grocery shopping as he is scared to drive any distance.
- Section 2 – the PR dated some time in 2015 (illegible), was completed and signed by the appellant's general practitioner (the GP) who has known him for 1 year and seen him 2 to 10 times. She reported the following:
 - Specific diagnosis: brain injury, onset February 2014.
 - Health history: the appellant has significant impairment with speech, left side weakness, balance off and tinnitus.
 - The appellant was prescribed no medication and/or treatment that interfered with his ability to perform DLA.
 - The appellant does not require any prostheses or aids for his impairment.
 - The impairment was likely to continue for 2 years or more from that date.
 - In terms of functional skills, the GP indicated that the appellant could walk 4+ blocks unaided, he could climb 5+ steps unaided, he can lift 2 to 7kg, has no limitation remaining seated and has cognitive difficulties with communication.
 - The appellant has significant deficits with the following cognitive and emotional functions: executive, language and memory with the comment that the appellant had neuropsychological testing – a sentence is illegible.
 - In terms of DLA, the GP did not answer the question as to whether the appellant's impairment directly restricted his ability to perform DLA but did mention restrictions for basic housework (continuous), daily shopping and use of transportation (continuous). He has no restriction in all other areas (personal self care, meal preparation, management of medications, mobility inside and outside the home, management of finances and social functioning). While no *periodic* restriction was indicated, the GP nonetheless noted at the question for "periodic" that the appellant could not tolerate loud noises and fatigues easily. In terms of the degree of restriction, she noted that the appellant has (illegible) impairment and unable to work in his past employment. In terms of assistance she indicated that he gets people to help him for shopping and driving.
- Section 3 – the AR completed by a social worker (SW), a prescribed professional, dated 29 April 2015, reported the following:
 - The appellant lives alone.

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- In terms of physical or mental impairments that impact DLA, the SW indicated that traumatic brain injury with low indicators with verbal comprehension, perceptual reasoning and processing speed.
 - The appellant's reading and writing abilities are good, hearing is satisfactory (ringing in both ears) and speaking is poor (speech impediment).
 - In terms of mobility and physical ability, the SW indicated that the appellant was independent for standing, but took significantly longer than typical for walking indoors and outdoors (slower – left side weakness), climbing stairs (slower) and standing and lifting (unable to raise left arm fully above head). The SW did not indicate anything for carrying and holding and commented that the appellant's fine motor coordination was severely impaired on his left side.
 - In terms of cognitive and emotional functioning, the SW circled "brain injury" and indicated a major impact for the following areas: bodily functions, memory, motor activity and language; moderate impact for emotion, insight and judgment, attention/concentration, executive and other emotional or mental problems; minimal impact for consciousness, motivation and other neuropsychological problems. The SW commented that the appellant has neurocognitive impairments that affect his daily life; limited speed of visual information processing; significant level of distress characterized by depression, anxiety; difficulties with expressive language; uses earplugs for noise sensitivity; limitations due to left sided weakness and conversational language is non-fluent and inarticulate.
 - For DLA, the SW provided the following assessments - his comments in brackets:
 - *Personal care*: independent in all aspects.
 - *Basic housekeeping*: independent for laundry; periodic assistance for basic housekeeping (uses friend to assist with cleaning).
 - *Shopping*: independent for reading prices and labels, making appropriate choices and paying for purchases; periodic assistance for going to and from stores (friend assists) and carrying purchases home (assistance required). General comments that the appellant's friend assists with getting to stores and shopping.
 - *Meals*: independent in all aspects.
 - *Pay rent and bills*: independent in all aspects.
 - *Medications*: independent in all aspects.
 - *Transportation*: independent in all aspects.
 - *Social functioning*: independent for appropriate social decisions, ability to develop and maintain relationships and ability to secure assistance from others; periodic support/supervision for interacting appropriately with others and ability to deal appropriately with unexpected demands but no explanation or description of the degree and duration of support/supervision required.
 - The SW indicated a marginal functioning for immediate social network (motor functioning and speech barrier) and extended social network (presents well but motor function / language – speech – huge barrier).
 - In terms of help required that would maintain him in his community, the SW wrote: "people with patience to try and understand his communication".
 - For assistance provided by others, the SW indicated friends and community service agencies.
 - The appellant does not use an assistive device but indicated "speech therapy" for "equipment or device that is needed" if equipment is required but not currently being used.

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- The appellant does not use a service animal.
 - For additional information, the SW indicated that the appellant does his best to live semi-independently, that some help is required for DLA as a result of traumatic brain injury. Difficulties with speech and mobility, left sided paralysis / weaknesses. The appellant was tested by specialists indicating that he scored low on processing speed, understanding and verbal.
 - The assessor's sources of information were:
 - Office interview with the appellant;
 - WCB reports;
 - File/chart information from specialists;
 - Reports from specialists.
 - The SW had not met the appellant before – it was their first contact and he saw him once.

In the Request for Reconsideration dated 3 November 2015 signed by the appellant but completed by the same SW who wrote the AR and is now acting as an advocate for the appellant, he indicated that the appellant had not been back to work since his accident and that the medical professionals do not all agree on a diagnosis. The SW indicated that since completing the AR, he saw the appellant quite frequently and has a better understanding of his condition. He indicated that the appellant's impairments would greatly impact his ability to gain successful employment without the support of an employment counsellor. The physical impairments make it very difficult for the appellant to be re-employed in his type of employment and to function successfully. With the Request for Reconsideration, the appellant provided 4 reports (1 is partial) from specialists mostly focused on the appellant's ability to pursue his career in his type of employment.

Prior to the hearing and after the reconsideration decision, the appellant filed with the tribunal a 10-page report dated 5 November 2015 on his ability to return to work in his previous type of employment. This report is an assessment of his abilities in terms of that type of employment by an occupational therapist (OT). The OT doubts that the appellant can return to the full privileges of his past employment and that further work is required to assess his capacity in a lesser category. The OT concludes that the appellant's reported medical issues (cognitive impairments self-reported and detected through testing, headaches, poor sitting tolerance and fatigue) alone are likely to present significant barriers to a successful return to work in his previous type of employment.

At the hearing, the appellant provided evidence that he had recently received an eviction notice because his residence was not kept according to the lease and the landlord alleged interference, harassment and intimidation of other occupants. He also fired his advocate a few weeks prior to the hearing demonstrating he does not link his actions with its consequences – subsequently he reversed his decision.

The panel determined the additional oral and documentary evidence were admissible under s. 22 (4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration since the documentary evidence corroborated the previous medical evidence at reconsideration and the oral evidence provided more information substantiating the impact of his impairment on the appellant.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria of section 2 of the EAPWDA for designation as a PWD was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry was not satisfied that:

- the appellant had a severe mental or physical impairment;
- the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLA either continuously or periodically for extended periods and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

The ministry determined that the age requirement and that his impairment was likely to continue for at least 2 years had been met.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;

"**health professional**" repealed

"**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 of the EAPWDR provides further clarification:

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;

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- (ii) manage personal finances;
 - (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*, if qualifications in psychology are a condition of such employment.

Severity of the impairment:

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the ministry's PR and AR forms define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment *resulting from a medical condition*.

The panel notes that the legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the *evidence from a prescribed professional* respecting the nature of the impairment and its impact on daily functioning. In this matter, many of the professional reports refer to the ability of the appellant to resume the type of employment he had at the time of his accident – the panel notes that employment is not one of the criteria determining eligibility for a PWD designation but the panel considers this evidence in respect of the appellant's medical condition and the impact of his impairments on DLA.

Severe physical impairment:

The appellant argued that a brain injury as a result of a motor vehicle accident (MVA) has impacted his physical abilities and prevented him from returning to work or find other employment. He has difficulties going to stores and he suffers from weaknesses, in particular for his left side. He is constantly tired and needs help to go shopping.

The ministry argued that despite his physical difficulties on his left side, the information provided is not sufficient to demonstrate that the appellant suffers from a severe physical impairment.

Panel decision:

At the outset, the panel notes that the appellant's GP diagnosed a brain injury but there is no diagnosis of a physical illness. According to the GP, the appellant's physical skills are adequate as he can walk 4+ blocks and climb 5+ stairs *unaided*, he has no limitation as to how long he can remain seated although there is evidence from the report dated 5 November 2015 that the fact he cannot remain seated could be a barrier to employment.

The AR gives a different perspective stating that it takes the appellant significantly longer than typical for walking indoors and outdoors and climbing stairs, however, the SW does not provide any information as to how much longer it takes and in what circumstances and it would be difficult to reconcile his opinion with the GP 's opinion for lack of information.

Both reports do agree on his limitations in terms of lifting, the GP indicating that the appellant can lift between 2 to 7 kg while the SW indicated that he takes significantly longer in terms of lifting. Neither of the reports detail how much longer this is expected to take or in what circumstances.

The panel also notes that the appellant is independent in the vast majority of the physical aspects of DLA except for basic housekeeping and going to and from stores and carrying purchases where the appellant gets help from a friend when she is visiting from out of town. Given the appellant's mobility and physical abilities as reported in the PR and the AR, the panel finds that the ministry was reasonable in determining that there was not enough information to support a severe physical impairment.

Severe mental impairment:

The appellant argued that he suffered from a traumatic brain injury that affects many aspects of his life, particularly his speech, and his ability to pursue his career in his trade. He has problems sleeping and is constantly fatigued.

The ministry argued that while the GP indicated that the appellant was not restricted with social functioning, the SW reported that he needed periodic support/supervision interacting appropriately with others and dealing appropriately with unexpected demands but did not indicate the degree and duration of support/supervision that is required. Thus, the ministry argued there is not enough consistent information provided to establish that the appellant has a severe mental impairment.

Panel decision:

The panel notes that the medical evidence supports the GP's diagnosis of brain injury that she qualifies in her letter of 25 March 2015 as a "traumatic brain injury". The other evidence provided by the appellant in terms of mental condition focused on the appellant's desire to return to his former employment and the specialists' opinion as to whether or not this is desirable or even possible taking into account whether the MVA was the cause of his impairment or not. As mentioned above, employability is not a criterion for a PWD designation and the panel is looking at the evidence of the appellant's medical condition as is, without being concerned as its cause.

At the hearing, the appellant's advocate had to "translate" for the panel what the appellant was saying. This reflects the mention in the AR that the appellant's speaking ability is poor while reading and writing abilities are good, which are confirmed by the tests.

The GP noted significant deficits in terms of executive, language and memory, commenting that the appellant had been for neuropsychological testing. It is important to note that the GP did not find any restriction for management of medications and finances or with social functioning. In terms of the degree of restriction, the GP focused on the impact of the appellant's impairment on his ability to work in his trade.

The AR appears to be more specific in terms of the restrictions and has some inconsistencies with the GP's assessment in the PR. For instance, the GP reported no impact for personal self care while the SW indicated a major impact for bodily functions (it includes toileting and hygiene plus sleep disturbances and there is no indication if the major impact is on all of those elements or only on sleep disturbance as reported by the appellant). Another example is "motor activity" that the GP did not indicate as having any significant deficit while the SW indicated a major impact.

For DLA that are specific to a mental impairment under s. 2 (1)(b) of the EAPWDR, making decision about personal activities, care or finances and relating to, communicating or interacting with others the panel notes that the reports do not mention any restriction in terms of decision making and while the GP did not mention any restriction in terms of social functioning, the SW reported periodic support/supervision for interacting appropriately with others and ability to deal appropriately with unexpected demands but did not provide any explanation or description of the degree and duration of the support/supervision or even whether it was support or supervision or both that was required.

The panel realizes that the appellant's speech problems make difficult his communication with others but notes that the appellant was nonetheless able to comply with the directions he was given when he was tested at the end of October 2015 (report dated 5 November 2015). Given the information provided, taking into account the inconsistencies that make it difficult to have a clear understanding of the appellant's mental impairment, the panel finds that the ministry reasonably determined that the information provided did not establish that the appellant had a severe mental impairment.

Daily living activities:

The appellant argued that he had to rely on friends to do some DLA like housekeeping, shopping and driving.

The ministry argued that while there are some limitations that impact the appellant's ability to perform DLA, the frequency and duration of these periods are not described in order to determine if they represent a significant restriction to the appellant's overall level of functioning.

Panel decision:

Again, the panel notes there are inconsistencies between the PR and the AR. The GP reported *continuous* restrictions for basic housework and use of transportation and did not mention whether the restrictions on daily shopping were continuous or periodic. The AR mentioned *periodic* assistance for basic housekeeping, going to and from stores and carrying purchases home. Neither report explains the reasons why continuous or periodic assistance is required except to mention that a friend assists with cleaning, going to stores and carrying purchases home – why continuous, how often is periodic and in what role are not mentioned. In the AR, the appellant is independent for all areas of transportation – unlike the PR where the appellant is continuously restricted: there is no explanation as to why the GP mentioned this restriction in the PR.

In general the panel notes that the appellant is independent for the vast majority of DLA and that there is no evidence of when or how long assistance is required for basic housekeeping. The only other area where DLA are impacted is social functioning according to the SW (while the GP did not report any impact or restriction) and there is no explanation or description of the degree and duration of support/ supervision required.

From the overall evidence it is obvious that the main challenge for the appellant is his speech and this is confirmed by the SW's comment in answer to the question "If the [appellant] requires help, as indicated above, please describe the support/supervision required which would help to maintain him in the community": he wrote "people with patience to try and understand his communication". Yet, while this impairment is serious by itself it still has a limited impact on the appellant's overall DLA. None of the reports indicated that the appellant would benefit from an assistive device.

Considering that a severe impairment has not been established and given the evidence presented and taking into account the opinion of the appellant's prescribed professionals that the appellant is independent for the majority of DLA and requires little help from others, the panel finds that the ministry reasonably determined that the information from a prescribed professional does not establish that the appellant's *impairments directly and significantly restrict* DLA continuously or periodically for extended periods.

As a result of those restrictions, help is required to perform DLA:

The appellant argued that because of his condition, he requires help with some of his DLA.

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons.

Panel decision:

It is clear that the appellant does have assistance with some of his DLA but the assistance is minimal and limited to basic housekeeping, going to and from stores and carrying purchases home. There is very little evidence that the appellant *requires* help. Further, a finding that a severe impairment directly and significantly restricts a person's ability to manage her 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, that precondition has not been satisfied in this case.

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:

Having reviewed and considered all of the evidence and the relevant legislation, and for the reasons provided above, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.