

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated November 16, 2015 which held that the appellant did not meet 4 of the 5 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 but was not satisfied that:

- a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- 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, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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

Evidence before the ministry at reconsideration

- A PWD application comprised of the appellant's Self-report (SR) dated June 5, 2015 and both a Physician Report (PR) and an Assessor Report (AR) dated June 10, 2015, completed by a general practitioner (GP) who has treated the appellant since November 2009.
- A January 12, 2015 consult letter from an orthopaedic surgeon.
- A December 12, 2012 note from the appellant's GP.
- An undated 1-page handwritten letter from the appellant received by the ministry on November 10, 2015 as part of the appellant's Request for Reconsideration submission ("reconsideration submission").

Information submitted on appeal

No further evidence was provided by the ministry or the appellant on appeal. The appellant's Notice of Appeal included argument, which is, included in Part F of this decision as part of the appellant's argument.

Summary of relevant evidence

Diagnoses and Duration of Impairment

A medical practitioner, the appellant's GP, diagnosed the appellant, who is right hand dominant, with Dupuytren's contracture of the right hand, noting that the ring and little finger of the right hand are contracted into the palm and that the onset was November 2014. The GP writes "probably" where asked if the impairment is likely to continue for two years or more from the date of the PR, adding that due to the severity of contraction the appellant was seen by an orthopaedic surgeon who has made a referral to a plastic surgeon but that the appellant has not yet had an appointment due to a long waiting list.

Physical Impairment

In the PR and AR, the GP provides the following information:

- The appellant is unable to use his right hand.
- The appellant can walk 4+ blocks unaided, climb 5+ steps unaided, and has no limitations in the time he can remain seated.
- The appellant can do no lifting with his right hand and requires continuous assistance from another person for lifting and carrying and holding.
- The appellant's ability to communicate in writing is good.

The orthopaedic surgeon assessed severe Dupuytren's disease with significant contracture on the

right ring and little fingers with more subtle deformity developing in the base of the ring finger of the left hand. There is no neurologic deficit and there is good circulation.

The 2012 note from the GP states that the appellant is unable to use his right hand and not able to work.

In the SR, the appellant writes that his right little and ring fingers do not open and that he requires plastic surgery to correct the problem.

In his reconsideration submission, the appellant writes that he is not requesting permanent disability, just until he has hand surgery and can return to work. He is unable to work and faces possible amputation of a finger.

Mental Impairment

The GP does not diagnose a mental impairment or brain injury, indicating that there are no deficits with cognitive and emotional functioning and that the sections of the AR respecting cognitive and emotional functioning and social functioning are not applicable.

DLA

The GP reports that the appellant:

- independently manages all listed tasks for the DLA of personal care, paying rent and bills, medications, and transportation;
- requires periodic assistance from another person due to the inability to use his right hand with both tasks of the DLA basic housekeeping (laundry, basic housekeeping) as well as with one task of shopping (carrying purchases home) and one task of meals (food preparation). All other tasks of shopping and meals are managed independently.

Need for Help

The GP reports that the help required for DLA is provided by friends, noting the need for help with grocery shopping and opening jars etc. The appellant also notes that his friends help but that this will soon end.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on 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 the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that:

- a medical practitioner had not confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- a severe physical or mental impairment was not established;
- the appellant's daily living activities (DLA) are not, 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, in the opinion of a prescribed professional, the appellant does not requires help, as it is defined in the legislation, to perform DLA?

Relevant Legislation

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.

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

EAPWDR

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Duration of Impairment

The appellant indicates that he is not seeking permanent disability but requires assistance for as long

as it takes to have his hands surgically repaired.

The ministry's position is that the GP's indication that the appellant's impairment will "probably" continue for two or more years and that he is awaiting an appointment with a plastic surgeon does not establish that the appellant's impairment is likely to continue for two years or more. The ministry also notes that no additional information respecting duration was included with the PWD application or the request for reconsideration.

Panel Decision

Section 2(2)(a) of the EAPWDA requires that the minister be satisfied that in the opinion of a medical practitioner an applicant's impairment is likely to continue for at least two years. In this case, a medical practitioner, the appellant's GP, did not check either the "yes" or "no" boxes in response to the question "Is the impairment likely to continue for two years or more from today?" Instead, the GP responded by writing "probably", noting a past consultation with an orthopedic surgeon and that the appellant is on a long wait list to see a plastic surgeon. While it is not unreasonable to view the GP's response as less than definitive, the legislation does not require a definitive or absolute forecast of the duration of impairment or that the impairment be permanent, only that a medical practitioner confirm a "likely" duration of two years or more. Roget's Thesaurus and the Canadian Oxford Compact Dictionary identify "probable" and "likely" as synonymous. Based on this analysis, the panel finds that the ministry was unreasonable to conclude that the information from the medical practitioner did not establish that the appellant's impairment is likely to continue for two years or more.

Severe Physical Impairment

The appellant argues that the ministry has not addressed his concerns and that the fact that he is unable to work and at risk of losing a finger establishes a severe impairment. He also argues that he knows people who are more able bodied than he is who are on disability.

The ministry acknowledges that the information provided by the GP in the PWD application, the consult letter, and by the appellant establishes limitations to the use of the appellant's right hand. However, noting that the GP did not describe any restrictions or limitations regarding the appellant's use of his left hand, the ministry argues that the GP's information respecting physical functional skills is not reflective of and does not establish a severe impairment of physical functioning.

Panel Decision

The legislation 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. While the legislation does not define "impairment", the PR and AR 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.

As the ministry notes, the information provided by the physicians and the appellant establishes that the appellant is limited with regards to the use of his right hand, most notably in terms of the ability to lift and carry, with the GP reporting the appellant's ability to write (presumably using his dominant right hand) is good. While the orthopaedic surgeon notes some mild deformity at the base of the left hand ring finger, neither he nor the GP identifies any limitations with the use of the non-dominant left hand. There are no identified restrictions in the appellant's ability to manage all other physical functional skills identified in the PR and AR – walking, climbing stairs, standing, and remaining seated. The panel finds that the ministry has reasonably concluded that although the information provided by the appellant and his physicians establishes limitations respecting the use of the right hand, there are no other identified limitations to physical functioning and that a severe physical impairment has not been established.

Severe Mental Impairment

The appellant has not advanced an argument respecting a mental impairment.

The ministry's position is that based on the assessments provided by the GP, the consult letter and the appellant's self-reports, a severe mental impairment has not been established.

Panel Decision

In the absence of any diagnosis of a mental condition or reporting of any deficits or difficulties with cognitive and emotional and social functioning by a medical practitioner or the appellant, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established.

Restrictions in the ability to perform DLA

The appellant argues that as a result of being unable to use his right hand, he requires assistance from friends and is unable to work.

The ministry notes that the legislation requires that DLA restrictions be both significant and either continuous or periodic for extended periods and that the need for periodic assistance with laundry, basic housekeeping, carrying purchases home and food preparation is not described in terms of frequency or duration. The ministry argues that such descriptive information is valuable in determining the significance of the restrictions. The ministry also notes that the GP has not described any restrictions or limitations regarding the use of the left hand and that the GP reports the appellant is independent with the majority of listed DLA. The ministry concludes that based on the GP's assessment of DLA in the AR and the information in the consult letter, the information from the prescribed professionals does not confirm that the appellant has a severe impairment that

significantly restricts his ability to perform DLA continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b)(i) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. As the ministry notes in its reconsideration decision, employability or the ability to work is not a prescribed DLA or a criterion under the legislation.

In this case, the prescribed professional is the appellant's GP; the information from the orthopaedic surgeon, who is also a prescribed professional, does not address the ability to perform DLA. The GP reports that the appellant independently manages most listed tasks of the prescribed DLA with no noted limitation or restriction. Periodic assistance from another person is however required for the DLA basic housekeeping and one task of the DLA shopping (carrying purchases home) and one task of the DLA meals (meal preparation) with the GP clearly identifying that these restrictions arise from the appellant's inability to use his right hand. Additional narrative describes the need for help with grocery shopping and opening jars etc. However, the GP does not indicate how often or for what duration the periodic assistance is required, which makes it difficult to establish that the restrictions are significant or for extended periods. The panel finds that the ministry reasonably determined that in the absence of this information and as the appellant independently manages the majority of listed tasks of DLA, there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods.

Help to perform DLA

The appellant argues that he currently receives assistance from friends which will soon end.

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

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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.

The evidence of the prescribed professional is that the appellant does not currently require the use of an assistive device and that he “needs help with grocery shopping + opening jars etc.” As the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

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 was reasonably supported by the evidence, and therefore confirms the decision.