

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated December 11, 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

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") which was left blank but signed by the appellant and dated July 23, 2015;
 - The Physician Report ("PR") dated June 2, 2015 and prepared by the appellant's general practitioner ("GP") of 4 years and who treated the appellant between 2 and 10 times in the 12 months prior to completing the PR; and
 - The Assessor Report ("AR") dated July 27, 2015 and prepared by a registered psychological nurse ("RPN") 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 November 26, 2015 ("RFR").

Admissibility of Additional Evidence

Oral Evidence

The appellant gave oral evidence at the hearing. He described his physical symptoms and associated impairment and the impact that they have on his ability to perform DLA. He further gave evidence that the help he receives with DLA comes from his parents and brother. The ministry did not object to the admissibility of the appellant's oral evidence and noted at the hearing that it was aware that the appellant lived in close proximity to his parents. On review of the evidence, the panel notes that there is reference in the PR and the AR to the appellant receiving help with DLA from "family" or "relatives." While the appellant's evidence at the hearing named specific relatives, the fact that he received such assistance was not new evidence. Rather, it was evidence referred to in the PWD application previously submitted and therefore, the panel finds that the appellant's oral evidence is admissible as it is in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the Employment and Assistance Act.

Diagnoses

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

1. C.O.P.D./Pulmonary Hypertension;
2. Hypothyroidism;
3. Sleep apnea;
4. Dyslipidemia,
5. Arthritis; and
6. Dermatitis/Atopy.

The GP has not provided the date of onset for any of the diagnosed conditions but has indicated "chronic" for each.

Physical Impairment

In the RFR, the appellant writes that he is constantly in pain and sometimes barely able to function. He continues that he is unable to work and that he is a hazard to be injured or cause someone else to become injured. He says that he sleeps barely 1-2 hours per night resulting in his dozing off during all hours of the day, that on some days his right arm won't move and that he can barely bend down and get back up. He writes that he has severe breathing problems as well as severe back and knee pain and that he cannot lift "lots" with his

right arm which is always in pain. The appellant concludes by encouraging the ministry to contact the GP to discuss the matter further.

In the PR, the GP comments that the appellant is significantly affected by his conditions both individually and as a whole. The appellant suffers from chronic respiratory symptoms with infection and chronic severe fatigue. The appellant has had previous upper respiratory tract surgery but has experienced no improvement in his symptoms. With respect to functional skills, the GP notes that the appellant can walk 1-2 blocks unaided on a flat surface, climb 2-5 steps unaided and lift 5 to 15 lbs. The appellant's ability to remain seated is unknown.

In the AR, the RPN comments that the appellant's physical health includes C.O.P.D., hypothyroidism, sleep apnea, dyslipidemia, arthritis and dermatitis. He notes that the appellant's ability to communicate by speaking, reading, writing and hearing are all good.

With respect to mobility and physical ability, the RPN notes that the appellant takes significantly longer than typical walking indoors and outdoors and climbing stairs. The RPN adds the comment that walking indoors takes the appellant twice as long, walking outdoors is limited to 1-2 blocks and takes twice as long and climbing stairs is limited to 2-5 steps and takes twice as long. The RPN has not commented on the appellant's ability to stand and adds that he is able to lift and carry between 2 and 7 kg. The RPN comments that the appellant's mobility and physical ability is severely impaired and that he experiences shortness of breath even with mild exertion and that his difficulty walking is due to arthritis in his knee.

Mental Impairment

The appellant has not commented on any conditions or symptoms related to mental impairment in the RFR.

In the PR, the GP has not diagnosed the appellant with a mental disorder. However, the GP notes that the appellant has difficulties with communication which are cognitive in nature although no specifics of that are provided. In response to the question as to whether the appellant has any significant deficits with cognitive and emotional function, the GP has checked "emotional disturbance" but has provided no further comment in that respect.

In the AR, the RPN writes that the appellant's cognitive and emotional functioning is "significantly impaired" and that he has reported sleep disturbances due to sleep apnea and C.O.P.D and that he sleeps 2-3 hours per night. The RPN comments further that the appellant reports increasing periods of low mood and of low motivation.

The AR asks to what degree the applicant's mental impairment or brain injury restricts his or her daily functioning. In response, the RPN notes that the appellant sees a major impact on bodily functions (specifically sleep apnea) and emotion. The RPN notes that the appellant experiences a moderate impact on motivation and a minimal impact on consciousness, impulse control, insight and judgment, attention/concentration, executive, memory, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems.

Daily Living Activities

In the PR, the GP notes that the appellant is periodically restricted with a number of DLA including personal self-care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, use of transportation and social functioning. The GP comments with respect to the periodic nature of the restrictions that the appellant has chronic severe fatigue despite regular treatments and that he has shoulder girdle pain and weakness as well as pain in his back and knees which fluctuates. Socially, the GP comments that the appellant withdraws at times. The appellant is noted by the GP as not having been prescribed any medication or treatment that interferes with his ability to perform DLA.

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

- Personal Care: The appellant is independent while toileting and feeding himself and regulating his diet but requires periodic assistance (“50% of the time”) dressing, grooming and bathing. For transfers in and out of bed and on and off of a chair, both take significantly longer (“2x longer”) due to arthritis in the appellant’s knees and right shoulder.
- Basic Housekeeping: The appellant requires periodic assistance with laundry and basic housekeeping (“50% of the time”).
- Shopping: The appellant is independent reading prices and labels, making appropriate choices and paying for purchases but requires continuous assistance going to and from the store and carrying purchases home due to his COPD and arthritis in his knees and right shoulder.
- Meals: The appellant is independent with meal planning and safe storage of food but requires periodic assistance with food preparation and cooking (“60% of the time”) due to arthritis, COPD and low motivation.
- Paying Rent and Bills: The RPN has provided no comment for this area of the appellant’s DLA.
- Medications: The appellant is independent filling/refilling prescriptions, taking medications as directed and safe handling and storage of medications.
- Transportation: The appellant is independent getting in and out of a vehicle but takes twice as long due to arthritis. While using public transit he needs to sit and he is independent using transit schedules and arranging transportation.
- Social Functioning: The appellant is independent making appropriate social decisions (“Growing social isolation”) and interacting appropriately with others (“Extended periods of low mood and risk of developing depression”). He requires periodic support/supervision 60% of the time when developing and maintaining relationships, dealing appropriately with unexpected demands and securing assistance from others. The appellant has good functioning with his immediate social network and marginal functioning with his extended social network.

Need for Help

In the PR, the GP notes that the appellant does not require any prostheses or aids for his impairment. In the AR, the RPN indicates that the appellant receives help required for DLA from family members

Evidence On Appeal

Appellant’s Evidence At Hearing

The appellant stated at the hearing that he and his doctor feel that he meets the requirements for PWD designation because it is very difficult for him to function on a daily basis due to his pain and various restrictions. If the appellant tries to hold down a job he has to leave for medical reasons and no employer is prepared to take on that responsibility. The appellant stated that he can barely move his right arm and that lifting things like a cup of coffee is hard. When he bends over he needs to hold on to something to get back up. The appellant described walking as being difficult and that he has a stabbing pain in his right shoulder due to ligament damage which may require surgery. The appellant stated that he only sleeps for one or two hours each night due to sleep apnea and while he has a machine to help him sleep it is hard to function during the day while suffering from constant headaches, likely due to lack of sleep.

In response to questions, the appellant said he is going to start using a cane because his walking is getting worse. The appellant stated that his parents live in an adjoining residence and that his mother comes by once in a while to assist him with basic housekeeping - once or twice a week, sometimes less. For personal care,

the appellant stated that his mother will help him get in and out of the tub every now and then. He is able to dress himself other than needing help with socks once in a while. For meals, his mother helps with food preparation and cooking and for shopping his father and brother help him.

Ministry's Evidence At Hearing

At the hearing, the ministry indicated that it would rely on the reconsideration decision.

In response to questions, the ministry clarified that employability is not a factor in the determination of the PWD designation.

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 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 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

At the hearing, the appellant reiterated that he felt that he qualified for the PWD designation because of his physical symptoms and his physical impairment.

In his Notice of Appeal dated December 18, 2015, the appellant writes that he does not agree with the reconsideration decision because both he and the GP are of the view that he “need[s] to be on disability.” The appellant writes that he needs to survive and feels that it is too difficult to be employed due to his health.

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 RPN.

Severity of mental impairment

At the hearing the appellant did not argue that he suffers from a specific mental condition or impairment.

The ministry takes the position that the evidence does not support a finding that the appellant suffers from a severe mental impairment. The ministry argues that the appellant has not been diagnosed with a mental

condition and that the symptoms identified by the GP and the RPN in the PWD application are not indicative of a severe mental impairment.

Panel Decision

The appellant does not indicate in the SR that he suffers from a mental disorder of any kind. However, in the PR the GP notes that the appellant has difficulties communicating due to cognitive reasons and that he suffers from a significant deficit with cognitive and emotional functioning in the area of emotional disturbance.

In the AR the RPN describes the appellant's cognitive and emotional functioning as "significantly impaired" with major impacts on bodily functions ("sleep apnea") and emotion, moderate impact on memory and minimal impact on the remaining listed items.

Despite there being no diagnosed mental condition, the panel has considered whether the evidence of the GP and the RPN as set out above is indicative of a severe mental impairment. While the evidence in the PR and the AR demonstrates that the appellant has some deficits, 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 mental impairment as provided by section 2(2) of the *EAPWDA*.

Severity of physical impairment

The appellant takes the position that his diagnosed physical conditions and their impact on his functional capacity support a finding that he has a severe physical impairment.

The ministry takes the position that the evidence as a whole, including the appellant's functional skill limitations, are in keeping with a moderate physical impairment.

Panel Decision

The PR was prepared by the appellant's GP of four years. In it, he describes the appellant as being "significantly affected" by his conditions and he describes the appellant's functional capacity as including an ability to walk 1-2 blocks and climb 2-5 steps unaided while being able to lift between 5 and 15 lbs. Despite his functional limitations, the GP has not indicated that the appellant requires any prostheses or aids for his impairment although the panel notes the appellant's evidence at the hearing that he was considering using a cane.

The AR was prepared by the RPN who met the appellant for the first time the day the AR was prepared. The RPN indicates that he prepared the AR based on information received from the appellant during an office interview as well as from the PR. The RPN describes the appellant's mobility and physical ability as "severely impaired" but the panel notes that the RPN has not indicated the degree of assistance required by the appellant in managing the listed areas. For example, for walking indoors and outdoors and climbing stairs, the RPN has described the same limitations as in the PR and has further noted that each takes significantly longer but without indicating whether the appellant is independent in each or if he requires periodic or continuous assistance. Similarly, while the RPN notes that the appellant's ability to lift, carry and hold is limited to between 5 and 15 lbs as is noted in the PR, the RPN has not indicated whether the appellant requires assistance with these tasks.

After having reviewed the evidence as described above, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment. Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment. Here, the GP has described the appellant as significantly affected by his conditions and the RPN has not indicated whether the appellant requires assistance in the area of mobility

and physical ability. While the panel finds that the evidence indicates that the appellant has a physical condition which causes him pain and has an impact on him, the evidence of his functional capacity and physical abilities is not suggestive of a severe physical impairment. 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 appellant argues that the evidence supports a finding that he is significantly restricted in his ability to perform tasks of 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 and at the hearing of the challenges that he faces with DLA, the legislation is clear that 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 RPN.

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.

In the PR, the appellant's GP has indicated that the appellant requires periodic assistance with the majority of the listed tasks of DLA, but he does not provide information as to the frequency or duration of the required assistance.

In the AR the RPN comments that the appellant "requires periodic to continuous assistance with some of the DLA". The appellant is noted as requiring continuous assistance going to and from stores and carrying purchases home and periodic assistance dressing, grooming and bathing (50% of the time), laundry and basic housekeeping (50% of the time) as well as food preparation and cooking (60% of the time). However, no information is provided to describe the nature or type of assistance required. Without such information, it is difficult to assess the degree to which the appellant is restricted in performing DLA. Further, for the remaining tasks of DLA the appellant is described as being independent.

Continuing with the AR, while the RPN describes the appellant as requiring periodic supervision or support when developing and maintaining relationships, dealing appropriately with unexpected demands and securing assistance from others, the frequency of this limitation is noted as 60% of the time

As noted above, the panel finds that the PR is unclear as to the frequency and duration of assistance that the appellant requires with his tasks of DLA. The AR indicates that for some of the listed tasks of DLA, the appellant requires continuous or alternatively, periodic assistance 50-60% of the time but is independent for the majority of tasks. As noted previously, section 2(2) of the *EAPWDA* provides that the restriction on a person's ability to perform DLA be both direct and significant. Considering the evidence as a whole, the panel

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concludes that the ministry reasonably concluded that the evidence was insufficient to establish that the appellant's impairment significantly restricts his ability to perform tasks of DLA either continuously or periodically for extended periods.

Help with DLA

The appellant argues that he requires help with various tasks of DLA with that help coming from his parents and brother.

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.