

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated January 13, 2016 made by the Ministry of Social Development and Social Innovation (the ministry) which determined 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* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that:

- the duration of the appellant's impairment would be at least two years,
- 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 (DLAs) 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

The relevant legislation is section 2 of the EAPWDA and section 2 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

PART E – Summary of Facts

The information before the ministry at the time of the reconsideration decision consisted of the following:

A physician's report (PR) dated May 12, 2015, and completed by the appellant's physician indicating that the appellant suffers from back pain (since 2005), mood swings, high anxiety (since 2005) and insomnia (since 2007).

Under Health History the physician writes:

*Patient tried to complete section 1 on his own. To the best of his ability, this is how he perceives his disabilities. The patient has some problems expressing himself in English. His back seems to be his main problem. His problems are the result of years working in a physical occupation. The patient is not very clear whether his injuries prevent him from completing his ADL's regularly.*

The physician does not check the box either yes or no where asked whether the appellant's condition is likely to last for two years or more. The physician states: "Patient has chronic medical problems, musculoskeletal pain, back pain, but he suffers from chronic back pain after working years (in a physical occupation)."

Under functional skills the physician indicates the following:

- walk unaided 1 to 2 blocks;
- climb 2 to 5 steps unaided;
- lift under 5 lbs;
- remain seated less than one hour;
- no difficulties with communication;
- significant deficits in consciousness, memory, emotional disturbance, motivation, impulse control, motor activity and attention.

Under additional comments regarding deficits with cognitive and emotional function, the physician writes: "Grade 11-12."

Under Additional Comments relevant to understanding the significance of the medical condition, the physician writes:

*The patient wants to qualify for PWD. I had some problems understanding his level of disability. He has musculoskeletal back pain. It takes him longer to go to and from the store to shop. He is limited in his ability to list and carry. A girlfriend helps him clean his room. He does his laundry, but it takes him a much longer time to complete. It seems that this man does not know how to ask for help which I believe that he needs. I cannot be sure that this patient fully understood the meaning of the questions in sections 2 and 3. As a result, I think that he has minimized his disability.*

The physician indicates that the applicant has been his patient for 6 months and he has seen him 2-10 times in the past 12 months.

An assessor's report (AR) dated May 13, 2015, also completed by the appellant's physician who states: "patient suffers from lower back and anxiety, which prevent him from completing his daily activities in a reasonable time. He gets help from friends to clean."

Under Mental or Physical Impairment, the AR indicates the following:

- Ability to communicate: speaking and reading are good, writing and hearing are satisfactory.
- Mobility and Physical Ability: walking indoors and standing are independent; walking outdoors and climbing stairs take significantly longer than typical; lifting and carrying and holding require continuous assistance or the appellant is unable to do them. Under "Explain and specify assistive devices", the physician has written "avoids" next to climbing stairs, "limited to 5lbs" beside lifting and "hurts back" beside carrying and holding. Under Comments the physician has written "patient suffers from musculoskeletal pain that's limits his ability to lift, carry and all much more than typical".
- Cognitive and Emotional Functioning: major impact is indicated under bodily functions ("sleep"), emotion and motivation; moderate impact under consciousness, memory, motor activity and psychotic symptoms ("disorganized thinking"); minimal impact under the remaining 7 items. Under comments, the physician writes: "This man seems to be suffering from depression and needs a full psychiatric assessment. Patient has been tried on antidepressants."

Under Mental or Daily Living Activities, the AR indicates the following:

- Independent in personal care: bathing, toileting feeling self, regulate diet; shopping: reading prices and labels, making appropriate choices, paying for purchases; meals: meal planning, safe storage of food; banking; medications: current prescriptions, taking as directed, safe handling and storage; and all aspects of social functioning.
- Takes significantly longer with dressing, grooming, transfers in/out bed, transfers on/off chair, laundry, going to and from stores, carrying purchases home ("back pain friend helps"), cooking, getting in and out of a vehicle, using public transport and using transit schedules and arranging transportation.
- Requires periodic assistance with basic housekeeping ("girlfriend helps w cleaning").
- Requires continuous assistance or is unable in budgeting ("not enough") and pay rent and bills ("Paid directly").
- Good functioning in both immediate social networks ("generally – conflict with family and others at times") and extended social networks.

Under Assistance Provided for Applicant, the physician check marks Friends and states "Gets help to shop (carry things home), gets help to clean room, can do own laundry but it takes longer".

A Self Report (SR) dated May 10, 2015, completed by the appellant which states:

"I suffer from depression and high anxiety, sleep disorder and massive back pain which I take three type of medicine for my condition daily.

I have problems in the morning with my back. I can't even tie my shoe laces, so then I take my medication and the medication starts working.”

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## 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 duration of the appellant's impairment would be at least two years,
- 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 DLAs 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 DLAs.

The ministry determined that the age requirement had been met as the appellant has reached 18 years of age.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA with further clarification in 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;
- (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.

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

### **The Appellant's Position**

In his Notice of Appeal the appellant writes: "I spoke to my doctor on my appointment on 15 January 16 and he was very surprised that you denied me. I don't know what else to tell you. I take three medications daily and it's on the record. Even I take three medication it's stable me. I am in pain, you should speak to my doctor."

### **The Ministry's Position**

The ministry relied on its reconsideration decision.

The ministry considers based on all the evidence before it that:

- The physician has failed to indicate in the PR whether the appellant's condition is likely to last for more than two years from the date of the PR.
- The appellant has a moderate rather than severe physical impairment because the PR indicates that the appellant can walk 1-2 blocks, climb 2-5 steps, lift up to 5lbs and sit for up to one hour. Because there is no indication that the appellant requires aids, the evidence supports a moderate,

not severe, physical impairment.

- The information in the PR and AR does not establish a severe impairment of mental functioning.
- The information in the PR and AR indicates a moderate level of restriction in carrying out DLAs rather than a severe restriction.
- As it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is required from other persons.

## **The Panel's Decision**

### **Impairment Likely to Continue for at Least Two Years**

The physician fails to check mark or state in the medical reports whether the appellant's condition is likely to last more than two years from the date of the assessment. The physician does state that the appellant's condition is "chronic". However, this does not necessarily mean that the physician is of the opinion that the appellant's condition is likely to last more than two years from the date of the assessment. The ministry relies upon the information provided by the physician completing the PR, and cannot imply that information. Therefore, it was reasonable for the ministry to find that this criterion is not met.

### **Severe Physical Impairment**

In terms of physical impairment, the appellant suffers from chronic back pain. The PR indicates that this condition does limit the functional skills of the appellant to a low to moderate range of function in the areas of walking, climbing steps, lifting, and remaining seated. The AR indicates that in mobility and physical ability his back pain limits his lifting and carrying, but he is independent or takes longer (not identified how much longer) in walking, standing and climbing stairs. In the SR the appellant reports not being able to tie his shoes in the morning due to back pain but feeling better later in the day when his medications take effect.

Based on the information in the AR, PR and SR which together indicate that the appellant is somewhat mobile and able to carry out basic physical tasks, the panel finds that the ministry reasonably interpreted the evidence to conclude that the appellant suffers from a moderate rather than a severe physical impairment.

### **Severe Mental Impairment**

The PR indicates that the appellant suffers from depression, mood swings, high anxiety and insomnia. The PR indicates that there are significant deficits in a number of areas of cognitive and emotional functioning. The AR indicates that the appellant suffers major impacts in the areas of emotion, sleep disturbance and lack of motivation; moderate impacts in consciousness, memory, motor activity and disorganized thinking; and minimal or no impact in the remaining 7 indicators. As well, the appellant is independent and has good functioning in all areas of social functioning.

The panel notes that the appellant's physician states that it is difficult for him to assess the appellant's medical condition because the appellant has difficulty asking for help and may be minimizing his symptoms. The physician recommends a full psychological analysis.

The information in the PR and AR indicates that the appellant is experiencing issues with his mental health in the areas of cognitive and emotional functioning. However, the legislative requirement is that in the opinion of the minister there is evidence of a *severe* mental impairment. Given the lack of information indicating a severe mental condition it was reasonable for the ministry to find that it could not conclude that such a condition exists.

### **Daily Living Activities**

The information before the ministry regarding the impact of the appellant's medical conditions on his ability to perform DLAs clearly indicates that in most cases he is independent or requires longer to perform specific activities, for example, dressing, laundry, cooking, and using transportation. The legislative requirement is that the appellant's medical condition "directly and significantly restricts daily living activities (DLAs) either continuously or periodically for extended periods." There is no indication in the PR or SR regarding how much longer these tasks take or how frequently assistance is required to establish a periodic restriction. Furthermore, the only DLAs requiring continuous assistance were cognitive activities (Budgeting and Paying Rent and Bills), and the physician's comments, "not enough" beside Budgeting and "paid directly" beside Paying Rent and Bills, are not relevant to the determination as to whether continuous assistance is required to complete these DLAs.

Overall, the information before the ministry indicates that the appellant can carry out most of his DLAs independently while some take a longer-than-typical time to complete. There is conflicting information as to whether an assistive device (a cane) is required, and no indication that help is needed either continuously or periodically for extended periods. Given this information, the panel finds that the ministry's determination that the appellant does not meet the legislative requirements under section 2(2)(b)(i) of the EAPWDA was reasonable.

### **Help is Required to Perform DLAs**

As noted in the above section, as it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is required from other persons. Therefore the panel finds that the ministry reasonably determined that the criteria of help in section 2(2)(b)(ii) of the EAPWDA has not been met.

### **Conclusion**

Accordingly, the panel concludes that the ministry's decision that the appellant is not eligible for PWD designation was reasonable based on the facts before it.