

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of February 15, 2016, 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 in the opinion of a medical practitioner the appellant’s 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 that
- 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

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

PART E – Summary of Facts

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 form dated September 20, 2015; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on September 15, 2015; and an assessor's report ("AR") also completed by the physician on September 15, 2015.
- A Request for Reconsideration form dated February 8, 2016, including a brief hand-written statement from the appellant.
- A medical imaging report regarding a CT scan of the appellant's lumbar spine, dated September 9, 2015.

Admissibility of New Documentation

Prior to the appeal hearing, the appellant faxed the following additional documents to the Tribunal's office:

1. A hand-written statement dated March 3, 2016. In this statement the appellant wrote in part that:
 - In addition to his back problem, his left hand was injured in a motor vehicle accident in 2007.
 - As a result of this accident, two fingers of his left hand suffer numbness that affects his ability to perform lifting or gripping.
2. A letter from the physician, dated March 9, 2016, stating that the appellant has "permanent numbness of his left index and middle fingers due [to] a nerve injury in 2007. He is unable to use his left hand for any forceful gripping action. He needs to avoid activities where he could accidentally cut or burn his left hand."

In support of these additional documents, the appellant stated that the physician has known about the hand injury for many years and that the physician "certified" the effects of the hand injury for discussions with the appellant's former employer. The appellant explained that when the physician filled out the PWD application forms he was focused on the appellant's spinal condition.

The ministry objected to admissibility of the two documents, stating that information about a hand injury had not been before the ministry at reconsideration.

This panel is not a decision-maker of first instance. Section 22(4) of the *Employment and Assistance Act* (the "EAA") limits the information that the panel may admit as evidence to "only...the information and records that were before the minister when the decision being appealed was made", and "oral or written testimony in support of the information and records" that had been before the minister. Information that is "in support" tends to corroborate information and records that were before the ministry at the time of reconsideration.

Documents 1 and 2 both provide information about the diagnosis of a medical condition – injury to two fingers of the appellant's left hand – that was not mentioned in any of the evidence that was before the ministry at the time of reconsideration. Accordingly, the documents cannot be said to support or corroborate information that was before the ministry as required by section 22(4) of the

EAA.

The panel must apply the legislation in accordance with the legislative intent as revealed by the legislative language. Based on the foregoing analysis, the panel has not admitted either of the two additional documents into evidence.

* * *

The panel assessed the evidence as follows:

Diagnoses

In the PR the physician diagnosed the appellant with lumbar spine spondylolisthesis (onset 2010).

Physical Impairment

In the PR the physician reported that:

- The appellant has been his patient for more than five years.
- The appellant's spinal condition presents with "worsening low back pain with radiation to legs. Decreased ability to sit/stand for long. Difficulty bending/lifting."
- The appellant can walk 1-2 blocks unaided on a flat surface, can climb 2-5 steps unaided, can lift under 5 pounds, and can remain seated for less than one hour.
- "Impairment will likely progressively deteriorate in the future. No surgery at this time. Possibly in the future...Getting more frequent + severe flare-ups of low back pain."

In the AR the physician indicated that:

- The appellant independently manages walking indoors and outdoors, as well as standing.
- He takes significantly longer than typical climbing stairs ("twice as long"), and requires periodic assistance from another person with lifting ("cannot lift > 5 lbs. without help") and carrying/holding ("cannot carry/.hold for long – needs help.")

In the medical imaging report, a medical practitioner reported her impressions as follows: "Bilateral spondylolysis at L5 associated with mild spondylolisthesis and a diffuse mild posterior disc bulge but no other complication...Mild degenerative disc disease at L3-4 associated with a mild posterior disc bulge."

In his reconsideration statement of February 8, 2016 the appellant indicated that:

- He is taking pain medication twice a day which makes him sleepy and weak.
- He is now on maintenance for high blood pressure.

In his oral testimony the appellant stated that:

- He first started complaining to his family doctor about his back pain in 2005. He was seated on a couch and reached for a TV remote, when he experienced breath-taking back pain and numbness in his feet. He was taken to hospital by ambulance and was given two injections of a powerful analgesic for the pain.
- His physician subsequently told him that his spine was 3 mm out of alignment. Recently, the physician told him the misalignment has increased to 5 mm.
- He has since been rushed to the hospital many times due to episodes where the pain

paralyzes his legs. During these episodes he is afraid to be moved or touched, and he experiences pain to the point of nausea.

- His walking is “sliding” and slow. The hardest thing is lifting and bending. For example, he has trouble taking off his underwear because it requires bending.
- He can’t lift more than five or ten pounds.
- The physician has told the appellant that he cannot go back to work or he will become more than disabled – he will be crippled.
- It is too painful to sit for long so he can’t be retrained for other work.
- The physician suggested exercise as a way to improve his condition, but the appellant explained to the physician that exercise causes too much pain, as well as shortness of breath because of a history of asthma.
- He was required to resign from his paid employment because of liability risks associated with his back condition.
- He takes over-the-counter pain medication three times a day, and periodically a prescription pain killer when he has a particularly painful episode.

In response to questions from the panel, the appellant stated that:

- He experiences back pain every day...it never goes away. “It is 24/7.”
- He has been taking the over-the-counter pain medication three times a day for almost eight years.
- He has difficulty getting up in the morning, and difficulty with bowel movements because of the medications.
- His physician has told him to reserve use of the prescription pain medication for “emergencies”. These “emergencies” arise “once or twice a month.”

Mental Impairment

In the PR and the AR the physician reported no difficulties with communication and no significant deficits with cognitive and emotional function.

In his oral testimony the appellant stated that he is frequently dizzy and not focused - his attention is focused on his pain. He stated that he is always uneasy because of pain in his lower back.

DLA

In the PR the physician indicated that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA.

In the AR the physician reported that the appellant independently manages almost all tasks related to almost all DLA. The only exceptions noted by the physician are as follows:

- With respect to the DLA of daily shopping, the appellant needs periodic assistance carrying purchases home (“needs help carrying > 5 lbs.”)
- Regarding the DLA of meal preparation, the appellant requires periodic assistance with cooking (“can cook light meals. Otherwise needs help.”)
- Regarding the DLA of use of transportation, the appellant requires periodic assistance with

using public transit (“cannot sit/stand for long, or needs help getting up.”)

In his reconsideration statement of February 8, 2016 the appellant indicated that:

- He experiences pain and difficulty performing DLA, even with personal self-care tasks such as wearing long pants and taking a shower, since he cannot bend without pain.

Help

In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment. In the section of the AR dealing with assistive devices, the physician did not indicate that the appellant routinely uses any equipment or devices to help compensate for his impairment.

The physician reported that the appellant receives help with DLA from friends and family, and that he does not have an assistance animal.

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 the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

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.

Severe Physical Impairment

The appellant's position is that his lumbar spine spondylolisthesis – and the resultant constant pain - constitute a severe physical impairment. He argued that he cannot lift more than five or ten pounds, and that he cannot sit or stand for more than about 15 minutes. He also argued that he had to resign from well-paid employment because he couldn't function anymore. He stated that he is willing to work but can't always be sitting or standing.

The ministry, while acknowledging that the appellant experiences limitations with lifting, took the position that the evidence does not establish a severe impairment of physical functioning. The ministry argued that the physical function limitations described by the physician in the PR and AR are not considered indicative of a severe impairment. Finally, the ministry argued that the physician did not describe the frequency or duration of the flare-ups of lower back pain, or of the appellant's decreased abilities with bending, lifting, standing, or sitting.

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. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, and that the fundamental basis for the

analysis is the evidence from prescribed professionals – in this case, the physician – though the appellant’s evidence must also be considered.

The physical functional skills as reported by the physician in the PR and AR indicate that while the appellant does experience limitations to his functioning, he is mostly independent with mobility and physical functioning. The physician reported that the appellant takes twice as long as typical with climbing stairs, but provided no evidence as to how much longer other functions take, making it difficult to conclude that it takes the appellant an unreasonably long time to function independently.

The physician also indicated that the appellant experiences “flare ups” of his back pain, but provided no information about the frequency of the flare-ups. The appellant’s oral testimony about his use of the prescription pain medication indicates that the flare-ups occur once or twice a month, which is not indicative of severe impairment. This conclusion regarding the severity of the impairment is consistent with the evidence in the medical imaging report which references “mild” disc bulges and “mild” degenerative disc disease.

There are a number of references in the evidence to the impact the appellant’s medical conditions have on his ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – unlike the CPP disability pension, the focus of the legislation is on the ability to perform DLA. Paid employment generally requires a higher level of functioning than DLA. As discussed in more detail in the subsequent section of this decision 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.

For the foregoing reasons, the panel has concluded that the ministry was reasonable in its determination that the evidence has not established a severe physical impairment.

Severe Mental Impairment

The appellant did not expressly advance an argument with respect to a severe mental impairment, though he did indicate that his attention and his ability to focus are affected by his back pain, and that he is uneasy because of the pain.

The ministry’s position is that the information provided by the physician does not establish a severe mental impairment. The ministry argued that physician noted no significant deficits with communication or with cognitive and emotional functioning.

Panel Decision:

Section 2 of the EAPWDA requires that a severe impairment –including a severe mental impairment - must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. In this case the physician has provided no diagnosis of a mental impairment, has indicated no significant deficits in cognitive and emotional functioning, and has indicated no difficulties with communication.

The panel notes that in the AR the physician indicated no restrictions to the appellant’s ability to manage the two DLA which section 2(1)(b) of the EAPWDR prescribes as being specific to severe mental impairment: decision-making and social functioning.

Based on the foregoing evidence, the panel concludes that the ministry reasonably determined that it does not establish a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his impairment significantly restricts his ability to manage his DLA. He argued that his ability to bend and to lift – and therefore his ability to perform DLA - is continuously restricted by pain.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to establish that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods. The ministry argued that the physician's evidence demonstrates the appellant independently manages the majority of DLA, and that the physician did not describe the frequency or duration of the periodic assistance that the appellant requires with specific tasks related to DLA.

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 – of how frequently the restriction arises and how long it lasts.

In the AR, DLA are broken down into discrete tasks. The physician's evidence is that the appellant is not directly restricted in any DLA except that he requires periodic assistance with certain tasks related to the DLA of daily shopping (carrying purchases), meal preparation (cooking), and use of transportation (using public transit). He has provided no information as to the frequency or duration of these periods. The appellant's evidence that he is continuously restricted in DLA due to pain is not consistent with the physician's evidence. Considering the emphasis that the legislation places on professional evidence, and assessing the evidence as a whole, it simply is not sufficient to establish that the appellant experiences significant restrictions to DLA.

Based on the foregoing analysis, the panel finds that the ministry reasonably concluded this statutory criterion was not satisfied.

Help with DLA

The appellant's position is that he requires assistance from friends and family to manage DLA.

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

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 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

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 finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.