

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 11, 2016 which found that the appellant did not meet two of the five 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 a severe physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- 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 the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated September 15, 2015, a physician report (PR) and an assessor report (AR) both dated September 9, 2015 and completed by a general practitioner who has known the appellant since December 2012, is his family physician, and has seen him 11 or more times in the last year.

The evidence also included the appellant's Request for Reconsideration dated March 10, 2015 (sic) to which the appellant attached his handwritten notes and a list of his medications.

Diagnoses

In the PR, the appellant was diagnosed by the general practitioner with spinal stenosis L3/L4 & L4/L5 and DDD [degenerative disc disease] L5/S1 with an onset in December 2012 and diabetes with thoracic neuropathy with an onset in 2015. In the AR, when asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities, the general practitioner wrote: "...severe pain, lower extremity weakness, propensity to fall."

Mental Impairment

In the PR and AR, the general practitioner reported:

- The appellant has motor difficulties with communication, described as "due to neuropathy- currently under neurological investigation."
- The appellant has significant deficits in his cognitive and emotional functioning in the areas of language and emotional disturbance, with a comment by the general practitioner that the appellant has "depressed mood, physical inability to steady hand to write."
- The appellant has a good ability to communicate in speaking, reading and hearing, and satisfactory ability with writing.
- Regarding daily impacts to cognitive and emotional functioning, the appellant has no major impacts to functioning, with moderate impacts to bodily functions and emotion. There is a minimal impact to consciousness and no impacts to the remaining 11 areas of functioning. The general practitioner commented "sleep- severe disturbance due to pain; toileting- difficult to wipe due to balance; depression secondary to situational loss of function."
- With respect to impacts to social functioning, the appellant is independent in all areas with marginal functioning in his immediate and extended social networks. The general practitioner did not provide any explanation or description of impacts.

Daily Living Activities (DLA)

In the PR and AR, the general practitioner reported that:

- In terms of health history, the appellant has "...severe bilateral foot and leg pain; unable to easily get out of bed, severe mobility limitation- cannot walk more than 50 m. without rest, severe rest pain- unable to maintain one position for more than 15 minutes, severe pain at night- cannot sleep more than 2 hours straight, uses a crutch to walk, go up stairs; severe neuropathic abdominal and back pain."
- The appellant has not been prescribed medications and/or treatments that interfere with his ability to perform DLA.
- In the additional comments to the PR, the general practitioner wrote that "in addition to the lower extremity symptoms which are attributable to his imaging-verified lumbar degenerative

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disease, [the appellant] is suffering from thoracic neuropathic symptoms. These cause additional disability and are being investigated by a neurologist, but even without these symptoms, [he] would feel [the appellant] is disabled from working.”

- The appellant uses an assistive device for walking indoors and walking outdoors and the general practitioner noted that he “uses crutch for balance, stability, strength when using stairs.”
- The appellant is independently able to perform every task of some DLA, specifically: meals (meal planning, food preparation, cooking, and safe storage of food), paying rent and bills (including banking and budgeting), and managing medications (filling/refilling prescriptions, taking as directed, and safe handling and storage).
- For the personal care DLA, the appellant is independent with the tasks of dressing, feeding self and regulate diet. He takes significantly longer than typical (note: 2 to 3 times longer) with grooming, bathing and toileting and significantly longer with transfers in/out of bed (note: “weakness and pain cause difficulty”) and with transfers on/off of chair.
- Regarding the basic housekeeping DLA, the appellant requires periodic assistance from another person with both housekeeping and laundry. There is no explanation or description provided.
- For the shopping DLA, the appellant is independent with reading prices and labels, making appropriate choices, and paying for purchases and uses an assistive device for going to and from stores (note: “crutch”) and requires continuous assistance from another person with carrying purchases home.
- For the transportation DLA, the appellant is independent with the task of using transit schedules and arranging transportation and he takes significantly longer than typical with getting in and out of a vehicle and with using public transit (note: “walking up stairs is painful”).

In his self-report, the appellant wrote that he cannot walk, he cannot sleep- 2 to 3 hours at a time, and he is in constant pain.

In his Request for Reconsideration, the appellant wrote that:

- He is totally dependent on medications to get out of bed and to get mobile. He takes 23 pills a day and cannot do anything without them. He is in constant pain.
- Everything he does, he needs assistance. He needs assistance with all household chores and even with walking due to the spasms he gets now.
- His condition is getting worse all the time.
- All activities could not be done without help from his brother and medications.
- He cooks his meals in the microwave.
- He cannot do any shopping by himself.
- He cannot stand or walk for any distance at all. He could walk half a block at a time as long as it is not uphill. For any stairs, he needs to hold onto the handrail to go up or down.
- He can only sit in one position for approximately 15 minutes then his lower back and feet get numb and start to hurt.
- He needs help cleaning his house.
- In the last 3 years, since his accident and the sciatic nerve problems, he needs help to move.
- He can only get 3 hours of sleep at a time because of pain.
- He is still waiting for an MRI request from his doctor.
- The list of medications included medications to treat depression, nerve pain, and diabetes.

Need for Help

The general practitioner reported in the PR and AR that:

- The appellant lives “with his brother at present” and the help required for DLA is provided by the appellant’s family.
- Describing the help required where none is available, the general practitioner wrote “...transportation- transit is very difficult, no other option; grocery shopping- transportation and carrying groceries.”
- The equipment or devices the appellant routinely uses to help compensate for his impairment are crutches and there is no indication of equipment required but not currently being used.

Additional Information

In his Notice of Appeal dated March 23, 2016, the appellant expressed his disagreement with the ministry’s reconsideration decision and wrote that he needed an extension as he wants his doctor’s signature on his conditions. He is not able to do house work or any type of lifting. He has a person helping him out with everything.

At the hearing, the appellant stated that:

- His depression is back. His condition is getting worse and he is in constant pain. He gets severe pains down his back and in his legs from his diabetes.
- He is on a special diet due to his diabetes. He has applied for additional funding from the ministry. He gets \$590 a month from the ministry but, because his medications cost \$400 per month, he can barely get by.
- He cannot sit in a chair for more than 30 minutes at a time.
- He is still waiting for a neurosurgeon's diagnosis but he thinks that it might be 6 months before he can get a referral. He is still waiting to get an MRI done.
- He cannot work anymore. He keeps falling down from the nerve pain. He has been losing his equilibrium and falling down a lot lately. He sometimes falls down once a week and sometimes daily or twice a day.
- His brother helps him with all his DLA. He moved in with his brother. His brother is retired and does everything for him. For example, he assists the appellant with going to the toilet, does all the cleaning and makes his bed. His brother cooks for him. His brother's assistance is required every day and his brother goes with him everywhere.
- For the last 2 years, he has been taking 39 pills a day for the pain.
- He uses the crutch whenever he goes outside. Inside he usually relies on the walls for support when moving around the house, but he uses the handrail to go up and down the stairs and he is very slow. When he is inside, if there are no railings, he has to crawl up the stairs.
- He also sometimes uses a cane which can also stabilize him.
- The appellant left the PWD application forms with the doctor to complete and then picked them up later. He met with the doctor last week to have him sign that he agrees with the description of the impacts to his DLA and the doctor told him it was not necessary and that he should just explain everything to the panel himself.
- In the last 5 months, his condition has gotten much worse. He is getting injections in his back and yet the pain is getting worse. His knees are now “bad” with pain.

The ministry relied on its reconsideration decision, as summarized at the hearing. At the hearing, the ministry stated that the general practitioner indicated in the AR that he has an extensive history of in office visits with the appellant overly nearly 3 years.

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 PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In the reconsideration decision, the ministry found that the appellant has a severe physical impairment but his DLA are not, 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, it could not be determined that 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 person with disabilities (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;

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- (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.

At reconsideration, the ministry was satisfied that the information provided is sufficient evidence of a severe physical impairment.

Severe Mental Impairment

The appellant did not directly advance a position that he has a severe mental impairment.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment as required by Section 2(2) of the EAPWDA. The ministry wrote that the general practitioner did not diagnose a mental impairment or brain injury and did not assess major impacts to cognitive, emotional or social functioning.

Panel Decision

The general practitioner did not diagnose the appellant with a mental disorder; however, the general practitioner indicated that there are significant deficits with cognitive and emotional function in the areas of language and emotional disturbance, with a comment that the appellant has "depressed mood, physical inability to steady hand to write." Regarding daily impacts to cognitive and emotional functioning, the general practitioner assessed no major impacts to functioning, with moderate impacts to bodily functions and emotion. The general practitioner commented "sleep- severe disturbance due to pain; toileting- difficult to wipe due to balance; depression secondary to situational loss of function." At the hearing, the appellant stated that his depression "is back" as his condition is getting worse.

Regarding the DLA of social functioning, the general practitioner reported that the appellant is independent in all areas and, although he has marginal functioning in his immediate and extended social networks, the general practitioner did not provide any explanation or description of impacts. The appellant has motor difficulties with communication, described as "due to neuropathy- currently under neurological investigation" but the appellant is assessed with a good ability to communicate in speaking, reading and hearing, and satisfactory ability with writing.

Given the absence of a definitive mental health diagnosis, the situational nature of the mental health condition, and insufficient evidence from the general practitioner of impacts to the appellant's cognitive and emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his severe physical impairment directly and significantly restricts his ability to perform DLA on an ongoing basis to the extent that he requires the significant assistance of another person, namely his brother.

The ministry's position is that the information from the prescribed professional does not establish that the appellant's severe physical impairment significantly restricts his DLA either continuously or periodically for extended periods. The ministry acknowledged that the appellant experiences restrictions as a result of his physical health conditions but argued that the general practitioner reported that a majority of the appellant's DLA are performed independently or take 2 to 3 times longer than typical, which is not indicative of significant restrictions to DLA.

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 DLA, continuously or periodically for extended periods. In this case, the general practitioner is the prescribed professional. 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, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the appellant's circumstances, the general practitioner reported in the PR that the appellant has not been prescribed medications and/or treatments that interfere with his ability to perform DLA. The general practitioner wrote that the appellant has "...severe bilateral foot and leg pain; unable to easily get out of bed, severe mobility limitation- cannot walk more than 50 m. without rest, severe rest pain- unable to maintain one position for more than 15 minutes, severe pain at night- cannot sleep more than 2 hours straight, uses a crutch to walk, go up stairs; severe neuropathic abdominal and back pain." In the AR, the general practitioner confirmed that the appellant uses an assistive device for walking indoors and walking outdoors and noted that the appellant "uses crutch for balance." In his Request for Reconsideration, the appellant wrote that he cannot stand or walk for any distance at all, that he could walk half a block at a time as long as it is not uphill. The ministry pointed out that the general practitioner, who has an extensive history with the appellant over the last 3 years, did not indicate that other equipment is required but not currently used, such as a cane or a walker or a wheelchair, which might be more effective for addressing balance issues.

The general practitioner reported that the appellant is independently able to perform every task of some DLA, specifically: meals (meal planning, food preparation, cooking, and safe storage of food), paying rent and bills (including banking and budgeting), and managing medications (filling/refilling prescriptions, taking as directed, and safe handling and storage). At the hearing, the appellant stated that his brother now helps him with all his DLA, including preparing meals, and goes with him everywhere. This is not consistent with the assessment by the general practitioner and the appellant stated at the hearing that the general practitioner would not sign his description of the impacts to his DLA. For the personal care DLA, the general practitioner reported that the appellant is independent with the tasks of dressing, feeding self and regulate diet. He takes significantly longer than typical (note: 2 to 3 times longer) with grooming, bathing and toileting and significantly longer with transfers in/out of bed (note: "weakness and pain cause difficulty") and with transfers on/off of chair. At the hearing, the appellant stated that his brother helps him with toileting; however, the general practitioner indicated it takes the appellant longer with this task, with no assistance required.

Regarding the basic housekeeping DLA, the general practitioner indicated that the appellant requires periodic assistance from another person with both housekeeping and laundry, but he does not provide an explanation or description to allow the ministry to determine that the periodic assistance is

required for extended periods of time. For the shopping DLA, the general practitioner reported that the appellant is independent with reading prices and labels, making appropriate choices, and paying for purchases and he uses an assistive device for going to and from stores (note: “crutch”) and requires continuous assistance from another person with carrying purchases home. For the transportation DLA, the appellant is independent with the task of using transit schedules and arranging transportation and he takes significantly longer than typical with getting in and out of a vehicle and with using public transit (note: “walking up stairs is painful”). At the hearing, the appellant stated that if there are no handrails, he would have to crawl up the stairs.

In the additional comments to the PR, the general practitioner wrote that “in addition to the lower extremity symptoms which are attributable to his imaging-verified lumbar degenerative disease, [the appellant] is suffering from thoracic neuropathic symptoms. These cause additional disability and are being investigated by a neurologist, but even without these symptoms, [he] would feel [the appellant] is disabled from working.” The general practitioner summarized the appellant’s symptoms as restricting him from working, and the panel notes that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR. At the hearing, the appellant stated that his condition has gotten much worse in the six months since the PWD application was completed and that he is still waiting for an MRI to be completed and for a consultation with a neurosurgeon. While the appellant described a need for assistance with many of his DLA, this has not been confirmed by the general practitioner in the PR or AR and there was no further evidence from the general practitioner available at the hearing to provide an update.

Considering the available evidence of the general practitioner as the prescribed professional, the panel finds that the ministry was reasonable to conclude that the appellant is independent with most of the tasks of DLA and that some tasks take him longer or require unspecified periodic assistance, which is not sufficient evidence of significant restrictions. Therefore, the panel finds that the ministry reasonably concluded that there is insufficient evidence from the prescribed professional to show that the appellant’s overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant’s position is that he requires the significant assistance of another person to perform DLA, namely his brother with whom he currently lives.

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 from other persons.

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. 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 panel finds that the evidence of the appellant’s general practitioner, as the prescribed professional, establishes that the help required for DLA is provided by the appellant’s brother. Describing the help required where none is available, the general practitioner wrote “...transportation-transit is very difficult, no other option; grocery shopping- transportation and carrying groceries.” The equipment or devices the appellant routinely uses to help compensate for his impairment are

crutches, and there is no indication of equipment required but not currently being used.

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, 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.

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 pursuant to Section 2(2) of the EAPWDA was reasonably supported by the evidence, and therefore confirms the decision.