

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated March 8, 2016 which held that the appellant did not meet 2 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years. The ministry was also satisfied that the appellant has a severe physical impairment. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2

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

PART E – Summary of Facts

Information before the ministry at reconsideration

- A PWD application comprised of the appellant's Self-report (SR) dated September 14, 2015, as well as a Physician Report (PR) and an Assessor Report (AR) both dated September 4, 2015 and completed by the appellant's general practitioner (GP) of 3 years.
- Respiratory Report (dictated November 30, 2013) which concluded that the test results were compatible with a diagnoses of COPD and asthma. Smoking cessation recommended.
- Psychiatrist Consult respecting a March 10, 2015 appointment with the appellant's psychiatrist (the psychiatrist).
- Diagnostic Imaging Report (dictated August 20, 2015).
- Psychiatric Progress Note respecting an August 25, 2015 appointment with the psychiatrist.
- March 3, 2016 self-report submitted at reconsideration (reconsideration submission).
- March 4, 2016 note from the GP stating that he has read the appellant's reconsideration submission and feels it is accurate.
- March 8, 2016 reconsideration submission from the appellant's advocate comprised of argument. (Argument is set out in Part F of this decision)

Additional evidence submitted on appeal and admissibility

Section 22(4) of the Employment and Assistance Act (EAA) limits the evidence that the panel may admit to information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration.

Prior to the hearing, the appellant provided (1) a 4-page typewritten advocate's submission comprised of argument based on the information available at reconsideration and (2) a Psychiatric Progress Note respecting a February 15, 2016 appointment from the psychiatrist. The psychiatrist notes that continuing financial struggles (difficulty getting employment and disability payments) as well as a continuing unstable housing situation are the stressors triggering the appellant's current symptoms. The psychiatrist confirms that the appellant has major depression recurrent, currently in relapse, and that now his alcohol abuse is only in early partial remission.

At the hearing, the appellant described limitations to his functioning caused by his COPD, the inability to lift his right arm, and his rib fractures.

The ministry did not object to the admission of the Psychiatric Progress Note. Both the Progress Note and the appellant's oral testimony tended to corroborate the information available at reconsideration and were therefore admitted as evidence "in support" in accordance with section 22(4) of the EAA.

The ministry did not provide additional evidence at the hearing and relied on its reconsideration decision.

Summary of relevant evidence

Diagnoses (date of onset in brackets)

The GP diagnoses COPD (2005), osteoarthritis/back pain (2007), depression, recurrent polysubstance abuse (March 2014), and rib fractures (August 2015).

Mental Impairment

The GP provides the following information.

- The appellant has been limited by depression, substance abuse, and limited education. He has been living marginally for a few years and has been appropriately seeking help from his GP, psychiatrist, and community support services.
- There are no difficulties with communication.
- He has significant deficits with cognitive and emotional function for 4 of 11 listed areas – memory, emotional disturbance, motivation, and impulse control, “mostly related to depression & substance abuse.”
- The appellant’s ability to read and write is poor. Speaking and hearing are good.
- A moderate impact on daily functioning is reported for emotion and memory. A minimal impact is reported for 7 other aspects of cognitive and emotional functioning, including motivation and impulse control. No impact is reported for the 5 remaining aspects. The appellant has chronic low mood and is prone to anger. Impulse control is an issue, prone to abusing alcohol and drugs, though lately he has been working with a psychiatrist and taking medication.
- For social functioning, the appellant is independently able to develop and maintain relationships and interact appropriately with others. Periodic support/supervision is required for making appropriate social decisions (“occ. Makes bad choices with alcohol + drugs, + company he keeps”) and ability to deal appropriately with unexpected demands (“he’s seeking help from local mental health agency”). Ability to secure assistance from others was left blank.
- He has marginal functioning with both immediate and extended social networks.

Both the March 10, 2015 Psychiatrist consult and the August 25, 2015 Psychiatric Progress Note assessed the appellant as having had 2 or 3 previous episodes of major depression, currently in relapse and as having a history of polysubstance abuse which is in early remission. Both describe some of the stressors impacting the appellant at the time, with the most recent noting that the appellant has been left owing his former roommate’s share of the rent and that due to his broken ribs he is unable to pick up part time work to pay off the rent.

DLA

The GP reports that inhalers, anti-depressants, and mild opiate analgesics interfere with the appellant’s ability to perform DLA. Information specific to the DLA prescribed in the legislation is as

follows.

Move about outdoors and indoors

- AR - The appellant is able to:
 - Walk 2 to 4 blocks unaided. Walking outdoors takes 2-3 times longer than typical as he gets winded easily. Standing and walking indoors are managed independently.
 - Climb 2 to 5 steps unaided (takes 2-3 times longer than typical);
 - Lifting is limited to 5 to 15 lbs. and takes 2-3 times longer than typical. Carrying and holding are managed independently.
 - Remain seated for 2 to 3 hours.
- Reconsideration submission - He recently walked 2-3 blocks and had to stop twice due to breathlessness. He estimates that other people walk 2-3 times faster than him, not including the time he has to stop due to breathlessness. Walking upstairs to an upstairs apartment is too much for him. Osteoarthritis in his neck makes it difficult to lift any weight. Lifting is particularly bad. Lifting his arms is painful and slow and if he tries to lift 2kg he has to stop all the time due to pain. Dust from gravel roads “kills” him.
- At the hearing, the appellant confirmed that neighbours burning wood for heat in the winter, gravel dust, exhaust fumes, and summer forest fires are problematic. He attended the emergency department twice last summer due to the smoke from fires. When exposed to irritants he has had to use his inhalers more than the recommended 4x daily. Sometimes he is gasping for air.

Personal care

- AR - All listed tasks are managed independently.
- Reconsideration submission – Can’t lift his right arm up to put a sweater on and when trying to wash his hair. He must use his left arm to get himself out of bed.
- At the hearing, the appellant stated that he uses shower bars when bathing and a scrub brush.

Basic Housekeeping

- AR - Laundry is managed independently. Basic housekeeping requires continuous assistance from another person or unable (“needs to use air filter + go slowly”).
- Reconsideration submission - Needs someone to drive him to the laundromat as he can’t carry things there himself and can’t fold sheets. He has someone who cleans his place sometimes and, due to his COPD, he must leave his home when it is being cleaned due to the dust and cleaning chemicals.
- At the hearing, the appellant clarified that he pays a person to clean his home once a week. He must leave when oven cleaner is used and he cannot use really strong cleaning products. He can manage washing his clothes, but he cannot carry his laundry to the Laundromat, which is 2 km from his home.

Shopping

- AR - Going to and from stores and carrying purchases home take significantly longer due to dyspnea. Periodic assistance is required for reading prices and labels (poor literacy). Making appropriate choices and paying for purchases are managed independently. Occasionally gets

rides to and from market.

- At the hearing, the appellant stated that there are two hills between his home and the grocery store and that he must stop half way up the first hill due to shortness of breath. He needs a ride to the grocery store when getting a lot of groceries and walking to the store for a little bit of groceries leaves him done for the day. He accesses the food bank once a month but it is not close to his home.

Meals

- AR - All listed tasks are managed independently.
- Reconsideration submission - Struggles to get things out of the oven or just doesn't do it. He struggles with chopping anything that requires a little strength.
- At the hearing, the appellant stated that he has no problem making spaghetti and prepares simple meals, not having a lot of money, but that he cannot manage taking heavy items out of the oven, such as a turkey.

Paying Rent and Bills

- AR - All tasks require periodic assistance from another person (most issues relate to lack of money).
- At the hearing, the appellant stated that finances are more of an issue than his GP reported given that the appellant has little money.

Medications

- AR – All tasks - filling/refilling prescriptions, taking as directed, and safe handling and storage are managed independently.

Transportation

- AR - All listed tasks are managed independently – getting in and out of a vehicle, using public transit, using transit schedules.

Social Functioning (described under Mental Impairment)

Need for Help

The GP reports that assistance provided by other people is from a health authority and community service agencies, noting that the appellant is working with a caseworker at mental health. Puffers for COPD are identified as assistive devices. The appellant does not require an assistance animal.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that:

- a severe mental impairment was not established;
- the appellant's daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require help, as it is defined in the legislation, to perform DLA?

Relevant Legislation

EAPWDA

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

EAPWDR

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

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

Severe Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence, including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed

professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define “impairment,” the PR and AR define “impairment” as a “loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.” While this is not a legislative definition, and is therefore not binding on the panel, in the panel’s opinion it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

The legislation does not require the existence of both a severe physical and a severe mental impairment, as either is sufficient to meet this legislative criterion, and the ministry determined that the appellant has met this criterion having been satisfied of a severe physical impairment. However, the panel will still consider the reasonableness of the ministry’s determination that a severe mental impairment was not established.

Mental Impairment

Appellant’s Position

On appeal, the appellant did not advance an argument respecting the severity of mental impairment because the ministry acknowledged a severe [physical] impairment.

Ministry’s Position

The ministry acknowledges that the appellant is currently experiencing limitations to his cognitive and emotional functioning due to depression and limited education; however, based on the assessments provided by the GP, the supplemental medical information, and the submissions from the appellant and his advocate, a severe impairment of mental functioning has not been established. In particular, the ministry notes that although the GP indicates significant deficits to cognitive/emotional functioning in the areas of motivation and impulse control, noting that impulse control is an issue, he indicates a minimal impact on daily functioning in these areas. Further, while moderate impacts are indicated for two areas of cognitive/emotional functioning, minimal impacts are reported for seven areas, and no impacts to five areas; cumulatively, this is not considered indicative of a severe impairment of mental functioning. With regards to social functioning, the GP does not describe the frequency/duration of the periodic support/supervision required for making appropriate decisions and dealing appropriately with unexpected demands. While the GP reports marginal functioning with both immediate and extended social networks, no safety issues are described with regards to social functioning and the appellant is reported as independently able to develop/maintain relationships and interact appropriately with others.

Panel Decision

The appellant is diagnosed with major depression recurrent in relapse and polysubstance abuse in early partial remission.

While the GP indicates that these mental conditions result in significant deficits to cognitive and emotional functioning in 4 areas, the GP does not report that any of the deficits have a major impact on daily functioning and that, with the exception of a moderate impact for emotion and memory, there is little or no impact on the remaining 12 areas.

For the two DLA specific to a person with a mental impairment or brain injury – make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively – the GP reports that there are no difficulties with communication, including due to cognitive causes, and that the appellant independently manages the decision-making tasks of all DLA, noting that the restriction with finances is due to lack of money. Respecting social functioning, as the ministry notes, despite having marginal functioning with immediate and extended social networks, the appellant is reported as independently able to develop/maintain relationships and interact appropriately with others. For the 2 of 5 aspects of social functioning for which periodic support/supervision is required - making appropriate decisions and dealing appropriately with unexpected demands -- the GP does not describe the frequency/duration of that support though he does note that the appellant occasionally makes bad social choices. While the GP does not “tick” any of the boxes for “able to secure assistance from others,” he repeatedly reports that the appellant is appropriately seeking help from health care professionals.

Based on this information, the panel finds that the ministry reasonably determined that the information respecting the appellant’s cognitive, emotional and social functioning does not establish that the appellant has a severe mental impairment.

Restrictions in the ability to perform DLA

Appellant’s Position

The appellant’s advocate argues that in accordance with section 8 of the *Interpretation Act*, a “large and liberal” interpretation of the legislation should be undertaken with an eye to assisting a man with a recognized severe impairment.

Since the biggest issue appears to be the ministry’s contention that “it has not been established that daily living activities are *significantly* restricted”, it makes sense to define “significant.” The advocate cites the Merriam Webster online definition of “significant” which in part reads “having or likely to have influence or effect” and “probably caused by something other than mere chance.” The advocate argues that the appellant has provided sufficient information to establish that his severe impairments restrict him in a way that is influential to his ability to function and that his limitations are caused by more than mere chance, as they are caused by his severe disability.

The evidence of the significant symptoms from the pain associated with his osteoarthritis and his

COPD demonstrate that he is restricted in a significant way, every day. That is, the appellant's symptoms are not periodic, they are continuous and manifest in the need to take breaks periodically. The advocate points to the evidence that the appellant doesn't simply get out of bed but instead first requires his puffers. She also notes the information in the appellant's reconsideration submission, corroborated by the GP, that it takes 2-3 times longer to walk, with associated breathlessness, resulting in the need for assistance with carrying and transportation for shopping. Additionally, the GP reports the need for continuous help with housekeeping, which is further explained by the appellant. The advocate also points to the appellant's evidence of the restrictions arising from pain and the ability to lift, again corroborated by the GP, resulting in limitations with meals and aspects of personal care.

The advocate takes particular issue with the ministry's assertion that the GP's statement respecting occasionally getting rides to and from the market does not establish that such transportation is required. The advocate argues that the ministry has failed to take the "big picture" approach to the PWD application as required by *Hudson v. Employment and Assistance Appeal Tribunal*. Given the GP's information showing the need for transportation for shopping and that dyspnea occurs getting to and from stores, it has been clearly demonstrated that transportation to the market is required because of the appellant's medical condition.

The legislation does not require that most or the majority of DLA be restricted but, even if the number of DLA were the issue, the appellant has significant restrictions with 5 of 8 DLA. The advocate concludes that, in light of the evidence respecting his restrictions in preparing meals and performing personal hygiene, the need for help with shopping and moving about outdoors (in the form of rides) and housework (laundry, due to his inability to carry, as well as the help he receives with housework), the ministry's decision is unreasonable.

Ministry's Position

The ministry acknowledges that the appellant is currently experiencing limitations to DLA which involve lifting. However, there is not enough evidence to confirm that the appellant has a severe impairment that *significantly* restricts his ability to perform DLA *continuously or periodically for extended periods*.

In reaching its decision, the ministry acknowledges that the legislation does not specifically require the frequency and duration of restrictions be explained but that it finds this information valuable in determining the significance of the restrictions. To determine if the DLA criterion is met, the ministry relies on the medical opinion and expertise from the medical practitioner and other prescribed professionals.

The ministry points to the DLA and the specific tasks within each DLA that the GP reports are managed independently, and also notes that the GP does not describe how much longer than typical the appellant takes with going to/from stores and carrying purchases home or the frequency of the periodic assistance required with reading prices/labels and all tasks of paying rent/bills. The ministry also notes that the GP's narrative suggests that assistance with paying rent/bills is due to finances not impairment, and argues that occasionally getting rides to and from the market does not establish that the appellant requires vehicle transportation to the market. The ministry also notes that the

appellant's reconsideration submission does not describe how much longer than typical he takes with dressing, bathing, and transferring in/out of bed.

Panel Decision

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

In this case, both the appellant's GP and the psychiatrist are prescribed professionals; however, only the GP has provided information respecting the appellant's ability to manage the prescribed DLA, in the PWD application and by his endorsement of the appellant's reconsideration submission. As noted by the advocate, "significantly restricted" is not defined in the legislation. The advocate submits that "significant" means "having or likely to have influence or effect" and "probably caused by something other than mere chance", and that the appellant has provided sufficient information to establish that his severe impairments restrict him in a way that is influential to his ability to function and that his limitations are caused not by mere chance but rather by his severe disability. The panel does not find the definition relied on by the advocate reflective of the plain meaning of "significant" or to be reflective of an impact commensurate with disability. The plain meaning or understanding of "significant" is more appropriately reflected by the Canadian Oxford Compact Dictionary definition of "significant" as "of great importance or consequence."

With the exception of the appellant's ability to manage finances, which both the GP and the appellant attribute to lack of money, not mental or physical impairment, the ministry accepts that the reported restrictions with DLA are directly caused by the appellant's impairments. At issue, is whether the appellant is significantly restricted either continuously or periodically for extended periods.

Aside from managing dressing and bathing with some difficulty, and needing to use his left arm to get out of bed, the appellant manages most tasks of personal care without restriction. And as the ministry notes, neither the GP nor the appellant's reconsideration submission describe how much longer than typical the restricted tasks take. Similarly, while the appellant is limited in his ability to place heavier items in and out of the oven and has difficulty with some chopping, he is able to independently prepare simple meals.

Respecting basic housekeeping, the appellant's evidence is that he can manage the tasks associated with laundry, though folding sheets is difficult, but that he is unable to carry his laundry 2 km to the laundromat, which reflects a limitation in terms of accessing the laundromat rather than a restriction in the ability to manage laundry itself. The GP reports that the appellant requires an air filter or must go slowly when performing basic housekeeping and the need for continuous assistance. The appellant clarified that he pays for one hour of weekly cleaning, but this has not been confirmed by the GP.

Most tasks of shopping are managed with little or no assistance; however, those tasks involving mobility and lifting – going to and from stores and carrying purchases home - take longer due to dyspnea. The GP comments that the appellant occasionally gets rides to and from the market and at the hearing, the appellant provided further clarification when explaining that he needs rides if he is getting a lot of groceries and that both the grocery store and the food bank are some distance from his home.

The GP has not identified restrictions resulting from the appellant's physical and mental conditions for the medications, paying rent and bills, or transportation. As discussed under the heading "Mental Impairment," the information respecting the appellant's cognitive, emotional and social functioning was reasonably viewed by the ministry as not reflecting a significant restriction for the two DLA specific to a mental impairment.

The panel finds that the information establishes that the appellant is clearly limited in his ability to manage DLA tasks that involve mobility and lifting more than 5lbs, such as accessing his laundromat and food sources, which are not nearby. However, the appellant's GP reports the appellant as managing most DLA tasks independently and for those for which assistance is required or which take longer, the GP has either provided narrative suggestive of some independence or has not indicated how much longer than typical a task takes. For example, while the GP notes that continuous assistance is required for basic housekeeping, his comment that the appellant "needs to use air filter + go slowly" suggests that the appellant can manage some housekeeping without assistance. The GP has not indicated the need for the use of any assistive devices to perform DLA, and while the appellant requires puffers, they are more properly characterized as medication, not assistive devices.

Based on the above analysis, the panel finds that the ministry reasonably determined that the assessments do not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant argues that because of his limitations, he needs help with shopping and moving about outdoors (in the form of rides) and laundry (due to his inability to carry) and that he already gets help with housework due to the limitations arising from his COPD. At the hearing, the appellant's advocate also argued that the appellant requires the use of medications – particularly the puffers for his COPD – to even function; such reliance on medications needs to be considered when assessing the need for help in performing DLA.

The ministry notes that the use of assistive devices is described by the GP as "only puffers for COPD" and concludes that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of 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. Under this definition, medications are not considered “help.”

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)((b)(ii) 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, was reasonably supported by the evidence, and therefore confirms the decision.