

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated April 27, 2016 which found that the appellant did not meet all of the statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a Person With Disabilities (PWD). The ministry found that the appellant met the age requirement and that he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or physical impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

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

PART E – Summary of Facts

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:
 - The Applicant Information and Self-report ("SR") completed by the appellant and dated June 7, 2015;
 - The Physician Report ("PR") dated July 26, 2015 and the Assessor Report ("AR") dated October 13, 2015, both prepared by the appellant's general practitioner ("GP") since 2008 and who treated the appellant 2-10 times in the 12 months prior to completing the PR and AR;
2. The appellant's Request for Reconsideration (RFR) dated March 30, 2016 in which he states that:
 - He did not consider his cane to be an aid when speaking to his GP about functional skills as he misunderstood 'aid' to be another person directly physically supporting him;
 - Counters, handrails (which have been installed around his home), shelves, carts and other furnishings are used for support;
 - Assistance is required for shopping 1-2 times per week as he is unable to manage on his own;
 - He cannot stand for more than a few minutes, walk or climb stairs unaided (uses a cane);
 - The disabilities have been prolonged and aggravated his depression;
 - Although he is able to speak, he finds communicating frustrating due to difficulty in being understood or understanding others; and
 - His landlady manages his household chores and laundry.
3. 2-page letter from the GP ("the letter") signed and dated April 13, 2016, which states in part:
 - Due to not seeing the use of a cane as an aid and shame, the appellant under reported his abilities;
 - The appellant suffers from chronic back pain which has gotten progressively worse over the past year;
 - The reason for the appellant's disability is the back-pain and arthritis pains of his spinal column that have restricted and slowed down his mobility and ability to sit (can only sit for about 1 hour) and stand (can only stand for about 10 minutes);
 - He can only walk less than 30 meters without his cane and cannot climb 5 stairs without a handrail or another person for stability;
 - He is unable to perform normal daily functions without the assistance of his cane or another person on a regular basis;
 - "I have witnessed [the appellant] on many occasions, while visiting my office and he has significantly declined over the last year and he is at least 80% slower in all his activities compared to a healthy individual of the same age group"; and
 - The appellant's condition is not expected to improve. Rather, deterioration in all his activities is foreseeable.

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with lumbar backache with right SI joint pain with an onset date of 2008 and mood disorder - depression with an onset dated of 2014.

Physical Impairment

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In the SR, the appellant describes his disability as including “back pain, right knee problems, right hand problems, hip pain, right ankle problems, anxiety and depression”.

In the PR, the GP states that the:

- appellant has chronic lower back pain. This restricts his ability to do strenuous work, lift [illegible] or walk more than 2 blocks before having to rest. Also pain in shoulder area which restricts lifting;
- on-going prescribed opioids interfere with his ability to perform DLA as they cause drowsiness;
- back pain is likely to continue for more than 2 years;
- appellant can walk 1-2 blocks unaided, climb 5 stairs unaided, lift 5-15 lbs. and remain seated for less than 1 hour;

In the AR, the GP reports that the appellant:

- is independent in walking indoors, standing, lifting, and carrying and holding (limited to 15lbs.);
- uses an assistive device for walking outdoors (“uses a cane”);
- uses an assistive device for climbing stairs and takes significantly longer (“needs handrails, slower than average”); and
- receives assistance from friends, uses a cane and bath aid as assistive devices and does not have an assistive animal;

Mental Impairment

In the SR, the appellant describes that the inability to work has caused major depression, anxiety, panic attacks, and mood swings.

In the PR, the GP has diagnosed the appellant with the mood disorder – depression and notes:

- “Mood has been low due to chronic pain”;
- there are no difficulties with communication and emotional disturbances are the significant deficits with cognitive and emotional functions;
- and social functions, which are periodically restricted.

In the AR, the GP notes that the appellant’s ability to speak, read, write and hear are good and that he:

- has no impacts to all listed items under cognitive and emotional functioning except memory and other emotional or mental problems which are listed as moderate impact (“low mood due to chronic pain and inability to work” and some symptoms of PTSD [post-traumatic stress disorder]); and
- is independent in all areas of social functioning with good functioning with immediate and extended social networks.

Daily Living Activities

In the PR, the GP has indicated that with the exception of daily shopping, and mobility outside the home which are periodically restricted, the rest of the appellant’s DLA are not restricted. In the comment section the GP describes the appellant’s restriction is due to back pain with some days worse than others and affected by weather changes. Back pain and mood affects him moderate to severe at times.

In the AR, the GP notes that the appellant is independent in all DLA except laundry and going to and from stores which require occasional periodic assistance and basic housekeeping is independent but takes significantly longer. For carrying purchases home and getting in and out of a vehicle the GP has not indicated if the appellant is either independent or requires periodic or continuous help. Rather the GP has only indicated that these activities take significantly longer;

Need for Help

In the PR, the GP notes that the appellant does not require any prostheses for his impairment. In the AR, the GP indicates that the appellant receives help required for DLA from friends and through the use of an assistive device namely a cane, and bathing aids.

Evidence On Appeal

In the Notice of Appeal (NOA), signed and dated May 10, 2016, the appellant states in part that his “disability is serious enough to warrant help and cannot be fully evaluated on paper”.

Appellant’s Evidence At Hearing

The appellant described his difficulty in adjusting to his medical condition and that his doctor stated the condition will only get worse. He also stated that:

- given his medical condition, he cannot get gainful employment;
- he uses a cane to go to the washroom, can shower and get up with the use of handrails, sits multiple times when preparing meals; walking is a chore and he has to ask for help;
- he is upset, moody and angry but does not want to be;
- he can drive but not for long periods; and
- somedays he needs to take medication to sleep because the pain is unbearable.

The ministry relied on the reconsideration decision.

Admissibility of Additional Evidence

Oral Evidence

The appellant gave oral evidence at the hearing. He described his physical condition, the associated impairment and its impact on his ability to perform tasks of DLA that corroborated his previous evidence. The panel therefore finds that the appellant’s oral evidence is admissible as it is in support of the information and records that were before the minister when the decision being appealed was made, pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's Reconsideration Decision, which found that the appellant is not eligible for designation as a PWD under section 2 of the *EAPWDA*, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe mental or physical impairment;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the *EAPWDA* as follows:

Persons with disabilities

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

Section 2(1)(a) of the *EAPWDR* defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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

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

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

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

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

Positions of the Parties

At the hearing, the appellant argued that he is in pain which causes him to be unable to live his life as he normally did.

The ministry's position as set out in the Reconsideration Decision is that the appellant is ineligible for designation as a Person With Disabilities on the basis that the appellant had not satisfied the legislative requirements in the *EAPWDA*.

Severity of impairment

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning. In making its determination, the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the GP.

Severity of physical impairment

The appellant takes the position that he is in pain on a daily basis and that his back pain constitutes a severe physical impairment.

The ministry's position as set out in the Reconsideration Decision is that the evidence as a whole, including the appellant's functional skill limitations, does not support a finding that the appellant has a severe physical impairment. It argues that the information found in the PWD application demonstrates moderate impairment and the GP's letter is not significantly different from the original application.

Panel Decision

The panel notes that the letter is dated April 13, 2016 and in the original PWD application the PR is dated July 26, 2015 and the AR is dated October 13, 2015. The letter is therefore the most current information before the ministry at the time of reconsideration. The panel finds that the information in the GP's letter captures a different level of functioning from the original PWD application and does support a finding of severe impairment. Specifically, the letter explains that the information in the PWD application was incomplete and that the major reason for the appellant's disability is his back pain which has restricted and slowed his mobility. The GP has stated that the appellant's medical condition is progressively getting worse and has deteriorated significantly over the past year. The GP goes on to explain that unaided (i.e. without his cane) the appellant can only walk less than 30 metres, cannot climb even 5 stairs or perform normal daily functions. The GP also states that the appellant always has to have help from friends with shopping and is at least 80% slower in all his activities compared to a healthy individual of the same age group.

In this case, the panel finds that the GP has provided evidence to demonstrate that the appellant's medical condition results in restrictions to his ability to function independently or effectively and that he requires help. Therefore the panel finds that the ministry was not reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment.

Severity of mental impairment

The appellant argues that he is upset, moody and angry.

The ministry's position as set out in the Reconsideration Decision is that the evidence does not support a finding that the appellant suffers from a severe mental impairment.

Panel Decision

On review of the evidence, the GP diagnosed the appellant with a mental impairment or condition - depression. In the PR, the GP indicates that the appellant has significant deficits with cognitive and emotional function in the area of emotional disturbances. In the AR, the GP indicates that the appellant experiences moderate impacts in the area of motivation and other emotional or mental problems with the statement "mood low due to chronic pain and inability to work...with some symptoms of PTSD", but that a major impact on daily functioning is not reported for any aspect of cognitive and emotional functioning. The GP also indicates that the appellant is independent in all listed areas of social functioning. The panel notes that in the GP, he does not specifically speak to how a mental impairment results in restrictions to the appellant's ability to function independently or effectively. The panel also notes that in the letter provided by the GP, he does not specifically speak to a mental impairment or how a mental impairment affects the appellant's DLA. The panel also

notes that the appellant has not been diagnosed with PTSD.

After reviewing the evidence as a whole as set out above, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe mental impairment as provided by section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

The appellant argues that he is restricted in his ability to perform tasks of DLA due to the pain he suffers from his back pain.

The ministry's position as set out in the Reconsideration Decision is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by his physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence at the hearing and in his RFR of the challenges that he faces with DLA, the legislation is clear that to satisfy the criteria the evidence must come from a prescribed professional. In the present case, this evidence has been provided by one prescribed professional - the GP.

DLA are defined in section 2(1) of the *EAPWDR* and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

The GP addresses DLA's in the PR and AR, and the letter but the ministry's analysis focuses on the PR and AR only. In the PR the GP has indicated that the appellant is periodically restricted in daily shopping, mobility outside the home. In the AR, the GP has indicated the appellant is periodically restricted in laundry and going to and from stores. The GP also indicates that the appellant takes significantly longer with basic housekeeping, carrying purchases home, dressing and getting in and out of a vehicle. The letter indicates that the appellant's physical functional abilities in terms of walking and standing are markedly worse than originally reported and the GP assesses the appellant as being 80% slower in all his activities than healthy individuals of the same age group. In his letter, the GP also states that it is documented that the appellant has had handrails installed in his house to help him get around and in and out of his bathroom, which the panel notes demonstrates that the appellant is restricted in his mobility in the house as well.

In making its decision in this matter the panel must consider the evidence that was before the ministry at reconsideration and therefore, considering the evidence of the GP as set out in the PR, AR and in particular the information provided in the letter, the panel concludes that the ministry did not

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

Help with DLA

The appellant argues that he requires help with the tasks of DLA with that help coming from his friends, and that he cannot perform his DLA without the use of handrails and his cane.

The ministry's position as set out in the Reconsideration Decision is that because it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period.

The GP has stated that the appellant cannot walk more than 30 metres or climb stairs without his cane, that the appellant uses bath aids and has had handrails installed in his home to help with mobility. As well, the GP has indicated that help from friends is always required for shopping and according to the appellant it is required 1-2 times per week. The GP also stated in his letter that the appellant relies significantly and all the time on mobility aids.

Given the panel's finding that the ministry did not reasonably determine that direct and significant restrictions in the appellant's ability to perform DLA has not been established, and that the evidence demonstrates that the appellant requires help from other persons and help aids to perform DLA, the panel finds that the ministry's conclusion that it cannot be determined that the appellant requires help to perform DLA as a result of restrictions, as defined by section 2(3)(b) of the *EAPWDA*, was not reasonable.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's Reconsideration Decision which determined that the appellant was not eligible for PWD designation under section 2 of the *EAPWDA* was not reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore rescinds the decision.