

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated April 19, 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 appellant was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

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 November 4, 2015;
 - The Physician Report ("PR") dated January 22, 2016 prepared by the appellant's general practitioner ("GP") of an unspecified amount of time and who treated the appellant 2-10 times in the 12 months prior to completing the PR; and
 - The Assessor Report ("AR"), date unspecified, prepared by a registered psychiatric nurse who has known the appellant for one visit.
2. Section 8 of the Interpretation Act.
3. 1-page summary of Hudson v. Employment and Assistance Appeal Tribunal (EAAT).
4. Medical Reports which include: discharge summary report dictated on July 29, 2015, operative report dictated on July 29, 2015, 2 diagnostic imaging reports dictated on July 18, 2015 and a follow up assessment report by the appellant's neurosurgeon dated September 25, 2015.
5. Request for Reconsideration (RFR) signed and dated April 8, 2016, describes the medical conditions the appellant suffers from and how they affect his functional ability.

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with cervical myelopathy (onset unspecified), C3 to C6 decompressive laminectomy (onset July 15) and anxiety (onset unspecified).

Physical Impairment

In the SR, the appellant describes his disability as including "neck pain, shortness of breath (SOB), depression, anxiety and fatigue".

In the PR, the GP states that the appellant has "intermittent numbness in his hands, pain in [his] neck that aggravates with physical activity, still numbness in fingers and walk with a cane if more than a mile walking". The GP indicates that the conditions are likely to continue for 2 years or more, and that the appellant uses a neck brace. The appellant can walk 1-2 blocks unaided on flat surfaces, climb 5+ stairs, lift under 2 to 7 kg, can remain seated for less than 1 hour and has no difficulties with communication. The GP adds that the appellant has not been prescribed any medication or treatment that interfere with his ability to perform DLA's and does not require any prostheses or aids for his impairment.

In the AR, the nurse indicates that the appellant is independent in all listed areas of mobility and physical ability but uses a cane and takes significantly longer with walking outdoors and takes significantly longer with climbing stairs.

Mental Impairment

In the SR, the appellant describes his mental impairments, impacts to his mental functioning and resulting restrictions in the ability to manage DLA.

In the PR, the GP diagnosed the appellant with anxiety and has indicated that he has significant deficits with cognitive and emotional function in the area of emotional disturbances. The GP indicates that the appellant is continuously restricted in the area of social functioning and states that the appellant "Does not like new people. Difficult to talk to new people. Does not like to be with new people". He also states that the appellant isolates himself.

In the AR, the nurse notes that the appellant's ability to read and hear are good, and speaking and writing are satisfactory. The nurse states that the appellant "suffers from depression" and that depression and SOB lessen his motivation to walk. In terms of cognitive and emotional functioning the nurse indicates that there are: major impacts to emotion and motor activity; moderate impacts to attention/concentration, memory, motivation, psychotic symptoms and other emotional or mental problems; and all other listed areas of cognitive and emotional functioning are either minimal impact or no impact. The nurse also notes that the appellant is independent in all aspects of social functioning listed on the PWD application and that working with a mental health clinician would be beneficial as it has in the past.

Daily Living Activities

In the PR, the GP also indicates that the appellant is restricted in all listed areas of DLA but without indicating whether the restrictions are continuous or periodic except for the areas of: personal care; meal preparation; basic housekeeping; mobility outside the home and social functioning, all of which have been indicated as continuous in terms of restriction.

In the AR, the nurse indicates that the appellant is independent in all areas of listed DLA but: takes 15 minutes longer to get dressed; uses a stool for bathing; takes 10% longer to transfer in and out of bed; takes 20% longer and uses a cane for basic housekeeping; takes 10% longer to in food preparation and getting in and out of a vehicle. The nurse also indicated that going to and from stores is both independent and continuously restricted with the note "needs someone to take him grocery shopping as he doesn't have a license".

Need for Help

In the PR, the GP notes that the appellant requires a neck brace as a prostheses or aids for his impairment. In the AR, the nurse indicates that the appellant does not receive help required for DLA from family members and friends but that he receives assistance through the use of assistive devices; namely a cane and a bath aid. The nurse also indicates that the appellant does not have a license and therefore needs help from other to go to the grocery store.

Evidence On Appeal

A Notice of Appeal (NOA) signed and dated April 29, 2016.

Appellant's Evidence At Hearing

The appellant's advocate reviewed the PR, AR and SR.

The ministry relied on the reconsideration decision and added that SOB has not been diagnosed by the GP and the information provided in the PR, AR and SR is inconsistent.

Admissibility of Additional Evidence

Oral Evidence

The appellant's advocate 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. The panel 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

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

The appellant's position is that he suffers from an on-going severe physical impairment that restricts his ability to perform DLA. He argues that his GP confirms all of the diagnoses and symptoms and that the nurse confirms the pain experienced, the impact of the pain on DLA, goes into depth to explain the mental impairment experienced and addresses the need for help from others and assistive devices. The appellant also argues that the GP confirms that all DLA are restricted and the nurse confirms that most DLA take significantly longer to complete and thereby the nurse has confirmed that DLA are restricted. Finally he argues that the ministry needs only the opinion of one prescribed professional to render its decision according to *Hudson v. EAAT*.

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*. Specifically, the information provided by the GP and nurse is not consistent.

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 and the nurse.

Severity of physical impairment

The appellant takes the position that he is in chronic pain on a daily basis and that his medical condition 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.

Panel Decision

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. In the PR the GP indicates that the appellant can walk 1-2 blocks *unaided*, climb 5+ stairs, lift 2-7 kg, sit less than 1 hour and walk a mile with a cane. In the AR, the nurse, who conducted an office interview with the appellant, indicates that the appellant is independent in all listed areas of mobility and physical ability but uses a cane and takes significantly longer with walking outdoors and takes significantly longer with climbing stairs with no indication that a cane is used. The nurse also states that the appellant can lift 20lbs.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently or effectively. Therefore the panel finds that the ministry was 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 suffers from depression, anxiety, and anxiety attacks which cause low energy and confusion.

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. Rather the evidence supports a finding that he suffers from cognitive and emotional functioning that are situational in nature and may lessen in the future.

Panel Decision

On review of the evidence, the panel notes that the GP indicates that the appellant suffers from anxiety whereas the nurse mentions anxiety but also focuses his comments on depression, which has not been diagnosed by the GP. The GP indicates that the appellant is continuously restricted in the area of social functioning whereas the nurse indicates that the appellant is independent in all aspects of social functioning listed in the PWD application. The nurse indicates that the appellant is either good or satisfactory in all areas of communication and that there are two areas of cognitive and emotional functioning that have major impacts, with the rest being moderate, minimal or no impact. In terms of DLA, neither the GP nor nurse has provided a enough evidence to demonstrate that a mental impairment significantly restricts the appellant's ability to perform his DLA. The panel finds that the evidence provided by the GP and nurse is conflictual which renders it difficult to establish that

evidence supports a severe mental impairment.

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 as a result of his medical conditions. The appellant also argues that the added requirement of an explanation of the frequency and duration of the restrictions is not required by the legislation. He argues that the nature of most mental and physical health conditions and resulting symptoms cannot be quantified or generalized to have a measured, expected rate of occurrence, and therefore it is reasonable that medical professionals would not provide such measurement.

The ministry's position as set out in the Reconsideration Decision is that there is not enough evidence to establish 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 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 two prescribed professionals - the GP and nurse.

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.

In addition, the GP and nurse appear to have differing opinions regarding DLA. In the PR the GP has indicated that the appellant is restricted in all listed areas of DLA and in the areas of personal care, meal preparation, basic housekeeping, and mobility outside the home are all continuously restricted. Yet in the AR, the nurse, who conducted an office interview with the appellant, indicates that he is independent in all listed areas of DLA but that he takes 15 minutes longer to get dressed, uses a stool for bathing, takes 10% longer to transfer in and out of bed, takes 20% longer and uses a cane for basic housekeeping, takes 10% longer to in food preparation and getting in and out of a vehicle. The nurse also indicates that going to and from stores is both independent and continuously restricted. Additionally, the GP indicates a lifting restriction of 5-15lbs and the nurse indicates a lifting restriction 20lbs. The panel finds that the appellant faces challenges but the impacts of his physical impairments on his ability to perform DLA as indicated by both prescribed professionals are not clear or consistent.

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 and nurse as set out in the PR and AR, the panel concludes that the ministry 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 the use of a cane to complete his DLA, uses a stool to shower and needs help from another person to go grocery shopping.

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.

Given the panel's finding that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel further finds that the ministry's conclusion that 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*, was 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 reasonably supported by the evidence and a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.