

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated May 31, 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 December 17, 2015;
- The Physician Report ("PR") signed and dated November 24, 2015 and prepared by the appellant's general practitioner ("GP") of 2 months, and who treated the appellant 2-10 times in the 12 months prior to completing the PR; and
- The Assessor Report ("AR") signed and dated January 4, 2016, prepared by a social worker ("SW") and the source of the information used to complete the PWD application was "office interview with applicant" and "home assessment";

2. The appellant's Request for Reconsideration ("RFR") dated May 10, 2016 in which he states in part that:

- His health is deteriorating;
- He is awaiting a follow-up appointment with the specialist to determine treatment; and
- He was diagnosed with COPD ("Chronic Obstructive Pulmonary Disease") and will be using a puffer.

Included with the RFR was a 2-page letter signed and dated May 11, 2016, in which the appellant describes the results of his May 9, 2016 X-rays, that he is now in excessive and constant pain, requires a cane for stability some days, he has arthritis in both hands, he has COPD, how his medical conditions affect his ability to work and that he does not have the financial means to afford the treatments and medicines he needs to alleviate some of his pain and discomfort.

With the 2-page letter the appellant included a radiology report dictated on May 9, 2016 and a note from his GP which states that there is a suspected diagnosis of "ankylosing spondylitis which is an inflammatory condition that causes back pain and stiffness as well as arthritis at other joints".

3. Letter from the appellant's advocate, signed and dated January 4, 2016, in which she describes the appellant as withdrawn, speaks quietly, avoids eye contact, has poor hygiene, does not demonstrate motivation or the care to complete DLA, needs support services to help bring his living situation to a healthier level, chooses not to engage or interact with others, tires easily, his legs give out, experiences shortness of breath and medications are too expensive so he goes without.

4. 2-page self-assessment questionnaire, signed and dated December 14, 2015, prepared by the appellant's advocate and completed by the appellant.

5. 4-page self-assessment, signed and dated December 14, 2015, prepared by the appellant's advocate and completed by the appellant. It presents a number of tasks under the headings of preparing meals, shopping, eating, managing money and paying bills, housework, using transportation, moving around inside my home, moving around outside my home, social skills, personal hygiene, taking medications, mental and emotional skills and communication. The appellant has provided check marks for the various tasks he cannot complete and added comments as well for some.

In the Notice of Appeal (NOV), signed and dated June 9, 2016, the appellant describes his physical and mental conditions and how they affect his ability to perform DLA.

With his NOV, the appellant submitted 2-page list of 7 medications prescribed by a second physician.

Diagnosis

In the PR, the GP notes that the appellant has been diagnosed with depression, and with a note that states “not yet diagnosed – fatty/liver disease secondary to alcohol” and “severe dyspnea not yet diagnosed – COPD likely”.

Physical Impairment

In the SR, the appellant describes his physical disability as including dizziness, nose bleeds, disorientation, high blood pressure, depression, diminished eyesight, COPD, weakness, numbness, and tingling.

In the PR, the GP indicates that the depression is likely to continue for 2 or more years and that “the other conditions are currently being investigated so a prognosis for recovery is unclear”. The GP also indicates that the appellant can walk 1-2 blocks unaided, climbing stairs is unknown, he can lift 5-15 lbs and no limitations as to how long the appellant can remain seated.

In the AR, the SW indicates that the appellant is independent and walking outdoors, climbing stairs, standing, lifting, and carrying and holding are only indicated as taking significantly longer without any indication as to whether or not these activities are independent, or if periodic or continuous assistance is required. For each task that is indicated as takes significantly longer there is a narrative provided but it appears to be the appellant’s self-reported narrative as it uses language such as ‘I’ and ‘my’.

Mental Impairment

In the SR, the appellant describes his mental disability as depression.

In the PR, the GP indicates that the appellant is diagnosed with moderately severe depression. The GP also indicates that the appellant has no difficulties with communication, and under cognitive and emotional function the GP indicates deficits in the areas of emotional disturbance and motivation.

In the AR, the SW indicates that the appellant has good speaking, satisfactory reading and writing and poor hearing due to being around loud shops and equipment. In the comments section, the appellant stated “I don’t have the patience anymore to listen to people or take part in conversations”. Under cognitive and emotional functioning the SW also indicates major impact for emotion, and motivation, and moderate for bodily functions, attention/concentration, and memory. All other listed areas are indicated as either minimal impact or no impact. The narrative provided in the comment section is provided by the appellant.

Daily Living Activities

In the PR, the GP indicates that there are no medications and/or treatments prescribed that interfere with the appellant's ability to perform DLA. The GP indicates that management of medications, mobility inside the home and management of finances are not restricted. But personal self care, meal preparation, basic housework, daily shopping, mobility outside the home, use of transportation and social functioning are all restricted periodically with no comments to explain what periodically means in the case of the appellant. The GP also indicates that due to depression the appellant is socially isolated and his friends help with shopping and basic housework as additional assistance is required.

In the AR, the SW indicates that all DLA, including social functioning, are independent with the exception of basic housekeeping, going to and from stores, and carrying purchases home which are indicated as takes significantly longer with no indication as to whether these activities are independent or require either periodic or continuous assistance. Meal planning and filling/refilling prescriptions are left blank with comments added by the appellant. For social functioning, immediate social networks are indicated as very disrupted and extended social networks are indicated as marginal functioning and the previously indicated good functioning for both have been crossed off without being initialed.

Need for Help

In the SR, the appellant indicates that he receives assistance from friends with driving him to appointments or buying groceries.

In the PR, the GP indicates that the appellant does not use any prostheses or aids for his impairment and that the appellant's "friends help him out with shopping and housework because he is needing additional assistance with these things".

In the AR, the SW indicates that assistance is provided by friends and that the appellant relies on friends for transportation and big issues such as broken down furnace. The SW indicates that no assistance is provide by assistance animals and did not indicate if the appellant requires assistance through the use of assistive devices.

Evidence On Appeal

Appellant's Evidence At Hearing

The appellant sister described the appellant's current condition, the ways in which he is restricted with DLA, and the amount of help that he requires. She also stated that the AR is no longer accurate as the appellant's condition has deteriorated. Specifically she stated that the appellant:

- cannot bend, twist or stand due to back problems and uses a cane most of the time or its not safe for him to walk;
- cannot put on socks or prepare meals and that his meals are either pre-made or she cooks for him;
- requires assistance with hygiene management;
- there was no home visit when the AR was completed;
- transportation is listed as independent only because he does not use public transit and she and friends provide the appellant rides for shopping and doctor's appointments;
- the chronic pain and the inability to pay for services/treatments has caused emotional

problems that were previously largely worked out after the death of his brother.

The appellant described his current condition, the ways in which he is restricted with DLA, and the amount of help that he requires. He described for the panel a typical day in his life and the meals he eats. He stated that he requires help from another person every 3rd day. He also stated that he is reluctant to allow his depression to get to him and that it has been manageable.

At the hearing, the ministry relied on the reconsideration decision.

Admissibility of Additional Evidence

Oral Evidence

The appellant and his sister gave oral evidence at the hearing. They described his physical condition, the associated impairment and its impact on his ability to perform tasks of DLA. On review of the evidence, the panel notes that oral evidence was not “new evidence” but rather, it specifically related to and referred to the documents that were before the ministry at reconsideration. 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*.

Additional Evidence

Prior to the hearing the appellant submitted a 2-page list of his prescription medication. On review of the evidence, the panel notes that the list of prescription medication is not “new evidence” but rather, it specifically related to and referred to the documents that were before the ministry at reconsideration. The panel therefore finds that the list of prescription medication 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*.

At the hearing the appellant submitted a letter dated June 24, 2016 which confirms that he is eligible for a disability pension from the federal government with a qualification date of August 2015 and a start date of December 2015. On review of the evidence, the panel notes that the letter confirming a federal disability pension is “new evidence” and not specifically related to or referred to the documents that were before the ministry at reconsideration. The panel therefore finds that the confirmation of eligibility for a federal disability pension is not admissible as it is not 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*.

At the hearing the appellant submitted a letter dated June 28, 2016 from his GP which provides an update on his symptoms but does not provide a definitive diagnosis or speak to the restrictions he faces to his DLA. On review of the evidence, the panel notes that the June 28, 2016 letter from the GP is not “new evidence” but rather, it specifically related to and referred to the documents that were before the ministry at reconsideration. The panel therefore finds that the June 28, 2016 letter from the GP 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

At the hearing, the appellant argued that the AR is inaccurate as his medical conditions have deteriorated and the SW did not conduct a home assessment when completing the AR.

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 and SW.

Severity of mental impairment

The appellant takes the position that his medical condition has deteriorated to becoming a severe mental impairment consistent with the legislation. The oral testimony given by the sister supports this statement.

The ministry's position as set out in the Reconsideration Decision is that the evidence provided 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 *moderately severe depression* that is likely to continue for 2 years or more and indicates that the appellant has significant deficits with cognitive and emotional function without providing any remarks in the comment section which speak to the how the deficits are significant. Similarly in the AR, the SW indicates that the appellant has major impacts in the same 2 areas. However the preponderance of listed items under cognitive and emotional functioning in the AR have been indicated to have a moderate, minimal or no impact, and the narrative provided in the comment section is provided by the appellant and not the SW. As stated previously, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the GP and SW. In the case of the appellant, the GP and SW have provided evidence that does not establish 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*.

Severity of physical impairment

The appellant takes the position that his medical condition has deteriorated to becoming a severe physical consistent with the legislation. The oral testimony given by the sister supports this statement.

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. However, in the case of the appellant, in the PR, or in any subsequent information provided, the GP has not provided a definitive diagnosis for a physical medical condition that in her opinion is related to a severe physical impairment. Without such a diagnosis, it is difficult to establish a severe physical impairment.

The appellant faces challenges but panel is of the view, that given the evidence, the impacts of his physical impairments are not severe. In the PR the GP mentioned that the appellant could walk 1-2 blocks *unaided*, lift under 5-15lbs and can sit without limitation. In the AR the SW indicates that walking indoors is independent and walking outdoors, climbing stairs, standing, lifting, and carrying and holding do not require either periodic or continuous assistance from another person or that the appellant is independent in these functions. The SW has only indicated that these functions take significantly longer. Furthermore, the narrative provided in the comments section appears to be provided by the appellant himself. While the appellant's self report can be considered, the assessor as a prescribed professional, in this case the SW, is to provide an independent assessment.

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.

Restrictions in the ability to perform DLA

The appellant argues that he is continuously restricted in his ability to perform the tasks of DLA due to his physical restrictions and the pain he suffers. While he receives assistance approximately every third day, his testimony is that he is restricted every day.

The ministry's position as set out in the Reconsideration Decision is that it has not been established by the evidence of the prescribed professionals 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 SW.

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 professionals completing these forms have the opportunity to indicate which DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods.

The GP addresses DLA's in the PR and indicates that personal self care, meal preparation, basic housework, daily shopping, mobility outside the home, use of transportation and social functioning are all restricted periodically without explanation as to what type of assistance is required or how often. She also indicates that due to depression the appellant is socially isolated without indicating specifically whether the restriction is continuous or periodic. As per the legislation, it is required that the prescribed professional indicate that a severe impairment directly and significantly restrict the appellant from performing DLA continuously or periodically for extended periods and in the case of the appellant the information provided by the GP failed to establish that the appellant is restrict either continuously or periodically for extended periods.

The SW, who conducted a home assessment, indicates that all DLA are independent with the exception of basic housekeeping, going to and from stores, and carrying purchases home which are indicated as takes significantly longer with no indication as to whether these activities require either periodic or continuous assistance. Meal planning and filling/refilling prescriptions are left blank with comments provided by the appellant. For social functioning, immediate social networks are indicated as very disrupted and extended social networks are indicated as marginal functioning and the previously indicated good functioning for both have been crossed off without being initialed. The

information provided by the SW demonstrates only that the appellant takes significantly longer to carry out 3 of the listed DLA items. However, the legislation requires that the prescribed professional, in this case the SW, establish that the appellant is restricted either continuously or periodically for extended periods in performing his DLA.

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 SW 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 is continuously restricted in his ability to perform the tasks of DLA due to his physical restrictions and the pain he suffers. While he receives assistance approximately every third day, his testimony is that he is restricted every day.

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. The appellant was not successful with his appeal.