

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“ministry”) reconsideration decision dated August 22, 2016 in which the ministry found the appellant was not eligible for designation as a Person With Disabilities (“PWD”) because he did not meet all of the criteria in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry was satisfied that the appellant has reached 18 years of age and that his impairment is likely to continue for at least 2 years. However, based on the information provided in the PWD Designation Application (“PWD application”) and Request for Reconsideration, the minister was not satisfied that:

- the Appellant has a severe mental or physical impairment; and
- the impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- as a result of these restrictions, the Appellant requires help to perform those activities through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

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 minister at Reconsideration included:

1. A PWD application comprised of the applicant information signed by the Appellant on December 18, 2015, a Physician Report (PR) dated September 3, 2015 and an Assessor Report (AR) dated September 3, 2015, both completed by the same internal medicine specialist (the physician). In the PR, the physician reported that the Appellant has been his patient since August, 2014, and that he has seen him 2 to 10 times in the past 12 months. The Appellant did not complete a self-report.

The PWD application included the following information:

Diagnoses

PR

In the PR, the Appellant's diagnoses were reported as chronic fatigue syndrome, fibromyalgia, anxiety disorder, mood disorder and irritable bowel syndrome. No date of onset was given. In the section dealing with health history, the physician wrote "See attached consult note", which consisted of a consultation report dated March 17, 2015 which states that the Appellant fits into the spectrum of central sensitivity syndrome and recommends referral to a chronic disease program, and an outpatient clinic note dated June 25, 2015, which states that the Appellant is very incapacitated with chronic fatigue, fibromyalgia and anxiety, with a functional capacity of about 30% which "means that he can do his activities of daily living with some modification and effort."

Degree and Course of Impairment

The physician wrote that given the severity and duration of his symptoms, the Appellant should be considered disabled indefinitely. Treatment is expected to improve his quality of life but is not expected to resolve or minimize the impairment to the point where he could return to work.

Functional Skills

PR

The physician provided the following information regarding functional limitations:

The Appellant:

- Can walk 1 to 2 blocks.
- Can climb 5+ stairs unaided.
- Can lift 2 to 7 kilograms.
- Can remain seated 1 to 2 hours.
- Has no difficulties with communication other than a lack of fluency in English.
- Has significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance and attention or sustained concentration.

In the section headed "Additional Comments", the physician wrote that the Appellant has a functional capacity of about 30% which means he can complete his DLA's but little else. He cannot work at any job.

AR

The physician provided the following information for Mental or Physical Impairment:

- The section asking what are the applicant's mental or physical impairments that impact his/her ability to manage daily living activities (DLA's) is left blank.

-
- Ability to communicate: speaking, writing and hearing are good; reading is satisfactory.
 - Mobility and physical ability: walking indoors is independent; walking outdoors, climbing stairs, standing, lifting and carrying and holding take significantly longer than typical. There is no explanation provided. There is a comment, "Activities take longer & cannot be sustained."
 - Cognitive and emotional functioning: Major impacts are reported with bodily functions, sleep disturbance is circled, emotion and attention/concentration; moderate impacts with executive and memory; minimal impact with motivation; consciousness, impulse control, insight and judgement, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems are reported as no impact.

Daily Living Activities (DLA's)

PR

The physician checked "no", the Appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA's.

AR

The physician reported that dressing, grooming, bathing and toileting take significantly longer than typical, with no description; laundry, basic housekeeping, going to and from stores and carrying purchases home are reported to require periodic assistance, with no description; feeding self, regulate diet, transfers in and out of bed, reading prices and labels, making appropriate choices and paying for purchases are reported as independent. All aspects of meals, paying rent and bills, medications and transportation are reported as independent, with no comments.

All aspects of social functioning are reported as independent with no comments. The physician reported marginal functioning with immediate and extended social networks, with the comment "isolated, too fatigued to interact socially".

Need for Help

PR

The physician checked "no", the Appellant does not require any prostheses or aids for his impairment.

AR

- The physician indicated the Appellant receives help from friends.
 - There is no indication that the Appellant uses assistive devices.
 - The physician checked "no", the Appellant does not have an assistance animal.
 - No additional information was provided.
2. The Ministry's Persons with Disabilities Designation Denial Decision Summary, dated June 15, 2016.
 3. The Ministry's letter to the Appellant advising him of their decision, dated June 15, 2016.
 4. A copy of a surgical operation note dated June 2, 2016, reporting that the Appellant has evidence of active colitis.
 5. A copy of a follow-up visit report from a physician dated August 22, 2016, stating that the Appellant is

[]

tolerating treatment well, although he is suffering chronic myofascial pain and has shoulder and neck pain.

6. A copy of a surgical pathology report dated August 13, 2014.
7. A copy of a colonoscopy report dated August 5, 2014.
8. A copy of a letter from one physician to another dated September 4, 2014.
9. A copy of a letter from a physician to the Ministry dated August 2, 2016, stating that the Appellant has an activity tolerance of about 30%, meaning he has about 3 usable hours during the day inside the home, which translates to about 1 ½ hours outside the home. At this level he can barely complete his activities of daily living without limitations/modifications/assistance.
10. The Appellant's Request for Reconsideration, signed August 8, 2016, with a note from the Appellant stating his health history and the effects of his condition on his activities.

The Appellant provided a written copy of his submission. The Appellant's advocate summarized the Appellant's arguments with elaboration by the Appellant. The Panel will deal with these in Part F – Reasons.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration decision which found that the Appellant was not eligible for PWD designation was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. Based on the information provided in the PWD application and Request for Reconsideration, the Ministry was not satisfied that the following criteria in EAPWDA section 2 were met: the Appellant has a severe mental or physical impairment; and the impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA's, either continuously or periodically for extended periods, and, as a result of these restrictions, he requires help to perform those activities.

Legislation

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.

EAPWDR

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.

Severe mental or physical impairment

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or provide evidence of a severe impairment. To satisfy the requirements of section 2(2) of the EAPWDA, evidence of how, and the extent to which, a medical condition restricts daily functioning must be considered. This includes evidence from the appellant and from a prescribed professional regarding the nature of the impairment and its impact on the appellant's ability to manage the DLA's listed in section 2(1) of the EAPWDR. However, section 2(2)(b) of the EAPWDA clearly sets out that the fundamental basis for the analysis of restrictions is the evidence from a prescribed professional, in this case, a physician.

Appellant's position – Severe mental impairment

The Appellant argued that he has significant cognitive and physical impairments, and pointed to the diagnoses of anxiety and mood disorders. The Appellant stated that he attends a cognitive therapy group and that he has depression and anxiety to the point where he is terrified to leave home or meet new people.

Ministry's position – Severe mental impairment

The Ministry argued that the Appellant does not have a severe mental impairment based on the information provided. The ministry noted that the Appellant is reported to have no difficulties with communication. Significant deficits with cognitive and emotional function are reported in the areas of memory, emotional disturbance and attention or sustained concentration, however the physician reported major impacts to cognitive and emotional functioning in the areas of bodily functions, emotion and attention/concentration, moderate impacts with executive and memory and minimal impacts with motivation and no impacts in eight areas. In regard to social functioning, the Ministry noted that the Appellant is reported to be independent in all areas, with marginal functioning with immediate and extended social networks, with no description of the support or supervision required to help him maintain in the community, with a note that the Appellant is isolated and too fatigued to interact socially.

Panel's decision – Severe mental impairment

The Panel finds that the Ministry reasonably determined the Appellant does not have a severe mental impairment based on the information provided. The Panel notes that the Appellant is reported to have no impacts in eight of the listed aspects of cognitive and emotional functioning, a minimal impact in one, memory, which is reported earlier to be a significant deficit, moderate impacts in two and major impacts in three, bodily functions, emotion and attention/concentration. The Appellant is reported to have good communication. All aspects of social functioning are reported as independent, with marginal functioning with immediate and extended social networks. There is no report of a requirement for help in this area. Based on this, the Panel

finds that the Ministry reasonably determined that a severe mental impairment under s. 2(2) of the EAPWDA was not established.

Appellant's position – Severe physical impairment

The Appellant argued that the information before the minister is sufficient to determine that he has a severe physical impairment. He stated that in addition to the diagnoses listed on the PWD application form, he has ulcerative colitis. The Appellant argued that it is unreasonable for the Ministry to focus on functioning as a determining factor in determination of a severe physical impairment, rather than considering the severity of his impairment in its entire context. He argued that he has had a pattern of extensive treatment from multiple physicians for several years, which speaks to the severity of his impairment. The Appellant pointed to his recent flare up of ulcerative colitis, his injections to control pain and his other supporting medical information which indicate the severity of his impairment.

Ministry's position – Severe physical impairment

The Ministry argued that the Appellant's diagnoses indicate serious medical conditions, but do not establish severe impairment. The Ministry stated that there are some indications of limitations, but the Appellant's application does not contain sufficient information to determine that severe restrictions apply. The Ministry noted that the Appellant's reported functional skills, walking 1 to 2 blocks unaided, climb 5+ stairs unaided, lift 2 to 7 kilograms and remain seated 1 to 2 hours are not indicative of a severe impairment of physical functioning.

Panel's decision – Severe physical impairment

The Panel notes the differences between the Appellant's self-report and his physician's report contained in his PWD application. The Panel finds that the Ministry reasonably determined a severe physical impairment has not been established on the basis of the information provided. As argued by the Ministry, the AR and PR do not confirm that the Appellant's impairment of physical functioning is severe. As noted by the Ministry, the functional limitations reported by the physician – walk 1 to 2 blocks, climb 5+ stairs, able to lift 2 to 7 kg and sit 1 to 2 hours – do not indicate a severe impairment, and while walking outdoors, climbing stairs, lifting/carrying/holding take significantly longer, no description of how much longer is provided. The physician reports that the appellant does not require aids or prostheses, although the Appellant reports that he uses a cane and toilet and bathing aids. In the outpatient clinic notes, the physician described the Appellant's functional capacity at about 30%, which the physician describes in his August 2, 2016 letter as translating to about 3 usable hours during the day inside the home and 1 ½ hours outside the home. As the determination of PWD designation is largely based on functioning and as information from a medical practitioner is the fundamental basis for assessing PWD eligibility, the Panel finds that the Ministry reasonably determined that a severe physical impairment under EAPWDA s. 2(2) was not established.

Restrictions in the ability to perform DLA's

Appellant's position

The Appellant argued that the physician's report of an activity tolerance of 30% is consistent with a significant restriction of his ability to perform DLA's, and that viewed in light of the available medical evidence, the Ministry's conclusion that significant restrictions to DLA's has not been established is unreasonable.

Ministry's position

The Ministry noted that the Appellant's physician wrote that he has an activity tolerance of about 30%, which means he has about 3 usable hours during the day inside the home and about 1 ½ hours outside the home, and at that level he can barely complete his activities without limitations/modifications/assistance. The Ministry

concluded that this is not indicative of significant restrictions to DLA's. The Ministry noted that the PWD application does not contain sufficient information to determine that there are significant restrictions to DLA's and the material provided from other physicians does not speak to restrictions.

Panel's decision – Restrictions to DLA's

Subsection 2(2)(b)(i) of the EAPWDA requires the Ministry to be satisfied that in the opinion of a prescribed professional an applicant's severe impairment directly and significantly restricts DLA's either continuously or periodically for extended periods. In the present case, the Appellant's physician is the prescribed professional who provided information respecting the appellant's ability to perform DLA. DLA's are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA's are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods.

The Panel recognizes that the Appellant reports that he has difficulty and takes much longer with some DLA's. In the AR, the majority of DLA's are reported to be performed independently, with the DLA basic housekeeping (laundry, basic housekeeping) and two tasks of the DLA shopping, going to and from stores and carrying purchases home, requiring periodic assistance which is not described in terms of degree or frequency. He is reported to be independent in all other aspects of shopping, all aspects of meals, paying rent and bills, medications, and transportation. He is reported to take significantly longer with some aspects of both personal care (dressing, grooming, bathing and toileting) and moving about outdoors and indoors, with no indication of how much longer. There is no indication of a need for assistive devices or the services of an assistance animal. Additionally, the physician reports that the appellant has 3 usable hours inside the home and 1 ½ usable hours outside the home, which the panel finds was reasonably viewed by the ministry as allowing for the completion of a large number of activities and the physician has stated that the appellant's 30% functional capacity means he can complete his ADL's, though little else. Therefore, the panel finds that the ministry reasonably determined that the physician's assessments do not provide enough evidence to confirm that the appellant has a severe impairment that significantly restricts his ability to perform DLA either continuously or periodically for extended periods and that the criteria of section 2(2)(b)(i) of the EAPWDA were not met.

Help to perform DLA's

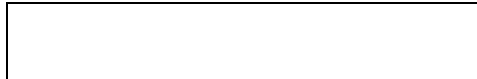
The Appellant argued that he has required frequent ongoing support from health care providers and bathing aids to be able to continue to manage DLA's.

The ministry's position is 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 DLA.

The establishment of direct and significant restrictions with DLA are 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 determined the criterion for help under EAPWDA s. 2(2)(b)(ii) was not met.



Conclusion

The Panel finds that the Ministry's reconsideration decision denying the Appellant's PWD application was reasonably supported by the evidence. The Panel therefore confirms the Ministry decision.

The Appellant's appeal is not successful.