

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated October 6, 2016, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years. However, the ministry was not satisfied that:

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

Information before the ministry at reconsideration 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 May 3, 2016, in which the appellant states his medical conditions are: post-traumatic stress disorder (PTSD), possible brain injury, social anxiety, attention deficit disorder (ADD), bipolar disorder, depression and back pain. In what appears to be the general practitioner's writing ("GP"), dilated cardiomyopathy is added. The appellant describes his depression, inability to sleep, his history of violence, inability to remember, shortness of breath (SOB), and feelings of daily weakness;
 - The Physician Report ("PR") dated April 26, 2016 and the Assessor Report ("AR") dated May 3, 2016, both prepared by the appellant's GP of 7 years, who treated the appellant 11 or more times in the 12 months prior to completing the PR and AR, and indicated that the source of the information used to complete the PWD application was "office interview with applicant" and "file/chart information";
2. 3-page letter from a general internal medicine specialist ("specialist"), signed and dated October 2, 2015 and states in, part, that the appellant has dilated cardiomyopathy, is at risk for coronary artery disease, has anemia and has mildly elevated triglyceride levels (dyslipidemia).
3. 1-page nuclear medicine report dated November 4, 2015, which states, in part, that the appellant has no chest pain, findings are suggestive of a moderate sized area anteroseptal ischemia and moderately reduced resting left ventricular function.
4. Request for reconsideration, signed and dated September 8, 2016.
5. Undated 1-page, signed letter from the appellant's advocate which states in part, that the appellant "has severe mental impairments that restrict his ability to do daily living activities. He requires assistance, support and supervision on a daily basis". Also he lives with his parents in order to get the assistance he requires. Finally, the advocate states that the appellant has "difficulty with daily decision-making, motivation, social skills, self-awareness and self-control".

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with dilated cardiomyopathy (onset 2015), ADHD (onset 1973), substance use disorder (onset 1993), and opiate dependence on methadone maintenance treatment (onset unspecified).

Physical Impairment

In the SR, the appellant describes his physical disability as dilated cardiomyopathy which causes SOB and weakness, and back pain.

In the PR, the GP indicated the following:

- Severe impairment. Has seen internist and had echocardiogram and angiogram. Cannot do any labouring work. Dyspnea/low exercise tolerance. Above is due to cardiomyopathy;
- Unaided, the appellant can walk 1-2 blocks and climb 5+ steps; and
- Can lift 5-15 lbs and remain seated with no limitation.

In the AR, the GP indicates the following:

- Independent with walking indoors, climbing stairs with the comment “can climb 5-10 steps without SOB”, and standing;
- Periodic assistance from another person is required for walking outdoors with the comment “cannot walk over 2 blocks” and lifting with the comment “cannot do heavy lifting”; and
- “physical ability markedly decreased”.

Mental Impairment

In the SR the appellant described that he suffers from PTSD, possible brain injury, social anxiety, ADHD, bipolar disorder and depression. He described his severe depression as marked with disruptions in sleep and social interactions. He also described his history of violence, need for counselling, methadone treatment and feeling jumpy and cautious.

In the PR, the GP indicated the following:

- There are no difficulties with communication;
- Significant deficits with cognitive and emotional function with emotion and attention or sustained concentration; and
- “ADHA [causes decreased] concentration” and “long history of anxiety”.

In the AR, the GP indicated the following:

- “[decreased] energy and SOB, unemployable at any kind of labouring job”;
- Speaking, reading, writing and hearing is good;
- Major impact to attention/concentration, moderate impacts to bodily function, emotion and memory, and all other listed areas of cognitive and emotional function are indicated as minimal or no impact; and
- “ADHD treated. History of anxiety and depression but has worked through same in the past. [increased] symptoms [in] 2016 as realizes cannot go back to work”.

Daily Living Activities

In the SR or the advocate’s letter, the appellant did not directly or specifically address DLA but did state that he has “difficulty with daily decision-making, motivation, social skills, self-awareness and self-control”.

In the AR, the GP has indicated that the appellant is independent in all DLA except where he needs periodic assistance from another person:

- Going to and from stores, with the comment “needs vehicle”;
- Carrying purchases home;
- Banking, budgeting, and pay rent and bills with the comment “addiction [?]; and
- The comment “cannot do heavy lifting or walk distance”;
- Social functioning (appropriate social decision with the comment “depression and anxiety”; develop and maintain relationships, interacts appropriately with others, deals appropriately with unexpected demands and able to secure assistance from others with the comment “he’s always done things for himself. [increased] anxiety cannot do so’; and
- Relationships with immediate and extended social networks are indicated as good.

Need for Help

In the SR, the appellant stated that he lives with his parents because he needs a supportive environment. In the PR, the GP notes that the appellant does not require any prostheses or aids for his impairment. In the AR, the GP indicates that the appellant receives assistance from his family.

Evidence On Appeal

A Notice of Appeal (NOA) which is signed and dated October 20, 2016 and states "I don't feel that adequate consideration was given to the information submitted".

At the Hearing

Note: The appellant stated that he did not receive the appeal record. The appellant was presented with the options of continuing the hearing or adjourning it until he had received the appeal record. After consulting with his advocate, the appellant opted to proceed with the hearing.

At the hearing the appellant submitted a 4-page letter from his GP, signed and dated October 11, 2016. The GP states that the appellant has difficult functioning due to "ADHD(attention deficit hyperactivity disorder), depression with anxiety, antisocial behaviour, anger, mixed substance use disorder" and that past psychiatric review has judged the appellant as sociopathic. The GP also described the appellant as distractible, having childhood trauma, having a long history of polysubstance abuse, banned from driving due to DUI's, banned from the use of public transit due to physical altercations, and as having over 100 criminal convictions. The GP speaks to the appellant's mental state and his ability to perform DLA. The GP also states that in writing this assessment she spent an additional 90 minutes with the appellant and has read the advocates assessment.

At the hearing the appellant stated that:

- He has had ADHD since age 6 or 7;
- Went through a lot of drug use, drinking and depression;
- He has dealt with mental health issues for years and they have been progressively worse;
- He lives with his parents since December 2014 for support with his DLA;
- His father does his cooking and drives him around;
- He tried trade school but could not keep up due to problems with concentration;
- His psychiatrist diagnosed him with sociopathy and that the appellant assumed that bipolar disorder was a part of being sociopathic;
- His SR was seen by his GP and that the GP has been his physician for 7 years on and off but not consistently;
- He diagnosed himself with depression, anxiety, antisocial behaviour, PTSD and bipolar disorder because that is how he feels and that his GP saw these conditions listed on his SR;
- He experienced an improvement with his ADHD medication initially but the dosage had to be increased; and
- The GP's October 11, 2016 letter provides the whole picture and speaks to the degree of mental health issues presented by the appellant, which include poor concentration, antisocial behaviour, poor memory, and tendencies to self-medicate;

At the hearing the appellant's father (as his witness) stated that:

- He helps the appellant by driving him to appointments and whatever the appellant needs including emotional support;

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- The appellant does not go out much but has good relations with everyone in the family;
 - In terms of DLA, the appellant does his own cooking and laundry;
 - The appellant spends the majority of his time sleeping; and
 - The appellant moved in with his parents because at the time he was living on the streets, and he had no job or money.

Admissibility of Additional Evidence

On review of the October 11, 2016 letter from the GP, the panel notes that though it confirms the appellant self-diagnoses of his mental conditions, the diagnosis of depression, anxiety, antisocial behaviours and sociopathy are new diagnoses from the GP, and the appellant's history of childhood trauma and incarcerations is new evidence, all of which should have been before the ministry at the time of the reconsideration decision. The description of the appellant's mental state and ability to perform DLA is also new evidence. The panel's jurisdiction is to review the ministry's reconsideration decision with consideration of the evidence that was before it at that time and with the consideration of information that corroborates or is in support of the information that was before the ministry at that time. Since the preponderance of the evidence provided is new evidence and did not specifically relate to and/or refer to the evidence that was before the ministry at reconsideration, the panel finds that the October 11, 2016 letter from the GP 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*.

PART F – Reasons for Panel Decision

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

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, 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.

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 specialist.

Severity of mental impairment

The appellant argued that he suffers from PTSD, possible brain injury, social anxiety ADD, bipolar disorder and depression. He also argued that his GP has indicated that attention/concentration has a major impact and combined with the moderate impacts in emotion, bodily function and memory, he has a severe mental impairment.

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. The ministry notes that in the PR, the GP reports that the appellant does not have any difficulties with communication and in the AR, the GP reports one major, 3 moderate, 1 minimal and 9 no impacts to the listed areas of cognitive and emotional function. The GP also indicates that speaking, writing, reading and hearing are all good. Finally, the ministry argues that although periodic assistance is required for social functioning, the GP did not indicate the frequency or duration of the assistance required and therefore

it is difficult to establish the severity of a mental impairment.

Panel Decision

On review of the evidence, the panel notes that the GP has diagnosed the appellant with ADHD but not depression, anxiety, antisocial behaviour, PTSD, or bipolar. These later conditions were self-diagnosed by the appellant in his SR and when referring to these later conditions, he stated at the hearing that this is how he feels. Although the appellant may think that he experiences these conditions, the legislation requires a diagnosis from a prescribed professional. Furthermore, in the PR, the GP stated that the ADHD is treatable and in the AR, the GP stated "ADHD- treated". The panel notes, that the comments made by the GP suggest that the appellant's ADHD is under control.

In the PR, for the question regarding *significant* deficits with cognitive and emotional function the GP indicates the appellant has deficits with emotional disturbances and attention or sustained concentration, and comments "ADHD [decreased] concentration" and "long history of anxiety". In the AR, the GP indicates that the appellant has a major impact in the area of attention/concentration with the comment "history of anxiety and depression but has worked through [the] same in the past. [Increase in] symptoms 2016 as realizes cannot go back to work". In the AR, the GP notes that the appellant's ability to speak, read, write and hear are good and although periodic assistance is required for social function, the GP did not indicate the frequency or duration of that assistance.

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 he is weak, has sleep disturbances, and suffers from SOB and cardiomyopathy.

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 but rather a moderate impairment.

Panel Decision

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. The restrictions to functional ability as a result of an impairment is helpful in determining its severity. The information provided in the PR by the GP, who conducted an office interview and referred to file/chart information, indicates that the appellant has good functional skills, despite experiencing low energy and SOB. He can walk 1-2 blocks and climb 5+ stairs unaided, he can lift 5-15lbs and remain seated without limits. In the AR, the GP indicates that the appellant is independent with walking indoors, climbing stairs and standing. It is indicated that the appellant requires periodic assistance with walking outdoors and lifting and holding but does not indicate the frequency or duration of the assistance required, which is helpful to determine if the assistance required is periodically *for extended periods*.

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. The evidence given by the GP and the appellant does not clearly establish that the appellant suffers from severe impairment. 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 restricted in his ability to perform tasks of DLA due physical and mental conditions.

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*. In particular, the GP provides evidence that the appellant is independent in the majority of his DLA and for those that are indicated as requiring periodic assistance, the GP has not provided information regarding the frequency or duration of the assistance required.

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 of the challenges that he faces with DLA, the legislation is clear that to satisfy the criteria there must be confirming evidence 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 AR and indicates that the appellant is independent in all the lists DLA except going to and from stores, carrying purchases home, banking, budgeting, pay rent/bills, and all listed items under social functioning. For these DLA, the GP has indicated that periodic assistance from another person is required. However the GP failed to provided evidence as to the frequency and duration of the periodic assistance that is required. Without such information, the panel notes that it is difficult to determine if the required assistance is needed periodically *for extend periods*. Furthermore, the appellant father stated that the appellant does his own cooking (unless the father chooses to cook for the whole family) and laundry, and that he has good relations with other family members. According to the appellant's father, the appellant lives with his parents because he did not have a job or money and therefore not necessarily because he needed support with his DLA.

Considering the evidence of the GP, the panel finds 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 help and that help comes from his father.

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 available to the ministry at the time of reconsideration 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 is not successful in his appeal.