

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated October 12, 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") dated May 26, 2016 but left blank by the appellant;
 - The Physician Report ("PR") dated May 27, 2016 and the Assessor Report ("AR") dated May 27, 2016, both prepared by the appellant's general practitioner ("GP") of 6-7 years and who treated the appellant 2-10 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";
2. The appellant's Request for Reconsideration (RFR) dated September 28, 2016.

The following information was presented in the PWD application:

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with chronic back and neck pain/degenerative disc disease (DDD) (onset 3-4 years), hypertension (onset 2-3 years), diabetes (onset 2-3 years), insomnia/depression (onset 1 year), asthma/allergies (onset 2 years), and osteoarthritis knees (onset 3-4 years).

Mental Impairment

PR:

- "He has decreased motivation, depressed mood and insomnia."
- Significant deficits with cognitive and emotional function in the areas of executive function, memory, emotional disturbance, motivation and attention or sustained concentration, with the comment "forgets at times. Mood depression. Insomnia";
- "Because of chronic neck and back pain and osteoarthritis knees and depression, unable to work".

AR:

- Speaking and hearing are satisfactory, and reading and writing are poor;
- Moderate impacts to emotion, attention/concentration, memory, and motivation;
- All other areas of cognitive and emotional function are listed as minimal or no impact, including minimal impact to executive function;
- Social functioning requires periodic support/supervision in the areas of 'able to develop and maintain relationships' and 'able to secure assistance from others', and continuous assistance required with 'able to deal appropriately with unexpected demands', without describing the frequency and duration of the periodic and continuous help that is required or what help specifically is needed. Immediate and extended social networks are indicated as 'marginal functioning'.

Physical Impairment

PR:

- “Has painful ROM [range of motion] and difficulty bending. Osteoarthritis knees with obesity and difficulty with walking” and “gets SOB [shortness of breath] (asthma).”
- Unaided can walk 1-2 blocks and climb 5 steps (slowly while holding the handrail);
- Can lift under 5lbs and remain seated for less than 1 hour.

AR:

- Independent with walking indoors and standing;
- Takes significantly longer walking outdoors and climbing stairs, with the comment pain back and knees, holds on to railings and climbs slowly;
- Periodic assistance required for lifting, and carrying and holding.

Daily Living Activities

AR:

- Independent in all listed areas of the personal care DLA (with the comment next to regulate diet “eats in temple and son brings food”), the pay rent and bills DLA, the medications DLA, and the transportation DLA;
- Continuous assistance required for the basic housekeeping DLA and the meals DLA [planning, preparation, cooking and safe storage], with the comment “eats in temple or son and nephew bring food/arrange food”;
- Periodic assistance required for carrying purchases home with the comment “son helps”;
- It is unclear if the other listed areas of the shopping DLA are either independent or require periodic assistance.

Need for Help

PR:

- He does not require an aid for his impairment and “May need a cane at some stage”.

AR:

- Assistance is provided by family;
- No assistance is provided by an assistive device or animal.

Evidence On Appeal

Notice of appeal, signed and dated October 21, 2016, which states that he disagrees with the ministry’s decision in terms of severity of his impairment, DLA and the help he requires.

Evidence At Hearing

At the hearing the appellant stated that he:

- Cannot move and his body is stiff/restricted and in pain;
- Cannot walk, or bend to pick up things from the ground;
- Needs support of an umbrella or stick to move up or down and his heart races when he gets up;
- Does not know what to do because his body is not functioning properly, and if he was able he



would not have to come to the hearing;

- Tells his doctor what his issues are but the doctor does not come to his home to see how he functions;
- Knows he needs the support of a cane or he'll fall and he told the doctor this;
- Has problems lifting his arms up and the left arm is worse than the right arm;
- Has friends help every 8-10 days, when the friend is back in town, otherwise things are not done unless someone else comes around and will help;
- Cannot stand more than 2-3 minutes;'
- Is willing to develop relationship but others do not have time and he is isolated due to problems with his mobility;
- Is willing to see specialists and have operations but his doctor says there is no cure;
- Cannot survive on the money he currently gets;
- His condition is getting worse and he worries that there will be a time when he cannot move at all and does not know what he will do then.

The ministry relied on the reconsideration decision.

Admissibility of Additional Evidence

Oral Evidence

On review of the evidence, the panel notes that the appellant's 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*.

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.

Severity of impairment

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

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

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

Severity of mental impairment

The appellant argues that he suffers from insomnia and depression and that 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.

Panel Decision

On review of the evidence, the GP has diagnosed the appellant with insomnia and depression. In the PR, the GP indicates that the appellant has significant deficits with cognitive and emotional function in the areas of executive function, memory, emotional disturbance, motivation and attention or sustained concentration. However in the AR, the GP indicates that the appellant experiences

moderate impacts in the areas of emotion, attention/concentration, memory, and motivation and a minimal impact in the area of executive functioning, and does not provide an explanation for the inconsistency in his assessment. All other listed areas of cognitive and emotional functioning are listed as either minimal or no impact. In terms of social functioning, the GP has indicated that some periodic support/supervision is required but does not indicate the frequency or the duration of the assistance required. Furthermore, the appellant stated at the hearing that his social life is more limited by his mobility and not his ability to develop or maintain relationships.

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 in pain on a daily basis and that the impact from his various medical conditions 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. The appellant described the challenges he faces; however, the evidence provided by the GP does not provide a complete picture of the appellant's physical impairment. The GP indicates that the appellant can walk 1-2 blocks unaided and climb 5+ steps (slowly while holding a handrail) unaided, lift under 5 lbs. and remain seated for less than 1 hour. Although the appellant stated at the hearing that he supports himself with an umbrella or stick when going up or down stairs, the GP did not indicate that the appellant requires an assistive device. The GP indicates that the appellant requires periodic assistance with lifting, and carrying and holding but does not explain or indicate the frequency and/or duration of the assistance required. Furthermore, walking outdoors is indicated by the GP as takes significantly longer but it is not explained or indicated how much longer it takes the appellant to walk outdoors.

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. Given the information provided by the GP, 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 directly and significantly restricted in his ability to perform tasks of DLA due to the pain, reduced range of motion and shortness of breath he suffers from his various medical 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 ministry found that for the DLA that require assistance, the GP did not provide information as to the frequency and duration of the help that is required, and his evaluation indicates that the majority of the DLA are performed independently.

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 the evidence must come from a prescribed professional. In the present case, this evidence has been provided by one prescribed professional - the GP.

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

The GP addresses the assistance required with DLA in the AR. The GP indicates that the appellant is independent in all listed areas of DLA except basic housekeeping and meals which require continuous assistance, and the task of carrying purchases home, which requires periodic assistance. It is unclear to the panel if the GP intended to indicate that the appellant is independent or requires periodic assistance in the other listed areas of shopping [going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases] as the notation "son helps" appears to apply, with no other detail provided. In terms of the DLA basic housekeeping and meals [planning, preparation, cooking and storage], the GP did not indicate why or what type of continuous assistance is required given that the appellant's functional skills limitations are in the moderate range. Similarly with carrying purchases home, the GP did not explain the frequency and duration of the assistance required and only provides the notation "son helps." The appellant indicated that he gets help every 8-10 days, but the GP has not confirmed this. The evidence provided by the GP does not provide a complete picture of how the appellant's impairment directly and significantly restricts the appellant's ability to perform his DLA. The GP wrote that because of chronic neck and back pain, osteoarthritis knees and depression, the appellant is "unable to work" and, as previously noted, employability is not listed among the prescribed DLA in section 2 of the *EAPWDR*.

In making its decision in this matter the ministry must consider the evidence from the GP as it is set out in the PR and AR. Given this evidence, 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 help with various tasks of DLA with that help coming from his friend and nephew, and that he requires the support of an umbrella or stick when going up and down stairs.

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 is not successful in his appeal.