

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 September 20, 2016 denying the appellant designation as a Person with Disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, Section 2. Specifically, the ministry determined that the information provided did not establish that in the opinion of a prescribed professional the appellant's severe mental impairment:

- (i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 3 criteria: he has a severe mental impairment, has reached 18 years of age and in the opinion of a medical practitioner his impairment is likely to continue for at least 2 years.

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

Adjournment Request

Prior to the commencement of the appeal hearing on November 14, 2016 the appellant requested an adjournment in order to obtain additional information from the doctor who completed the Assessor Report (the Assessor) in his Persons with Disabilities (PWD) application. The appellant explained that he has repeatedly tried to make an appointment but has been put off by his doctor's receptionist. He now has an appointment booked for November 21, 2016. The appellant added that he wants the Assessor to provide more specific detail concerning the degree and frequency of his restricted Daily Living Activities ("DLA"). He attempted to call the tribunal office on November 11 regarding his adjournment request, but did not realize that it would be closed due to the statutory holiday.

The ministry objected to the adjournment request on the grounds that additional medical information would probably be inadmissible under EAA Section 22 (4) as evidence in support of or directly related to the information before the ministry at the time of reconsideration.

After deliberation the panel decided to grant the adjournment for the following reasons:

- the appellant had repeatedly attempted to book an appointment with the Assessor but was unable to see him prior to today's hearing;
- the reason for the appellant's request is to obtain evidence from the Assessor related to the degree and frequency of restricted DLA, which was a major factor in the reconsideration decision; and
- the ministry is not prejudiced by the delay.

Evidence before the Ministry at Reconsideration

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of:

1. the appellant's self-report (SR) dated March 21, 2016;
2. a physician report (PR) dated February 3, 2016 completed by the appellant's psychiatrist Dr. X, who at the time of assessment had treated the appellant for less than 1 year and who had seen the appellant 2 to 10 times during that period; and
3. an assessor report (AR) dated April 22, 2016 completed by the appellant's family doctor (the Assessor), who had who has treated the appellant for 13 years and has seen him 2 to 10 times in the past year, for the purpose of completing the assessment.

The evidence at reconsideration also included the appellant's request for reconsideration received by the ministry on September 6, 2016, to which the appellant attached a two-page letter that included the following information:

- he has severe difficulty maintaining a consistent sleep schedule, often requiring his parents to wake him up, and making it difficult for him to keep commitments;
- he finds it difficult to stay awake for more than a few hours without napping;
- he finds it extremely difficult to stay focused on a single task and as such requires an excessively long time to complete it;
- his mania/depression mood swings occur without warning and can last for days to months, plummeting him from euphoria to worthlessness and negatively impacting his relationships;

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- his productive and independent periods are not consistent, and are followed by a period of depression, leaving him unable to maintain employment and dependent on the support of his parents;
 - he neglects his diet and often goes several days without showering or brushing his teeth.

The PWD application is summarized as follows:

Diagnosis

In the PR Dr. X notes that the appellant suffers from unspecified depressive disorder and dysthymic disorder, date of onset unknown.

Physical Impairment

Neither Dr. X nor the Assessor reports a physical impairment.

Mental Impairment

In his SR the appellant stated that he has struggled with depression for at least 10 years and has been unable to manage it, which has left him struggling with maintaining work and daily activities.

In the PR Dr. X notes that the appellant has *“a longstanding history of emotional difficulties, which have caused major impairment in his global level of functioning.”* In speaking to the estimated duration of the appellant’s impairment Dr. X writes: *“he has a background diagnosis of dysthymic disorder. His symptoms have been persistent.”*

Dr. X also noted significant deficits with cognitive and emotional functioning in the areas of emotional disturbance, motivation, motor activity and attention or sustained concentration.

In the AR under “Cognitive and Emotional Functioning” the Assessor noted the degree to which the appellant’s mental impairment or brain injury impacts his functioning as follows:

- major impact in bodily functions, emotion , attention/concentration and motivation;
- moderate impact in impulse control, insight and judgement, executive functioning (eg. planning, organizing, problem-solving), memory and motor activity;
- no impact on consciousness, language, psychotic symptoms and other neuropsychological problems;
- the Assessor comments: *“long history of Dysthymia. Currently attending care by psychiatrist. Marked lack of motivation and interest. Unable to sustain _____ for length of time required for completion”.*

Daily Living Activities (DLA)

In his SR the appellant noted that during his low periods he suffers in regards to eating habits and personal hygiene due to the fact that he can sleep for days at a time. He is unable to make any commitments due to his fear that he cannot keep them, which has resulted in lowered self-esteem and an overall sense of discontent with life.

In the PR Dr. X notes that the appellant’s impairment directly restricts his ability to perform DLA in the

following areas:

- Continuous Restriction:
 - meal preparation
 - management of medications
 - management of finances
- Periodic Restriction:
 - personal self care
 - basic housework
 - daily shopping
 - social functioning (including daily decision making; interacting, relating and communicating with others). Dr. X comments: *"He has profound difficulties interacting with other people due to his emotional problems."*

Regarding those DLA which are periodic in nature, Dr. X comments: *"He does manage to execute some functions on his good days without requiring any supports"*.

Dr. X indicated that the appellant is not restricted with mobility inside or outside the home or with use of transportation.

In the AR the Assessor noted that the appellant:

- is independent in:
 - walking indoors and outdoors;
 - all areas of personal self care except grooming and bathing - *requires others to sometimes point out the state of his hygiene and remind him to care for himself*;
 - shopping
 - meals, except meal planning where he is periodically restricted and requires assistance – *"due to lack of interest"*
 - transportation
- is periodically restricted and requires assistance with:
 - laundry and basic housekeeping – *"due to lack of interest/motivation he has others do the tasks for him"*
 - paying rent and bills – *"parents help"*
 - medications – *"parents help"*

The Assessor did not complete the section in which he was invited to describe the type and amount of assistance require and identification of any safety issues.

In the section of the AR dealing with restrictions to DLA that relate to social functioning the Assessor noted that the appellant was independent in his ability to secure assistance from others but required periodic support/supervision in:

- making appropriate social decisions
- developing/maintaining friendships – *"needs encouragement"*
- interacting appropriately with others – *requires support in settings where he is interacting with strangers*
- dealing appropriately with unexpected demands.

The Assessor also noted that the appellant has marginal functioning with both his immediate and extended social networks – *"currently adoptive parents provide supports for him as well as supervision in self care/meals."*

Assistance Required

In the PR Dr. X notes that the appellant's parents usually do the cooking at home and help him with shopping as well.

In the AR the Assessor notes that the appellant's family provides the majority of support. He does not describe what assistance would be necessary if the parents were not available to provide help.

Neither Dr. X nor the Assessor indicates that the appellant requires an assistive device or service animal.

Additional Information at the Hearing

Evidence of the Appellant:

At the hearing the appellant provided the following oral evidence:

- he met with his family doctor (the Assessor) who suggested that he find an advocate to suggest what additional information from the Assessor would be helpful;
- he owns a truck and is able to get around and do things on his good days;
- it is difficult to explain the frequency and duration of his low periods: sometimes he has 3 low days, followed by 1 good day; sometimes 2 months of low days, or 2 months of good days followed by a low period. Frequency and duration are not regular. On good days he can do pretty much everything, and then he is unable to do anything at all. In November only the first week was good, and the remainder of the month he just slept. But most of September and October were pretty good.
- the medication helps to a certain degree.

Evidence of Witness K (Appellant's mother):

The appellant's mother (K) stated that the appellant's condition has progressively worsened since high school. Sometimes she is unable to wake him up, and he seems almost to be in a coma. At those times he is unable to function. He remains in his room. Sometimes he will join his parents for dinner; at other times he isolates himself completely and won't even respond to an invitation to come to a meal. If hungry he may grab some food in mid-afternoon. He seems unaware that he needs to bathe, brush his teeth and change his clothes. He doesn't socialize, have a girlfriend or participate in family events. A lot of the time she needs to remind him to take his medication. Sometimes he asks them to fill his prescriptions, and sometimes he fills them himself.

At other times he appears okay but these times are becoming less and less frequent and now are occurring during the summer months as well.

Admissibility of New Evidence

The panel determined that the oral evidence of the appellant and of the witness K were admissible under Employment and Assistance Act Section 22 (4) (b) because they provided further detail to the frequency, duration and degree of restrictions to the appellant's ability to perform DLA.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably determined that the appellant did not meet two of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a PWD. The ministry found that the appellant has a severe mental impairment, meets the age requirement and, in the opinion of a medical practitioner, his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- 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 relevant legislation is as follows:

EAPWDA:

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 is in a prescribed class of persons or that the person

has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse 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:

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:

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- (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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

Restrictions in Ability to perform DLA

The appellant argues that the severity of his mental impairments have severely impacted his ability to maintain a functional lifestyle and significantly restrict his ability to perform DLA when he is suffering a depressive episode. He suffers from mood swings that range from mania to depression. On low days he is unable to wake up independently or to attend to his DLA. As a result he is unable to maintain employment. His low periods have no consistency or pattern in terms of frequency or duration: they can range from a few days' duration to a period of weeks or even months.

The ministry's position is set out in the reconsideration decision:

- in the PR Dr. X notes that the appellant is continuously restricted in meal preparation, management of finances, and is periodically restricted in his ability to perform personal self care, basic housekeeping, daily shopping and social functioning. He describes the degree of restriction as "*moderate – severe*" and indicates that the appellant manages to perform his DLA on good days without support. Dr. X does not indicate how frequently the appellant experiences "good days".

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- in the AR the Assessor indicates that the appellant requires periodic assistance with grooming and bathing, basic housekeeping, meal planning, paying rent and bills and medication, but does not specify the frequency, degree or duration of the required periodic assistance. The Assessor also notes that the appellant independently manages his other DLA.
 - the Assessor does not explain the type or degree of assistance required by the appellant to manage his social functioning.
 - because the prescribed professionals have not clarified the degree, frequency and type of assistance with DLA required by the appellant in the PR and AR, the ministry is not satisfied that the appellant's ability to perform DLA is severely impaired or that the impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in Section 2 (2) (b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from "prescribed professionals". DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application. The PR and AR also provide the opportunity for the prescribed professional to check marked boxes and provide additional comments when describing the nature, frequency and degree of the restriction(s). In the appellant's case, the information from prescribed professionals addressing the ability to perform DLA is provided by the appellant's psychiatrist Dr. X in the PR and by the appellant's family physician in the AR.

In the PR Dr. X indicated that the appellant's mental impairment directly restricts his ability to perform most DLA. He is continuously restricted in meal preparation, medication management and management of finances, and is periodically restricted in personal self care, basic housework, shopping and social functioning. Dr. X added that the restrictions are moderate to severe in severity. He commented that the appellant can perform his DLA on good days without requiring support. However he did not describe frequency or duration of either the good days or the bad days. Dr. X also did not utilize the area of the PWD application inviting additional information concerning the nature, extent and impact of the appellant's impairment on his daily functioning. The panel also notes that Dr. X did not provide additional information concerning the frequency and duration of restrictions to the appellant's ability to perform DLA when the appellant met with him on November 21, 2016 for the purpose of obtaining additional information.

Although Dr. X reported that there are restrictions to many of the appellant's DLA, including continuous restrictions, the Assessor indicated a need for periodic assistance in some areas, with no information provided to establish how often this assistance is required. In the AR the Assessor indicated that the appellant requires periodic assistance in grooming, bathing laundry, basic housekeeping, meal planning, as well as with bill payments and medication management, but did not describe the degree, frequency or duration of the periods when the appellant is restricted and in need of assistance. At the hearing the appellant stated that it was difficult to explain the frequency and

duration of his low periods. However he acknowledged that on good days he can do pretty much everything and on bad days is unable to do anything at all.

In the absence of information from the prescribed professionals as to the frequency and duration of the periodic assistance required for the remaining DLA tasks, the panel finds that the ministry reasonably determined that the information provided does not establish that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods as required by section 2(2) (b) (i) of the EAPWDA.

Help to perform DLA

The appellant's position is that without the continuing help provided by his parents he would be unable to perform his DLA, and notes that when he has been without his parents support he neglects his diet, hygiene, medication and bill payments.

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

The appellant, the witness K, Dr. X and the Assessor all indicate that the appellant periodically requires significant help from his parents to perform his DLA.

However, Section 2(2) (b) (ii) of the EAPWDA can only be met if, as a result of direct and significant restrictions with ability to perform DLA, the person requires help. In other words, the establishment of direct and significant restrictions with DLA is 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 concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

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, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.