

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated December 9, 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; however, based on the information provided in the PWD Designation Application (PWD application) and Request for Reconsideration (RFR), the minister was not satisfied that four other criteria were met:

- The appellant has a severe mental or physical impairment;
- The impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years;
- The impairment, in the opinion of a prescribed professional, directly and significantly restricts the appellant's 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 DLA 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

The evidence before the ministry at reconsideration consisted of the following:

1. A PWD application comprised of:

- The *Applicant Information and Self-report* (self-report) signed by the appellant on February 26, 2016;
- A *Physician Report* (PR) completed by a general practitioner (the physician) on February 25, 2016. The physician has known the appellant for one year and has seen him 11 or more times in the past 12 months;
- An *Assessor Report* (AR) completed by a registered social worker (the RSW) on March 17, 2016. He indicates he has known the appellant for one week, has seen him 2-10 times in the past year, provides counselling services at a community organization, and completed the AR through an office interview with the appellant and file/ chart information from a counsellor.

The PWD application includes the following information:

Diagnoses

PR

- The appellant is diagnosed with “musculoskeletal”, date of onset [question mark]. Under *Health History*, the physician writes that “patient has chronic back pain - history of previous lumbar surgery. He is waiting to be re-assessed by his previous neuro-surgeon for further neurologic assessments. He has pain with ambulating and routine daily tasks.”
- Under *Degree and Course of Impairment*, the physician writes “unknown” in response to whether the impairment is likely to continue for 2 years or more from today, explaining that “it will depend on the surgical consult and outcome.”

AR

- The RSW indicates that the mental or physical impairment that impacts the appellant’s ability to manage DLA is “back and hip pains.” He further comments, “FAI in left hip aggravates existing back surgery from 1994” and “living in constant pain daily with back and hip.”

Self-report

The appellant describes his disability as a herniated disc in his back [L4 L5]. He reports that he also has FAI (Femoral Acetabular Impingement) which, when aggravated, makes his hip a lot worse. He states that this condition makes his life very difficult as he can be “in not too much pain and make a wrong move and be laid up for days.” He reports that he had back surgery in 2009 that did not go well, as the disc ruptured again before he woke up from the surgery. He was laid up in bed for about one year and he never knows when he is going to do something that will aggravate his condition.

Functional Skills

PR

The physician provides the following information regarding any functional limitations:

- The appellant can walk 1 to 2 blocks unaided on a flat surface;
- can climb 2 to 5 steps unaided;
- can lift 5 to 15 pounds;
- The length of time he can remain seated is unknown; and
- He has no difficulties with communication and no significant deficits with cognitive and emotional function.

AR

The RSW provides the following information for *Mental or Physical Impairment (Abilities)*:

- The appellant has a good ability to communicate in all areas: speaking, reading, writing, and hearing;
- he is independent with Walking indoors [comment, “needs assistance with stairs and rails often”];
- he requires periodic assistance from another person with Walking outdoors [comment, “difficulties going uphill”];
- he is independent with Climbing stairs [comment, “difficulties going upstairs, needs rails”];
- he is independent with Standing;
- he requires periodic assistance from another person with Lifting [comment, “lifting that requires bending over”];
- he requires periodic assistance with Carrying and holding; and
- no check marks are provided to indicate whether any mental impairment impacts his *cognitive and emotional functioning*.

Self-report

Regarding functional abilities, the appellant reports that his herniated disc makes it very painful to do any bending, lifting, or standing/ sitting for an extended period.

Daily Living Activities (DLA)

PR

- The physician checks Yes, the appellant has been prescribed medication/ treatment that interferes with his ability to perform DLA [comment, “opioids for pain relief decrease alertness and cause lethargy”], and the expected duration of the medication is until he can be assessed by neuro-surgery for possible further surgical intervention.
- In Part E - *Daily Living Activities*, the physician checks Yes, the appellant’s impairment directly restricts his ability to perform DLA. The following information is provided:

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- 4 out of the 10 listed DLA are marked as continuously restricted: Basic housework, Daily shopping, Mobility inside the home, and Mobility outside the home [comments, “patient has chronic pain - difficulty ambulating and lifting. Pain with daily movements”].
 - The physician indicates that the remaining DLA are not restricted: Personal self-care, Meal preparation, Management of medications, Use of transportation, Management of finances, and Social functioning.
 - Under *Additional Comments*, the physician states that the appellant’s long history of chronic neurological back pain “inhibits his ability to do daily tasks.”

AR

The RSW provides the following information:

- The appellant is independent with all areas of Personal care, Basic housekeeping, and Shopping [comment, “any time required to bend low is a difficult chore”];
- he is independent with all areas of Meals, Pay rent and bills, and Medications;
- he requires periodic assistance with Transportation - Getting in and out of a vehicle [comment, “difficulties getting in and out of most vehicles”]. The RSW writes “N/A” for Using public transit, and Using transit schedules/ arranging transportation.
- The appellant is independent with all areas of Social Functioning and he has good functioning with his immediate and extended social networks [comment, “back pain can make a person grumpy but still maintains healthy relationships”].

Self-report

The appellant reports that he has not worked much in the past 3 years due to his back condition which makes his life very difficult. He states that his condition is very hard to deal with and an activity such as putting on his shoes can aggravate his back.

Need for Help

PR

- The physician writes that the appellant requires “possible help with day to day tasks in and outside the home.”
- The physician check marks *No*, the appellant does not require any prostheses or aids for his impairment.

AR

- The RSW indicates that the appellant often needs assistance with stairs and rails, and needs rails for going upstairs; and
- assistance is provided by family and friends; the appellant lives with family.
- The RSW writes “N/A” when asked to describe what assistance would be necessary if none is available; and

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- for assistive devices, the RSW check marks Braces and Other [comment, “seating supports...back braces and seating supports in vehicles/ home chairs, etc.”].
 - The RSW check marks *No*, the appellant does not have an assistance animal.

Self-report

- The appellant does not address the need for assistance in his self-report.

2. A Request for Reconsideration signed by the appellant on November 20, 2016 in which he states that he is not able to work full-time hours due to his injuries, and if it were not for his mother helping him out, he would probably be living on the streets as he cannot work enough to pay for medications and rent. He states that he is in constant pain and cannot get out of bed or a chair on bad days. He further states that he is unable to provide for his children due to his limited abilities.

Additional submissions

Subsequent to the reconsideration decision, the appellant filed his Notice of Appeal dated December 20, 2016 in which he provides his argument on appeal. The panel will address the arguments of both parties in *Part F - Reasons for Panel Decision*.

The appellant did not attend the hearing and upon confirming that he had been notified of the hearing date and time, the panel proceeded in the appellant’s absence pursuant to section 86(b) of the Employment and Assistance Regulation.

At the hearing, the ministry presented its argument on appeal and explained that in terms of functional skills and abilities, it looks for check marks at the most severe end of the scale in the PR and AR to establish that the person’s impairment is severe. In response to a question relating to how long the appellant’s impairment is expected to last, the ministry indicated that it has not received any update on the appellant’s surgical consult. The panel accepts the ministry’s oral submissions under section 22(4)(b) of the *Employment and Assistance Act* as argument in support of its position at reconsideration.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration decision of December 9, 2016, which found that the appellant is 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 RFR, the ministry was not satisfied that four criteria in EAPWDA section 2(2) were met: The appellant has a severe mental or physical impairment; the impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years; the impairment, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods; and as a result of these restrictions, the appellant requires help to perform DLA through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

2(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.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in section 2 of the EAPWDR:

Definitions for Act

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;

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;

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- (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.

Analysis

The panel provides the following analysis and decision for each of the legislative criteria that the ministry found were not met.

Severe mental impairment

The appellant is not claiming that he has a mental impairment and the ministry notes that a mental impairment has not been identified or diagnosed and that the physician and assessor report no deficits or impacts to daily living as a result of cognitive and emotional function and the appellant is also reported to have a good ability to communicate. The ministry argues that the information provided does not confirm that the appellant is severely impacted or restricted in his DLA as a result of a mental impairment and, therefore, the evidence in the PWD application does not establish a severe mental impairment.

Panel's decision - Severe mental impairment

The panel finds that the ministry reasonably concluded that the information provided in the PWD application does not establish a severe mental impairment. Not only is the appellant not diagnosed with a mental impairment, the evidence indicates that he does not have any deficits or impacts for any areas of cognitive and emotional functioning and his communication and social functioning are reported as unrestricted in the PR, and independent in the AR. The RSW comments that although the appellant's back pain can cause grumpiness, he is able to maintain healthy relationships.

The legislation requires evidence of a severe impairment that significantly impacts daily functioning. As the physician's and RSW's reports do not indicate a mental impairment that causes significant impacts and restrictions in any area of cognitive and emotional functioning and the appellant is also reported to have good communication and social functioning, the panel finds that the ministry reasonably determined a severe mental impairment under section 2(2) of the EAPWDA was not established.

Severe physical impairment

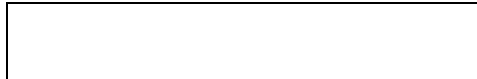
The appellant argues that his herniated disc and FAI make his life very difficult, causing significant pain with bending, lifting, and also standing/ sitting for any extended period. He submits that his condition is very hard to deal with as he never knows when even a simple task, such as putting on his shoes, is going to aggravate his back. He argues that while he “is not as disabled as some unfortunate people”, he is in constant pain and nowhere near to being fully able-bodied. On his bad days, he cannot even get out of bed or a chair and he “totally disagrees” that his impairment does not significantly restrict his life.

The ministry submits that a severe physical impairment is not established by the information in the PWD application and RFR submission, arguing that the functional skills limitations reported by the physician [able to walk 1-2 blocks unaided, climb 2-5 steps unaided, and lift 5-15 pounds] are more in keeping with a moderate degree of physical impairment. The ministry acknowledges that the appellant experiences pain and some limitations but notes that the assessor has not provided information to explain the degree or the frequency of the periodic assistance the appellant needs with activities such as Walking outdoors and Carrying and holding to establish that assistance is required for an extended period. The ministry further notes that the RSW indicates the appellant is independent with Walking indoors, Climbing stairs, and Standing and the physician indicates that the appellant does not require any prostheses or aids for his impairment.

Panel’s decision - Severe physical impairment

The panel finds that the ministry reasonably determined a severe physical impairment has not been established by the information provided. The legislation requires evidence of a severe impairment that significantly impacts daily functioning; however, the physician indicates that despite chronic back pain that causes difficulty with ambulating and performing daily tasks, the appellant’s physical functions fall within a moderate range of restriction as he can walk 1-2 blocks unaided, climb 2-5 steps, and also lift 5-15 pounds. Furthermore, while the RSW reports that the appellant is living with constant pain daily and needs periodic assistance with Walking outdoors, Lifting, and Carrying/ holding, he marks him as independent with Walking indoors, Climbing stairs, and Standing. In addition, some of the DLA involving physical movements such as bending or lifting [for example, Personal self-care and Meal preparation] are marked as unrestricted/ independent in both the PR and AR and while the physician indicates that the appellant is continuously restricted in other physical DLA such as housework and shopping, there is no evidence in either the PR or AR confirming that the appellant requires significant help to manage any of his DLA.

While the appellant experiences chronic pain and difficulty with movement in his daily activities, the information from the physician and RSW, described above, supports a moderate degree of restriction and a moderate physical impairment as argued by the ministry. The legislative test that requires evidence of a severe impairment is therefore not met, and the panel finds that the ministry reasonably determined a severe physical impairment under section 2(2) of the EAPWDA was not established.



Impairment likely to continue for at least 2 years

In his Notice of Appeal, the appellant “totally disagrees” that his injuries “will be better in 2 years or less.” He describes a previous back surgery that did not go well and his herniated disc and FAI continue to cause him pain and difficulties in his daily life. The ministry’s position is that the physician’s evidence does not confirm that the appellant’s impairment will continue for at least 2 more years as the physician reports that it will be depend on the surgical consult and outcome. At the hearing, the ministry argued that there is a possibility that the appellant’s condition “could be fixed if he had surgery and the outcome is good.”

Panel’s decision - Duration of impairment

The panel finds that the ministry reasonably determined that the appellant’s impairment does not meet the legislative criterion of being likely to continue for at least 2 more years. While the panel acknowledges that the appellant’s back pain is chronic, the legislative test under section 2(2)(a) of the EAPWDA is forward looking and requires a medical practitioner to confirm that the condition will persist for at least 2 more years. The physician’s evidence is that the duration of the appellant’s impairment is “unknown” as the appellant is awaiting re-assessment by his neuro-surgeon and it will depend on the surgical consult and outcome as noted by the ministry. The panel therefore finds that the ministry reasonably determined the criterion in section 2(2)(a) of the EAPWDA was not met.

Restrictions in the ability to perform DLA

The appellant’s position is that his impairment significantly restricts his daily life. He states that he is not able to pursue full-time work due to his injuries and he is unable to provide for his children, or earn enough to pay for medications and rent. He submits that he has bad days where he cannot even get out of bed or a chair and a wrong move or a simple task, such as putting on his shoes, can aggravate his condition and cause him to be laid up for days.

The ministry argues that the information from the prescribed professionals indicates that the majority of DLA are performed independently or require little help from others, and therefore the evidence does not establish that the appellant’s impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry notes the physician’s information that several DLA are continuously restricted; however, despite these “continuous” restrictions, the physician only indicates that “possible help” with day to day tasks is required, and at the same time, he indicates that many other DLA are not restricted. The ministry further notes that the RSW indicates the appellant independently manages the majority of DLA, though he is often unable to do simple household chores and he requires periodic assistance with getting in and out of most vehicles.

Panel’s decision - Restrictions to DLA

Subsection 2(2)(b)(i) of the EAPWDA requires the minister to be satisfied that in the opinion of a prescribed professional a severe impairment directly and significantly restricts DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are the physician and the RSW. DLA 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 are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

The panel finds that the ministry reasonably determined the evidence from the physician and RSW does not establish that the appellant's DLA are directly and significantly restricted either continuously, or periodically for extended periods. While the physician indicates that the appellant takes medication that causes lethargy and interferes with DLA, and that he is continuously restricted in his ability to perform nearly half of the DLA listed in the PR due to chronic pain that limits physical movement, no specifics are provided and half of the DLA listed are marked as unrestricted.

Furthermore, there are unexplained inconsistencies between the information in the PR and AR. While the physician reports continuous restrictions with Basic housework, Daily shopping, Mobility inside the home and Mobility outside the home, the RSW indicates that the appellant is independent with all areas of Basic housekeeping and Shopping, and is also independent with Walking indoors. Regarding Mobility outside the home, the RSW reports that the only difficulty the appellant has is with going uphill.

While the panel is inclined to give more weight to the PR as the RSW has known the appellant for only one week, the legislation also requires evidence of direct and significant restrictions to DLA and the physician has stated only that restrictions are continuous due to the appellant's chronic pain. Therefore, while the appellant reports that he has "bad days" where he cannot get out of bed, the evidence of the physician and RSW taken together indicates that the appellant is independent with most DLA. While some periodic restrictions are reported, the prescribed professionals do not confirm that the restrictions are for extended periods as required under subsection 2(2)(b)(i)(B) of the EAPWDA.

Regarding the appellant's information that he is unable to work or financially support his family, the panel notes that the ability to work and the need for financial support are not criteria for determining PWD eligibility. The legislation requires evidence of significant restrictions to DLA either continuously or periodically for extended periods as the result of a severe impairment. As the prescribed professionals indicate the appellant is independent with the majority of DLA, the panel finds that the ministry reasonably determined that the criteria in subsection 2(2)(b)(i) of the EAPWDA were not met.

Help to perform DLA

The appellant submits that if it were not for his mother helping him, he would probably be living on the streets. The ministry argues that as it has not been established that DLA are significantly restricted, it cannot be determined that *significant* help is required from other persons.

Panel's decision - Help to perform DLA

Subsection 2(2)(b)(ii) of the EAPWDA requires a prescribed professional to confirm that as a result of significant restrictions to DLA, the person requires help to perform an activity. Where another person is providing the help, the level of assistance or supervision required must be significant as set out in subsection 2(3)(b)(ii) of the EAPWDA. While there is evidence that the appellant uses back braces, which qualify as an assistive device under the EAPWDR, no detail is provided regarding the periodic assistance he requires for Transportation and there is no confirmation from the prescribed

professionals that he requires assistance with any other DLA. In any event, the panel found that the ministry reasonably determined the information provided does not confirm significant restrictions to DLA that are the result of a severe impairment. As restrictions to DLA are a precondition for the help criterion and the precondition has not been met, the panel finds that the ministry reasonably determined the criterion under subsection 2(2)(b)(ii) of the EAPWDA was not met.

Conclusion

The panel finds that the ministry's reconsideration decision that determined the appellant is not eligible for PWD designation under section 2 of the EAPWDA was reasonably supported by the evidence. The panel confirms the decision pursuant to sections 24(1)(a) and 24(2)(a) of the *Employment and Assistance Act* and the appellant is not successful in his appeal.