

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 January 23, 2017, 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 has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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

On June 10, 2016, the ministry received the appellant's PWD application which comprised a Physician Report (PR) dated May 29, 2016, and an Assessor Report (AR) dated June 2, 2016. Both the PR and AR were completed by a general practitioner (GP) who has treated the appellant since 2008. The appellant chose not to complete the Self-report (SR) part of the PWD application.

The appellant's request for PWD designation was denied on November 16, 2016. On December 21, 2016, the ministry received the appellant's Request for Reconsideration together with a request for an extension of time to submit additional information. No additional information was received by the ministry.

On February 6, 2017, the Tribunal received the appellant's Notice of Appeal in which the appellant stated as follows: "With medication I'm above ground. Most days, I can do DLA's, but several days a week I can't. Cooking, shopping, cleaning, communicating (even via email/phone), I can't do it. I shutdown. As for ESN's, I've missed more appointments than attended."

At the hearing, the appellant explained that he was with the GP when the AR was completed, and that the appellant understood that the information provided should describe the best-case scenario when medications are working, not the average or worst days. The appellant also clarified that the reference to "ESNs" in his Notice of Appeal means "extended social networks." The appellant stated that medications have been effective to "put a floor" on his condition but not to the point that he is able to function independently. He is "completely out" a couple of days a week and not able to do DLA and for a couple of days a week he can reliably do all listed DLA. He struggles to take his medications, particularly his evening medication which he both forgets to take and sometimes chooses not to take because of side-effects the next day. He has attended group therapy in the past, and had a psychiatric assessment recently but the results were not available in time to submit as part of his PWD application.

At the hearing, the ministry relied on its reconsideration decision.

Summary of relevant evidence at reconsideration

Diagnoses and health history

In the PR, the GP diagnoses the appellant as having depression since approximately 2008. The appellant has seen a psychiatrist in the past and has been prescribed various medications and counselling. There is some variable degree of symptoms, but in general it has persisted and worsened over recent years. He has been unable to continue his studies or work since earlier in 2016.

Physical Impairment

The GP reports that the appellant independently manages all aspects of physical ability and mobility

without any reported limitations.

Mental Impairment

The GP reports:

- No cognitive or other difficulties with communication.
- Moderate to severe depression symptoms that have not improved with current treatment.
- Low motivation and depressed mood worsened by insomnia and fatigue.
- Significant deficits with cognitive and emotional functioning in 4 of 11 listed areas: memory, emotional disturbance, motivation, and attention or sustained concentration. These deficits “limit his ADLs in many ways.”
- A major impact on daily functioning is reported for 3 of 14 listed areas of cognitive and emotional functioning – emotion, attention/concentration (distractible, unable to maintain concentration, poor short term memory), and motivation (lack of initiative, loss of interest). A moderate impact is reported for bodily functions (sleep disturbance) and memory. A minimal impact is reported for consciousness (drowsy) and executive. No impact is reported for the remaining areas.

DLA

The GP reports that all listed aspects or tasks of the following DLA do not take significantly longer to perform and are managed independently without assistance from another person, or an assistive device: mobility and physical ability, personal care, basic housekeeping, shopping, meal preparation, pay rent and bills, medications, and transportation.

Social functioning requires periodic support/supervision from another person in all 5 listed areas – appropriate social decisions, develop and maintain relationships, interact appropriately with others, deal appropriately with unexpected demands, and ability to secure assistance from others. “His depression symptoms leave him quite socially isolated with minimal to no interactions with friends.” The GP reports that the appellant has very disrupted functioning with his immediate social network (major withdrawn) and good functioning with extended social networks. The GP has not provided a response where asked to identify any safety issues.

“Longstanding depression that affects multiple ADLs and limits his social interactions and has caused severe problems with school/work functioning.”

Need for Help

The GP reports that help is provided by immediate family with whom the appellant lives and that he would benefit from a social worker/case manager. The GP also comments that the appellant’s family provides social functioning support during “worse episodes.”

PART F – Reasons for Panel Decision

Issue on Appeal

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?

Relevant Legislation

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 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.

(4) The minister may rescind a designation under subsection (2).

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:

- (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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Physical Impairment

As the appellant is not diagnosed with a physical medical condition or reported to have any physical functional limitations, and does not argue that he is physically impaired, the panel finds that the ministry reasonably determined that the information does not establish a severe physical impairment.

Mental Impairment

The appellant's position is that for a couple of days every week he is impaired by his depression to the point that he shuts down and is unable to communicate at all or do any DLAs.

The ministry's position is that while the appellant experiences some restrictions due to depression, the minister is not satisfied that the information exhibits a *severe* mental impairment. In reaching this conclusion, the ministry notes that the legislation clearly provides that the determination of severity of impairment is at the discretion of the minister and is based on an all-encompassing view of the PWD application and additional information as a whole. The ministry also notes that the PWD application is not intended to assess employability or vocational abilities and that a medical barrier to the ability to engage in paid employment is not a legislated criterion.

In reviewing the information, the ministry argues that if the appellant's impairment was severe it would be expected that there would be some impact on the ability to perform DLA, whereas the GP reports that all DLA, except social functioning, are managed independently.

Respecting social functioning, the ministry argues that the GP does not indicate how often "worse episodes" occur or what kind of support is required. Also, while "very disrupted functioning" with the appellant's immediate social network is reported, it is recognized that the appellant is able to access family support when needed and that he resides with family. Further, while minimal to no interaction with friends is reported, the GP also reports good functioning with extended social networks.

The ministry also notes that the GP does not explain how often the appellant's depression, which is described by the GP as "moderate to severe", is moderate versus severe. The ministry comments that if the appellant's condition was severe it would be expected that he would benefit from sessions with a psychiatrist; however, it is unclear if the appellant is currently under the care of a psychiatrist and that there are no notes/letters from the psychiatrist the appellant saw in the past, making it difficult to confirm the severity of impairment.

Panel Decision

The appellant is diagnosed with depression which the GP describes as resulting in moderate to severe symptoms, and as having a major impact on daily functioning in the areas of emotion, motivation, and attention or concentration. However, as the ministry notes, there is no explanation of how often the symptoms are severe and furthermore, these symptoms are not reported to have any impact on the appellant's ability to perform 9 of the 10 prescribed DLA.

For the DLA that is impacted, social functioning, the appellant is reported as requiring periodic support/supervision and that family provides support during "worse episodes", but there is no indication of how often these episodes occur or how long they last. While the appellant reports that every week he is unable to function for a couple of days, the GP has not confirmed this information either by his commentary or by the assessments of mostly independent functioning. Additionally, as the ministry notes, it is unclear why the GP comments that the appellant is "quite socially isolated with minimal to no interactions with friends" but also reports that the appellant has good functioning with

extended social networks and no difficulties with communication. Similarly, it is unclear why the GP reports that the appellant has very disrupted functioning with his immediate social network when he is reported as receiving assistance from his family when needed.

The panel finds that the ministry reasonably determined that based on the information as a whole, the level of functioning reported by the GP does not establish a severe mental impairment.

Restrictions in the ability to perform DLA

The appellant argues that for a couple of days every week he is unable to perform any DLA and that that the assessment of DLA in the PWD application is based on a misunderstanding that only the best days of functioning were to be described.

The ministry's position is that while the GP writes that depression impacts the appellant's ability to perform DLA, the GP reports that the appellant is independent in every category, including tasks that would be expected to be affected. Considering the information in the application as a whole, the ministry is not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and *significantly* restricts his ability to perform the DLA set out in legislation.

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 with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

In this case, the appellant's GP is the prescribed professional who has provided information respecting the appellant's ability to perform DLA.

The GP comments that the appellant's longstanding depression "affects multiple ADLs and limits his social interactions and has caused severe problems with school/work functioning" and that the 3 identified deficits with cognitive and emotional functioning "limit his ADLs in many ways." However, when assessing each of the prescribed DLA, which are broken down into specific tasks and areas in the AR, some of which relate to cognitive and emotional functioning, the GP assesses the appellant as completely independent for all DLA except social functioning which requires periodic support/supervision. As previously discussed, it is unclear how often or for how long the appellant requires this periodic support/supervision making it difficult to assess whether the restriction is either significant or for extended periods.

The GP reports that the appellant's symptoms have a severe impact on the ability to work and attend

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school, but the legislative test is the impact on the ability to perform the prescribed DLA which do not include employment or school.

Based on the level of independence with which the GP reports that the appellant manages DLA, the panel finds that the ministry reasonably determined that the information does not establish that as a result of a severe impairment, the appellant's ability to perform DLA is directly and significantly restricted, either continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant does not expressly indicate what help he requires with DLA but reports that every week he is unable to do DLA for a couple of days.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The establishment of direct and significant restrictions with DLA are a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably 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

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 a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.