

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the Ministry) reconsideration decision dated January 25, 2017, which found that the Appellant did not meet three of the five 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 his impairment 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 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 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 the PWD Application comprised of the applicant information and self report (SR) dated September 13, 2016, a physician report (PR), dated September 1, 2016 and completed by the Appellant's general practitioner (GP) who has known the Appellant for approximately 20 years and who has seen the Appellant 2 to 10 times in the past year, and an assessor report (AR) also dated September 1, 2016 and completed by the GP.

The evidence also included the following documents:

- 1) Request for Reconsideration (RFR) signed on January 16, 2017 in which the Appellant states that:
 - He is in constant pain when walking, sitting and standing and that he has spent over a year trying to prove his disability;
 - He doesn't know what he is supposed to do for income if he can't work;
 - He is not claiming that he has a mental disability and that he does not ask for "help around the house"; and
 - The only way he can get around and still get exercise is to ride his bicycle (bike), which he claims the Ministry does not recognize as a "medical vehicle".
- 2) A Medical Imaging Report (MRI) of the Appellant dated July 24, 2016 providing detailed findings of a Computed Tomography (CT) of his Lumbar Spine.

Diagnoses

In the PR, the GP diagnosed the Appellant with Degenerative Disk Disease (DDD) with onset in 2000.

Physical Impairment

In the PR, in terms of health history, the GP reported that the Appellant has constant severe lower lumbar pain, severe right leg radiation to the knee when standing or walking, he sleeps a maximum of 3 to 4 hours at a time due to the pain, and that the MRI referenced above confirms severe foraminal narrowing at L5 - S1 with disc bulge and mass impingement effect on the existing L5 nerve root.

Also in the PR, in terms of the degree and course of impairment, the GP stated that the Appellant's DDD is chronic, severe and likely to get worse over time. The GP further indicates that the Appellant had not been prescribed any medication or treatments that interfere with his ability to perform DLA. The GP also reports that the Appellant can walk 2 to 4 blocks unaided, climb 2 to 5 steps unaided, can lift 15 to 35 lbs, and can remain seated for less than an hour.

In the AR, the GP indicated that the Appellant's physical impairments that impact his ability to manage DLA are severe and involve constant back pain which is worse with activity or prolonged sitting, standing or walking. In the section of the AR dealing with mobility and physical ability, the GP indicates that the Appellant is independent and requires no assistance with any of the listed activities, which include walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding, but that it takes him significantly longer than typical to perform these activities and in particular that he

cannot stand for more than 5 to 10 minutes at a time. The GP comments “back pain constant / severe & very limiting”.

In the SR, the Appellant wrote that he has torn ligaments in his lower back with “fluid on L5”. His injuries are the result of him trying to lift a box at work when he had a cold. He stated that he was on Worker’s Compensation Benefits (WCB) for as long as possible and participated in a rehabilitation program. Eventually his WCB ran out and he went a year and a half without a job or any income.

In his SR, the Appellant also states that he cannot stand for more than 5 minutes without pain and cannot walk any distance as his impairment affects his legs, and that when it really hurts he can’t stand up straight. He also states that playing sports was a major part of his life but he can’t play any sports any more. He explains that he is unable to maintain full-time employment because he has to take time off when he can’t walk.

At the hearing, with reference to a point made in the reconsideration decision noting the absence of any information regarding referrals by the Appellant’s GP to specialists (chiropractor, massage therapist, occupational therapist, etc.), the Ministry explained that, because the client stated in his SR that he had previously received WCB, the Ministry would have expected evidence by either the GP or the Appellant showing that the Appellant had been receiving alternate or ongoing therapy to help substantiate the severity of the Appellant’s impairment.

Mental Impairment

In the PR, the GP reported that the Appellant has no difficulties with communication or any significant deficits with cognitive and emotional functioning.

In the AR, the GP reported that the Appellant has good speaking, hearing and reading abilities and satisfactory writing abilities. The GP did not complete the section of the AR that he is asked to complete if the applicant has been identified with a mental impairment.

In the SR the Appellant states that he has lost body conditioning because he has to sit so much, and that he went into major depression for a while and had suicidal ideation.

As mentioned in the summary of evidence provided in his RFR above, the Appellant states that he is not claiming that he has a mental disability.

Restrictions in the Ability to Perform DLA

In the PR, the physician is instructed not to complete the section of the PR detailing restrictions to DLA if the physician is also completing the AR. Consequently the GP did not provide any information about any impairments which might be restricting the Appellant’s ability to complete his DLA in the PR.

In the AR, the GP reported that the Appellant was independent with respect to all aspects of personal care, meals, paying rent and bills, medications, transportation and social functioning. Regarding personal care, the GP indicated that the Appellant takes significantly longer than typical with dressing, grooming, bathing and transfers out of chairs due to “severe pain”. In addition, the GP indicated that the Appellant takes significantly longer than typical with food preparation and cooking because he can’t stand for more than 5 minutes and that he takes significantly longer than typical to

get in and out of a vehicle because it is painful to do so. The GP also indicated that the Appellant requires continuous assistance with basic housekeeping, including laundry as it is too painful for him to do. With respect to shopping, the GP reports that the Appellant is independent with respect to reading prices and labels, making appropriate choices and paying for purchases. The GP also indicates that the Appellant takes significantly longer than typical in going to and from stores and carrying purchases home, and that for these DLA he uses his bike as an assistive device.

In his SR, the Appellant provided detailed information about the nature and severity of his impairment, as outlined above, but did not comment on its impact on his DLA. Similarly, in the RFR the Appellant did not comment on the impact of his impairment on his DLA except to state that the only way he “can get around and still get exercise is on his bike”.

Need for Help

In the PR, the GP does not provide any information regarding whether the Appellant requires any help to perform his DLA.

In the AR, the GP wrote that the Appellant lives with a friend who might be the person who provides the continuous assistance that the GP says the Appellant requires to do basic housekeeping. The GP also reported that the Appellant uses his bike as an assistive device in going to and from stores and carrying his purchases home. Under the section prompting the physician for comments, the GP writes “Any transport is by bike. He cannot carry parcels, etc. but requires bike handlebars to carry any load.” The GP also said that the Appellant does not have an assistance animal.

In his SR, the Appellant states that he needs financial assistance but does not need help with any of his DLA. In his RFR the Appellant states that he does not ask for help around the house.

Additional Information submitted after reconsideration

In his Notice of Appeal dated February 14, 2017, the Appellant wrote that he was appealing the Ministry’s reconsideration decision because he can’t work and that “the Government has made (him) feel like a burden”. He specifies the following four reasons for his appeal:

- 1) He does not have a mental disability;
- 2) He does not have home care because he is trying to stay independent;
- 3) He does not have an assistive device to get around but he uses his bike to stay in shape; and
- 4) He only takes medication when he has to bike.

The Appellant did not attend the hearing. After confirming that the Appellant was notified of the hearing, the hearing proceeded in his absence in accordance with section 86(b) of the Employment and Assistance Regulation.

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

Admissibility of Additional Information

The panel considered the information in the Appellant’s Notice of Appeal to be argument in support of his appeal of the reconsideration decision.

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 person with disabilities (PWD), 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 does not have a severe mental or physical impairment and that his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that it could not be determined that 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 as a result of any restrictions.

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 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.

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

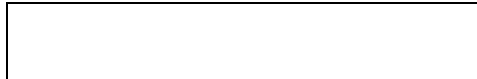
The EAPWDR provides as follows:

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.

(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 ...

Severity of Physical Impairment

The Appellant takes the position that he is in severe pain and as a result he is unable to work, he cannot stand for more than 5 minutes and cannot walk any distance.

The Ministry's position, as set out in the reconsideration decision, is that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. While the Ministry acknowledges that the GP, who has known the Appellant for 20 years, describes the Appellant's impairment as severe several times in the AR and the PR, the Ministry argues that determining the severity of a physical impairment requires "weighing the evidence provided against the nature of the impairment and its reported functional skill limitations". In its reconsideration decision, the Ministry points out that the Appellant's GP does not mention a referral to a pain clinic, chiropractor, massage therapist, occupational therapist, or any other kind of physical therapy that would be expected were the Appellant's impairment considered severe, nor does he mention any medication that Appellant might be taking for pain. At the hearing, the Ministry explained that, where an applicant has received rehabilitation therapy in the past, the effectiveness of that treatment and the possible ongoing need for that treatment should be addressed by the prescribed professional to assist the Ministry in its assessment of whether impairment severity and DLA impacts have been minimized.

The Ministry's conclusion is that the functional skill limitations of the Appellant as described by the GP

are more in keeping with a moderate impairment than a severe one because he is capable of basic mobility.

Panel Decision

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 or a nurse practitioner, is likely to continue for at least 2 years. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a “severe” impairment. An “impairment” is a medical condition which results in restrictions to a person’s ability to function independently or effectively. Employability is not assessed in the PWD application process.

To assess the severity of an impairment, the Ministry must consider both the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. 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 a prescribed professional, in this case the Appellant’s GP.

The panel notes that, when asked to indicate the severity of the Appellant’s medical conditions in the PR, the GP reported that the Appellant’s DDD is both chronic and severe. The panel further notes that while the Appellant stated in the SR that he had participated in a rehabilitation program when he was receiving WCB, neither he nor the GP have identified what impact rehabilitation therapy had on the Appellant’s functional ability. Neither the GP nor the appellant provided evidence that the Appellant continued to pursue other strategies, such as information on the ongoing value of rehabilitation therapies or medications in reducing the severity of an applicant’s impairment assists when assessing PWD eligibility.

In addition, the panel notes that in the AR, the GP indicates that the Appellant is independent with several DLA take significantly longer than typical. However, the GP does not explain how much longer than typical those activities take.

The panel finds that the Ministry’s determination that, given the Appellant’s independence in performing DLAs and the lack of information on the effects of rehabilitation programs or information pursuant of other strategies, the Appellant does not have a severe physical impairment which directly and significantly restricts the Appellant's ability to perform DLA either continuously, or periodically for extended periods pursuant to Section 2(2) of the *EAPWDA*, was reasonably supported by the evidence before the Ministry at reconsideration.

Severity of Mental Impairment

In the PR, the Appellant’s GP reported that the Appellant had no difficulties with communication or any significant deficits with cognitive and emotional function.

In his Notice of Appeal, the Appellant stated that he does not have a mental disability, although he did indicate in his SR that he did at one time suffer from depression and considered suicide.

In the AR, the GP left the section regarding cognitive and emotional functioning blank.

Panel Decision

The panel acknowledges that neither the Appellant, nor the Ministry, nor the GP indicated that the Appellant has any mental impairment. Regarding the Appellant's episode of suicidal ideation several years ago, the panel notes that this event was not referenced or included in the GP's diagnosis.

Therefore the panel finds that the Ministry reasonably determined that a severe mental impairment was not established pursuant to Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The GP reported that the appellant was independent with respect to his performance of all DLA except for basic housekeeping, for which he required continuous assistance from another person, and that it takes significantly longer than typical with food preparation and cooking because he can't stand for more than 5 minutes.

The Ministry's position is that the Appellant is largely independent in a majority of DLA, and that where the Appellant is not independent (basic housekeeping), the Ministry is not satisfied that the Appellant is experiencing *significant* restrictions because his GP reported that he can walk up to 5 blocks and lift 15 to 35 lbs unaided.

The Appellant did not provide any information in his SR, the RFR or the Notice of Appeal regarding any restrictions in performing his DLA.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restricts his DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. 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, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by an applicant's impairments either continuously or periodically for extended periods, and to further elaborate so that the nature and extent of the restrictions to DLA are clear. Prescribed professionals are further encouraged to elaborate on the nature and extent of the limitations or restrictions in the instructions provided in those sections of the forms. For example, in Part C of the AR the assessor is instructed to identify whether assistance is required in each case with respect to any of DLA, and if the applicant is not independent, to describe the type and amount of assistance required.

Because the Appellant stated in his Notice of Appeal that he does not avail himself of home care because he is trying to stay independent, it is unclear who does perform the Appellant's basic housekeeping. It is also unclear why the Appellant cannot perform basic housekeeping and laundry duties given that the GP has indicated that he can lift 15 to 35 lbs, climb 2 to 5 steps and walk 2-4 block unaided.

Regardless of who performs the Appellant's basic housekeeping, the panel recognizes that the Appellant is able to perform the vast majority of DLA independently. As the Appellant did not attend the hearing, it was not possible for the panel to identify who was performing basic housekeeping on

behalf of the Appellant, or how he was able to perform certain DLA, such as cooking, if he can only stand for 5 minutes.

The panel finds that the Ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the Appellant's impairment *significantly* restricts his ability to manage his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help with DLA

The Appellant's position is that his bike is an assistive device and the ministry should recognize it as such, and that he does not have any home care because he is trying to maintain his independence.

In its reconsideration decision, the Ministry states that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted.

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 a DLA.

The panel finds that the Ministry reasonably determined that, as direct and significant restrictions in the Appellant's ability to perform DLA have not been established, 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.

With respect to the Appellant's contention that his bike is an assistive device, Section 2(1) of the EAPWDA defines an assistive device to be "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".

While the panel acknowledges that both the Appellant and his GP have stated that the Appellant finds his bike to be an effective aid to both ambulation and carrying purchases home, the panel finds that a bike is not *designed* as a device to enable a person to perform DLA, and therefore does not meet the definition of an assistive device in the applicable enactment.

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 was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful in his appeal.