

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 24 April 2017, which denied 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 as 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 the appellant has a severe mental or severe physical impairment; the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of those restrictions, he requires help to perform those activities.

The ministry found that the information provided did establish that the appellant has reached 18 years of age and his impairment, in the opinion of a medical practitioner, 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

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

1. The appellant's **PWD Application** dated 18 August 2016. The Application contained:
 - A Physician Report (PR) dated 19 February 2016, completed by the appellant's general practitioner (GP) who has known the appellant since September 2016 and seen him 2-10 times in the past 12 months.
 - An Assessor Report (AR) dated 06 October 2016, completed by a social worker (SW) who has known the appellant since July 2016 and seen him 2-10 times in the last 12 months.
 - A Self Report (SR) dated 24 August 2016 completed by the appellant.
 - With the PWD application, the appellant submitted:
 - a list of health care practitioners he has seen, and
 - the first page of a psychiatric assessment dated 20 March 2016.
2. A **Request for Reconsideration** prepared by the appellant dated 12 April 2017, in which he indicates that he has provided his notes, a doctor's note and brain injury information.
 - The appellant's notes consist of a five-page letter in which the appellant describes his medical conditions and their effects. He states that he does not have family or friends to help him. He has been homeless since 2011 and lives in a holiday trailer without power, running water, fridge and heat; he does not eat very well. He describes advice provided by his chiropractor to help with his brain injury, energy and depression. He explains that he has been taking supplements to support cognitive health and brain function. The appellant describes the trigger point treatments and chiropractic treatments he has been receiving. The appellant also summarizes information about the links between head trauma and ADD (attention deficit disorder) and has provided photocopies from the source of this information (a book about healing ADD).
 - A one-page letter dated 24 March 2017 written by a medical doctor who has been providing trigger point injection treatments to the appellant.
 - An information flyer for a brain injury support group in the appellant's community.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

Diagnoses

In the PR, the GP diagnoses the medical conditions related to the appellant's impairment as:

- Generalized Anxiety Disorder – onset unspecified
- Concussion whiplash 2nd MVA – onset May 2015
- Headaches, Chronic – onset February 2008
- Leukopenia – onset > 1 year
- Ulcerative colitis – onset unspecified

The GP also provides a list of symptoms that he attributes to two motor vehicle accidents occurring on 7 May 7 2015 and 4 February 2008.

In the AR, the SW describes the appellant's mental or physical impairments as Generalized Anxiety Disorder, concussion, whiplash 2nd MVA, chronic headaches, leukopenia, ulcerative colitis, back pain – chronic

Severity of mental impairment

PR:

The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation, with the comment "chronic anxiety and lack of motivation to do things. Lack of energy."

The GP indicates no difficulties with communication.

AR:

The SW assesses the appellant's ability to communicate as good for hearing, satisfactory for speaking (*feels as though it takes longer to form thoughts, to speak*) and reading (*can be difficult to concentrate due to lack of sleep and anxiety*), and poor for writing (*is effected by stiffness in hands*).

The SW assesses the appellant's cognitive and emotional functioning as not impacted in the areas of impulse control, executive, language and psychotic symptoms. The SW assesses minimal impacts on daily functioning in the areas of insight and judgement and motor activity. Moderate impacts on daily functioning are assessed in the areas of consciousness, attention/concentration, memory, and other neuropsychological problems. Major impact on daily functioning is assessed by the SW for bodily functions, emotion and motivation.

The SW comments: *unable to sleep for more than three hours most nights. No energy or motivation to do tasks such as read a book that they once enjoyed. Has a generalized anxiety disorder. Distractible while writer was discussing health. Memory can be poor when sleep is (sic). Applicant reports short ten second periods of being unable to see properly and feeling like "his brain has shut down."*

The SW indicates that the appellant is independent in all social functioning DLA and has marginal functioning in his immediate social networks and good functioning in extended social networks.

Severity of physical impairment

PR:

Under Health History, the GP writes:

2 motor vehicle accidents in May 7, 2015, Feb 4, 2008 since suffering from back pain and concussion symptoms and low mood with chronic headaches on daily basis that affects his function. He describes presyncope episodes with no true syncope episodes. He describes his mood as low, anxieties about inability to manage work and finances and chronic headache and back pain prevent him from working.

Under additional comments, the GP writes:

Whiplash, concussion, and decreased mood and anxiety post-accident possibly chronic. He has been referred to a psychiatrist and neurologist. He has intolerance to SSRI's (selective serotonin reuptake inhibitors), neurologist appointment is pending but due to chronic nature of headaches and head trauma, lack of motivation and decreased mood, its possible that he may suffer for life and be unable to work. Chronic degenerative back disease prevents him from working, lifting and standing, sitting for long periods of time.

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift 7 to 16 kg. (15 to 35 lbs.), and remain seated less than 1 hour.

The GP has not completed the daily living activities (DLA) portions of the PR.

The GP does not specify the nature and extent of any assistance needed with DLA.

The GP indicates that the appellant does not require any aids or prostheses.

AR:

The SW indicates the appellant's mobility and physical ability as independent for walking indoors and walking outdoors, climbing stairs, standing (*after 15 minutes – unable*), lifting (*no more than 7-16kg.*) and carrying and holding (*no more than 7-16kg.*). The SW comments: *standing, lifting, carrying and holding are the most restricted due to chronic back pain and while applicant can do independently, applicant requires a break after 15 minutes and no more than 7-16kg to hold/lift.*

Ability to perform DLA

General

PR:

The GP indicates that the appellant has not been prescribed medication that interferes with his ability to perform DLA.

The GP indicates that the appellant has no difficulties with communication.

AR:

The SW assesses the appellant's ability to communicate as good for hearing, satisfactory for speaking and reading, and poor for writing.

Section 2(1)(a) DLA

Prepare own meals

PR:

The GP does not indicate whether the appellant is restricted in relation to meal preparation.

AR:

The SW indicates that the appellant is independent in all meals activities.

Manage personal finances

PR:

The GP does not indicate whether the appellant is restricted in relation to management of personal finances.

AR:

The SW indicates that the appellant is independent in all of the activities related to management of personal finances, including banking, budgeting, and pay rent and bills.

Shop for personal needs

PR:

The GP does not indicate whether the appellant is restricted with daily shopping.

AR:

The SW indicates that the appellant is independent in the shopping DLA of reading prices and labels, making appropriate choices, going to and from stores and carrying purchases home.

Use public or personal transportation facilities

PR:

The GP does not indicate whether the appellant is restricted in relation to use of transportation.

AR:

The SW indicates that the appellant is independent in the transportation DLA of getting in and out of a vehicle and indicates that using public transit and using transit schedules and arranging transportation are not applicable.

Perform housework to maintain the person's place of residence

PR:

The GP does not indicate whether the appellant is restricted in relation to basic housework.

AR:

The SW indicates that the appellant is independent with laundry and basic housework.

Move about indoors and outdoors

PR:

The GP indicates that the appellant is able to walk 4+ blocks unaided on a flat surface and can climb 5+ steps unaided.

The GP does not indicate whether or not the appellant is restricted in relation to mobility inside of the home or mobility outside of the home.

AR:

The SW indicates the appellant's mobility and physical ability as independent for walking indoors and walking outdoors, climbing stairs and standing (*after 15 minutes – unable*).

Perform personal hygiene and self-care

PR:

The GP does not indicate whether the appellant is restricted in relation to personal self-care.

AR:

The SW indicates that the appellant is independent all personal care DLA.

Manage personal medication

PR:

The GP does not indicate whether the appellant is restricted in relation to his management of medications.

AR:

The SW indicates that the appellant is independent in the medications DLA of refilling prescriptions and safe handling and storage, and requires continuous assistance or is unable to manage the DLA of taking medications as directed (*[appellant] believes he is allergic to past medications*).

Section 2(1)(b) DLA

The following DLA are applicable to a person who has a severe mental impairment:

Make decisions about personal activities, care or finances

PR:

The GP indicates that the appellant has no restrictions with communication and does not indicate whether the appellant is restricted in relation to social functioning, management of finances and medications.

AR:

THE SW indicates that the appellant is independent with all shopping DLA, meals DLA of meal planning and safe storage, all rent and bills DLA, the medications DLA of refilling prescriptions and safe handling and storage, and all social functioning DLA. The SW reports that the appellant requires continuous assistance or is unable with the medications DLA of taking as directed.

Relate to, communicate or interact with others effectively

PR:

The GP indicates no problems with communication and does not provide any assessment of the appellant's social functioning.

AR:

The SW assesses the appellant's ability to communicate as good for hearing, satisfactory for speaking (*feels as though it takes longer to form thoughts, to speak*) and reading (*can be difficult to concentrate due to lack of sleep and anxiety*), and poor for writing (*is effected by stiffness in hands*).

The SW indicates that the appellant is independent in all social functioning DLA and has marginal functioning in his immediate social networks and good functioning in extended social networks.

Help required

PR:

The GP indicates that the appellant does not require an aid or prosthesis for his impairment.

The GP does not indicate whether any assistance is needed with DLA.

AR:

The SW does not indicate whether that the appellant receives assistance from other people. In response to whether help is required but not available, the SW writes: *It would be of benefit for applicant to work with a mental health professional around low mood and anxiety.*

The SW does not indicate that the appellant receives any assistance through the use of assistive devices. The SW indicates that the appellant does not have an assistance animal.

Notice of Appeal

In his Notice of Appeal, dated 03 May 2017, the appellant gives as Reasons for Appeal: *I disagree because I'm living with the problems. Severe whiplash, severe concussion, severe brain injury, muscle and nerve damage in my muscles low back, neck and shoulders causes high stress depression.*

Appellant's Appeal Submission

The appellant's appeal submission included:

- A 5-page written submission signed by the appellant in which he describes his medical conditions and living situation. He describes being injured in two motor vehicle accidents, which were the other drivers' fault. He argues that his GP said she was not required to complete Part E – Daily Living Activities in the PR if the assessor was filling out Section 3 of the AR. The appellant also includes the applicable legislation and questions why it takes 5 months to get an answer for PWD qualification and 12 days for an answer on reconsideration.
- A 1-page letter from the appellant's GP dated 03 May 2017. The GP indicates that the appellant has been a patient since September 2016 and suffers from low back pain, since an MVA in February 2008. He developed severe post-concussion syndrome following an MVA in May 2015 and has been in mental and physical distress since the second accident. The GP indicates diagnoses of whiplash, post-concussion syndrome, generalized anxiety disorder and depression. The GP writes that the appellant has severe balance issues and cannot walk for more than 15 minutes without taking a rest. As well, the GP indicates chronic headaches and muscle spasms since the accident. The GP writes that the appellant has difficulty with focus, low energy, low mood, concentration and memory. She indicates that he finds it very difficult to complete DLA on a regular basis.
- A blank copy of Part E – Daily Living Activities from PR section of a PWD application, with the instruction note circled.
- Copy of the applicable legislation.

Ministry's Appeal Submission

The ministry indicated its reliance on its reconsideration decision and addressed the information and arguments presented in the appellant's Appeal Submission.

The ministry indicates that the DLA assessment in the PR should have been completed in the appellant's PWD application. The DLA assessment in the PR need not be completed where the same person completes the PR and the AR. In the appellant's application, the GP has completed the PR and the SW has completed the AR.

The ministry indicates that the letter from the appellant's GP has been reviewed and concludes that the information provided does not establish that the remaining PWD requirements have been met. The ministry recognizes that the GP describes the appellant's medical conditions as severe but argues that a severe medical condition does not in itself establish a severe impairment. Further, the ministry considers the GP's report of severe issues with balance in light of the fact that the PR and AR reports indicate that assistive aids are not required and the information in the PR report in relation to mobility and physical ability indicating that there are no impairments with respect to walking distances on flat surfaces or climbing stairs unaided. The ministry notes that the GP's reports do not include information about the degree and frequency of impairment experienced by the appellant in relation to the symptoms described. Finally, the ministry argues that the GP has indicated that the appellant finds it 'very difficult' to perform DLA on a regular basis but does not provide further detail about which DLA are restricted and why, particularly in light of the SW's assessment of most DLA as independent.

Admissibility of new information

The panel considers the information provided by the appellant in his Notice of Appeal to be argument and finds that the information provided by the appellant and the GP in the Appeal Submission tends to substantiate and corroborate the information and records before the ministry at reconsideration. The panel therefore admits the information contained in the Notice of Appeal and Appeal Submission in accordance with section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or severe physical impairment;
- that the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, he requires help to perform those activities.

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

The following section of the *EAPWDA* applies to this appeal:

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 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 following section of the *EAPWDR* applies to this appeal:

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, 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.

Severity of impairment

The legislation requires that the minister must be "satisfied" that the person has a severe mental or physical impairment before he or she can be designated as a PWD. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence, including that of the appellant. Diagnosis of a serious medical condition does not in itself determine severity of impairment. To assess the severity of impairment one must consider the nature of the impairment and the degree of impact on daily functioning.

Severity of physical impairment

In the reconsideration decision, the ministry found that it was not satisfied that the information provided established the presence of a severe physical impairment. In reaching this conclusion the ministry considered the functional skills assessment provided by the GP in the PR, which indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift 7 to 16 kg. (15 to 35 lbs.), and remain seated less than 1 hour. The ministry also considered that the SW indicated that the appellant is independent in all activities requiring mobility and physical ability. While acknowledging that the appellant experiences some limitations and challenges, the ministry concluded that requiring a break from standing after 15 minutes and being unable to sit for longer than an hour is not sufficient to establish a severe physical impairment.

The panel notes that the SW indicates that the appellant is independent in mobility and physical ability activities, and also includes the comment: *standing, lifting, carrying and holding are the most restricted due to chronic back pain and while applicant can do independently, applicant requires a break after 15 minutes and no more than 7-16kg to hold/lift*. The panel finds that the ministry's conclusion, that the functional skills assessment by the GP and the mobility and physical ability activities assessment by the SW do not reflect a severe physical impairment, is reasonable. The panel notes that the appellant has been diagnosed with several medical conditions, including concussion, whiplash, leukopenia and ulcerative colitis. However, the panel finds it reasonable that the ministry concluded that information provided does not establish that these conditions have led to a severe physical impairment for the appellant. The panel finds that the ministry's conclusion that this criterion has not been met is reasonable.

Severity of mental impairment

In the reconsideration decision, the ministry found that the information provided did not establish a severe impairment of the appellant's mental functioning. The ministry noted that the appellant's GP has diagnosed concussion, depression and anxiety. As well, the ministry noted that the GP has indicated significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation. The ministry also noted that the SW has indicated that the appellant's cognitive and emotional functioning is not impacted in the areas of impulse control, executive, language and psychotic symptoms. The SW assesses minimal impacts on daily functioning in the areas of insight and judgement and motor activity. Moderate impacts on daily functioning are assessed in the areas of consciousness, attention/concentration, memory, and other neuropsychological problems. Major impacts on daily functioning are assessed by the SW for bodily functions, emotion and motivation. The minister also considered the SW's assessment of the appellant's ability to communicate and social functioning. Ultimately, the ministry concluded that the information was reflective of a moderate rather than severe impairment.

The panel notes that the appellant has stated that he also suffers from ADD as a result of brain injury; however, no information has been provided to indicate that a medical practitioner has confirmed this diagnosis.

In light of all of the information provided, including the diagnoses, the GP's assessment of significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation, and the SW's assessment of major impacts on daily functioning for bodily functions, emotion and motivation, the panel finds that the ministry's determination that the appellant has not established a severe mental impairment is not reasonable. The panel takes note of the fact that the GP indicates in the PR that the appellant experiences chronic headaches, chronic anxiety, low mood, lack of motivation and lack of energy. The GP also indicates in the PR that the appellant has been referred to a psychiatrist and neurologist. In the AR, the SW provides commentary indicating that the appellant has difficulty with sleep, energy and motivation as well as poor memory. The appellant writes in his reconsideration submission that he has sleep problems, can't think properly and has no motivation. As well, in the letter provided with the Appellant's Appeal Submission, the GP re-iterates that the appellant has trouble with focus, low energy, low mood and problems with concentration and memory. The GP indicates in the letter that the appellant is in mental and physical distress. The panel concludes that this information, when considered as a whole, does not support the ministry's conclusion that a severe mental impairment is not established. The panel finds that the ministry's conclusion that this criterion has not been met is not reasonable.

Direct and significant restrictions in the ability to perform DLA

At issue is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment. The legislation requires that the minister assess direct and significant restrictions of DLA in contemplation of the opinion of a prescribed professional, in this case the appellant's GP and SW. This does not mean that other evidence should not be considered.

In the reconsideration decision, the ministry found that there was not enough evidence to confirm that the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods. The ministry noted that the GP had not completed the DLA section of the PR and, as such, relied on the information provided by the SW in the AR to complete its analysis. The ministry considered that the SW reported that the appellant was able to independently perform all DLA, except regulating diet (*reports poor appetite*) and taking medications as directed (*believes he is allergic to past medications*). Both of these activities were reported as requiring continuous assistance. The ministry went on to consider the comments provided by the SW for each

the activities that were indicated as requiring continuous assistance. The ministry concluded that having a poor appetite or suspected allergy to medication does not demonstrate that the appellant requires continuous assistance in these areas.

The panel finds that the ministry's decision, that there was not enough information to establish that the appellant had met this criterion, is reasonable. The panel finds that in the absence of any DLA assessment in the PR, the ministry reasonably relied on the information available in the AR and that this information indicates that the appellant is independent in almost all DLA. The panel further concludes that the ministry's determination that the SW's explanation in those areas where continuous assistance is indicated does not demonstrate a need for continuous assistance is reasonable. The panel notes that the GP indicates, in the letter provided with the Appellant's Appeal Submission, that the appellant finds it very difficult to perform DLA on a regular basis. However, the GP does not provide additional information to describe or demonstrate which DLA are restricted, whether the restriction(s) is significant, and whether the restriction is continuous or periodic for extended periods. The panel finds that ministry's conclusion that this criterion has not been met is reasonable.

Help required

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry found that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The panel finds this conclusion reasonable. The panel notes that to the extent that there are activities that the appellant cannot perform or complete, there is an absence of information to demonstrate that the appellant requires or receives help in these areas from another person, assistive device or assistance animal. The GP indicates in the PR that the appellant does not require any aids or prostheses. The SW indicates that the appellant would benefit from working with a mental health professional around mood and anxiety and that he does not have an assistance animal. The appellant indicates that he does not receive help from family or friends. Thus, the panel finds that the ministry's conclusion that this criterion has not been met is reasonable.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was a reasonable application of the legislation in the appellant's circumstances and reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant is not successful on appeal.