

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 May 4, 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 confirmed that the Appellant has an impairment that is likely to continue for at least 2 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 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

Information Before the Ministry at Reconsideration

1. Initial Application for Persons with Disabilities Designation

The Appellant's application for designation as a Person with Disabilities (PWD) dated November 16, 2007, in which the Appellant stated that he has

- physical difficulties which include
 - cirrhosis of the liver due to alcoholism, and is required to take medications for it which cause side effects, principally, constant urination, dizziness, ringing in the ears, loss of equilibrium and balance,
 - he has dry skin which cuts, scratches and tears easily, breast enlargement, muscle loss and weakness and large weight loss
 - brain damage due to too many head injuries
 - arthritis in his arms, wrists, hands, back, legs and neck due to excessive and repetitive work over the years involving lifting, twisting and bending
- mental or emotional difficulties which include
 - impatience, indecision, anxiety, constant worry, and he is easily upset
 - having a hard time understanding and concentrating as his mind often wanders,
 - having a hard time understanding instructions from others
 - difficulty reading instructions without asking about them or reading them over and over again
 - he is overly anxious but has a difficult time becoming motivated and when he starts he cannot stop
 - does not like most people and prefers to be left alone
 - hates change, must have things routine, and cannot tolerate aggressive noises or voices that are too loud and continuous
 - becomes depressed for no real reason
 - believes people think he is crazy
- Obsessive Compulsive Disorder, which for him means
 - that everything must be perfect, straight and precise
 - he cannot stand dirt, or clutter
 - he hates lines and crowds, and cannot stand waiting
 - when he does start something, then he does not stop until everything is precisely correct, at which time he notices other things that are not exactly perfect and starts organizing them
 - constantly counts things
- that he is unable to work and support himself due to his trauma and disease and injuries

2. Medical Report as Part of the Initial Application for PWD Designation

In the Medical Report

- **Section 2 Medical Report Part B – Health History** the physician reports that the Appellant has physical problems, which include that
 - he is an alcoholic who has been sober for about a year and a half, who likely stopped drinking because of cirrhosis and the other physical and mental conditions outlined by the Appellant
 - he has been prescribed medication or treatments that interfere with the Appellant's ability to perform Daily Living Activities (DLA), specifically frequent urination and that the Appellant will be on the medications in the long term

- **Section 2 Medical Report Part C – Degree and Course of Impairment** the physician reports that the Appellant will continue to experience the impairments for 2 years or more, although the Appellant is improving with his abstinence but there will be a long time challenge to a treat to him and avoid decompensation
- **Section 2 Medical Report Part D – Functional Skills** the physician reports that
 - the Appellant’s functional skills allow him to walk 4 or more blocks unaided, climb 5 or more steps unaided, pose no limit to the time he can remain seated, but limit him to lifting between 2 and 7 kg
 - the Appellant has significant deficits with cognitive and emotional function, and specifically difficulty with Executive, Memory, Emotional Disturbance, Motivation, Impulse Control, Motor Activity and Attention or Sustained concentration, which interfere daily with most activities, especially impulse control and a judgement
- **Section 2 Part E - Daily Living Activities** - here the physician is instructed that if the physician is completing the Assessor Report - Section 3, the physician is not to complete Section E; nevertheless the physician did to complete “Section E - Daily Living Activities” in which he reported
 - he has been the Appellant’s physician for three years and has seen him between two and 10 times in the last 12 months
 - that the Appellant’s impairments directly restrict his ability to perform DLA, specifically that the Appellant was restricted in 4 of the 10 listed DLA (daily shopping, mobility outside the home, use of transportation, Social functioning) but was not restricted in 6 of the 10 listed DLA (personal self-care, meal preparation, medication management, basic housework, mobility inside the home and financial management).
 - The physician did not indicate in the first part of the MR whether the 4 activities in which the Appellant is restricted or continuous or periodic, but in the narrative portion stated that the restrictions are episodic, with anxiety limiting much of the Appellant’s excursions out of the home and said that the Appellant’s social functioning was impacted so that his girlfriend had to do most of the shopping, assist him and support him in most social situations or the Appellant just withdraws
 - that despite the Appellant’s motivation to change in his ability to conquer alcoholism it remains very limited by his weakness, loss of muscle mass, anxiety and OCD
- **Section 2 Part F – Additional Comments**
 - The physician reports that despite the Appellant’s motivation to change and ability to conquer his alcoholism he remains very limited by his weakness due to loss of muscle mass, deconditioning, anxiety and OCD
- **Section 3 Assessor Report (AR)** in this part of the Initial Application the physician reports that in the areas of
 - Living Environment, that the Appellant lives alone with his girlfriend; there is no explanation for this seeming-contradiction
 - Mental/Physical Impairments which impact the ability to manage DLA include cirrhosis, alcoholism, anxiety and obsessive-compulsive disorder

- Ability to Communicate, the Appellant is good in all 4 tasks (speaking, reading, writing and hearing) but his ability declines when he is anxious
- Mobility and Physical Ability, the Appellant is independent in 3 of the 6 listed tasks (walking indoors, walking outdoors, and standing), requires continuous assistance from another person in 2 of the 6 listed tasks (lifting, carrying and holding) noting that for these the Appellant requires daily assistance, and takes significantly longer than typical in 1 of the 6 listed tasks (climbing stairs). The physicians comment is that with lifting, carrying and holding the Appellant requires daily assistance
- Cognitive and Emotional Functioning, the Appellant experiences no impact in 5 of the 14 listed areas (bodily functions, consciousness, language, psychotic systems, other neuropsychological problems), experiences moderate impact in the 7 of the 14 listed areas (insight and judgement, attention/concentration, executive, memory, motivation, motor activity, other emotional or mental problems) and experiences a major impact in 2 of the 14 listed areas (emotion, impulse control), and the physician notes that the Appellant has profound and lasting anxiety, with obsessive features, ritualized behaviour, social engagement, and poor impulse control of the leading to making poor decisions
- Daily Living Activities, which consists of an assessment of a number of tasks in each of 8 different DLA, the physician reports that in the areas of
 - Personal Care - the Appellant is independent in all 8 listed tasks
 - Basic Housekeeping - the Appellant is independent in 1 and requires continuous assistance, specifically daily help from a girlfriend as he is unable to carry loads, in the 2nd of the 2 listed tasks
 - Shopping - the Appellant is independent in 3 of the 5 listed tasks (reading prices and labels, making appropriate choices, paying for purchases), requires periodic assistance from another person in 1 of the 5 listed tasks (going to and from stores), and requires continuous assistance in 1 of the 5 listed tasks (carrying purchases home). Physician notes that in going to and from stores he often needs help from his girlfriend and that he needs help with the items he has purchased in the task of "carrying purchases home".
 - Meals - the Appellant is independent in all 4 listed tasks
 - Pay Rent and Bills - the Appellant is independent in 2 of the 3 listed tasks, and requires periodic assistance in 1 of the 3 listed tasks (banking] because his anxiety provokes a need to have assistance
 - Medications - the Appellant is independent in all 3 listed tasks
 - Transportation - the Appellant is independent in all 3 listed tasks
 - Social Functioning - the Appellant requires periodic support/supervision in 4 of the 5 listed tasks (appropriate social decisions, developing/maintaining relationships, appropriate interaction with others, dealing appropriately with unexpected demands) and the physician did not indicate the Appellant's ability with the 5th listed tasks (ability to secure assistance from others); the physician explained that the Appellant has limited ability to socially engage, to control impulses, and requires help from his girlfriend on a regular, on an at least weekly basis, to facilitate these relationships
 - and in describing how the Appellant's mental impairment impact his relationship with both immediate and extended social networks, the Appellant's functioning is marginal

- and says that the help required for the Appellant's DLA is provided by both friends and health professionals and, that if help is required but none is available, the Appellant would benefit from mental health services to assist with improving his social interactions and controlling his OCD.
- The physician does not report that the Appellant requires assistance through the use of an assistive device or an assistive animal but does say that the Appellant is profoundly limited by the combination of his physical syndromes due to cirrhosis and deconditioning alone, with his social problems and OCD.

3. Letter to the Appellant denying him PWD designation together with the denial decision summary dated March 1, 2017

Information Provided on Appeal

Appellant's Additional Evidence

The Appellant said that his advocate's office is downhill from his apartment and he has no trouble walking when going to her office, or going into town when he leaves her office, again downhill, but cannot walk back up the hill when he is on his way home but must take the bus. When he gets to his apartment, which is on the top floor of his apartment building, you must use the stairs, and stop partway up to rest before climbing the rest of the way.

Appellant's Position on Admissibility of the Additional Evidence

The Appellant submitted that the additional evidence was in support of the information and records before the ministry at reconsideration; specifically the Appellant's abilities regarding walking and climbing stairs.

Ministry's Position on Admissibility of the Additional Evidence

The ministry did not object to admitting the Appellant's additional evidence.

Panel Finding on Admissibility of the Additional Evidence

Whether there is an objection or not to the admissibility of additional evidence is not dispositive of whether or not that additional evidence is admissible. The panel finds pursuant to section 22(4)(b) of the *Employment and Assistance Act* that the Appellant's evidence is oral testimony and is admissible as it is in support of the information and records that were before the Minister when the reconsideration decision was made; specifically the additional evidence is in support of the Appellant's level of ability to walk and climb stairs.

PART F – Reasons for Panel Decision

Issue on Appeal

The Issue on Appeal is whether the Ministry of Social Development and Social Innovation's decision dated May 4, 2017, which denied the Appellant designation as a Person with Disabilities 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

Employment and Assistance for Persons With Disabilities Act (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 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).

Employment and Assistance for Persons With Disabilities Regulations (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.

Analysis

General Scheme of the Legislation

The general scheme of section 2 *EAPDWA* and section 2 *EAPDWR* is that in order to be designated as a Person With Disabilities, an applicant must satisfy the Minister that he is 18 years of age or older and that he has a severe mental or physical impairment which is likely to continue for at least 2 years, and that impairment, in the opinion of one of the members of a prescribed class of professionals, directly and significantly restricts his ability to perform Daily Living Activities continuously or periodically for extended periods, and as a result he requires help to perform them.

Age and Duration Requirement

There was no issue that the Appellant meets the age requirement of being 18 years of age or older or the duration requirement that the Appellant's impairment is likely to continue for two or more years.

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the Appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the

legislation does not define “impairment”, the PR and AR define “impairment” as a “loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.” While this is not a legislative definition, and is therefore not binding on the panel, in the panel’s opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

Physical Impairment

The legislation requires that an applicant have a severe physical impairment. .

Appellant’s Position

The Appellant’s position was that the medical evidence taken as a whole, together with his self-report, showed that he had a severe physical impairment.

Ministry Position

The ministry’s position was that the physician’s assessment that the Appellant was able to walk four or more blocks unaided on a flat surface, climb five or more steps unaided, lift 5 to 15 pounds and had no restrictions with remaining seated, but took significantly longer with climbing stairs, and in concluding that the Appellant was independent with the remaining activities requiring mobility and physical ability, uses no assistive devices, leads to the conclusion that the Appellant’s physical functioning may be limited, it does not indicate that the Appellant has a severe physical impairment, but rather a moderate level of impairment.

Panel Decision – Severe Physical Impairment

The panel finds that because the Appellant’s requirement is for assistance with some but not all of the DLA, his lack of need for assistance with most of the DLA set out in the MR, and because the physician is of the opinion that it takes the Appellant significantly longer to do some tasks as opposed to him being unable to perform those tasks, the ministry’s determination that the Appellant’s physical impairment is more indicative of a moderate level of impairment and does not rise to the level of the severe physical impairment is reasonably supported by the evidence.

Mental Impairment

The legislation requires that an applicant have a severe mental impairment.

Appellant’s Position

The Appellant’s position as to whether or not he has a severe mental impairment was similar to his position on whether he has a severe physical impairment; specifically that the evidence concerning his emotional or mental problems, taken as a whole indicate that he has a severe mental impairment.

Ministry Position

The ministry position was that given the Medical Report and the Assessor Report, the Appellant’s mental impairment is moderate as opposed to severe.

Panel Decision – Severe Mental Impairment

The panel observes that in the MR, the physician notes that the Appellant has significant deficits with cognitive and emotional function, specifically with the areas of Executive, Memory, Emotional disturbance, Motivation, Impulse control, Motor activity and Attention or sustained concentration, which daily interferes with most activities, and especially with regard to impulse control and judgement

Nowhere in the MR does the physician give an opinion that the Appellant has a severe mental impairment; the most that the physician said was that the Appellant has significant deficits which interfere with most activities.

The panel notes that a “significant deficit” is not the same as a “severe impairment”, and that interference with DLA is not the same as a significant restriction on ability to perform DLA. Interference is more indicative of a moderate restriction than of a “significant restriction”.

In the AR dealing with Cognitive and Emotional Functioning for an applicant with an identified mental impairment or brain injury, of the 14 listed tasks the physician noted that the Appellant’s difficulties had no impact on 5, moderate impact on 7 and a major impact on 2. The physician commented that the Appellant has poor impulse control which leads to poor decisions, is limited in his social engagement, and has obsessive features and ritualistic behaviour. The physician has given an opinion on the impact that the Appellant’s disabilities have but not whether or not the impairment causing the difficulties is severe.

In the AR, under the 8th DLA, “Social Functioning”, which is the only DLA in the AR dealing with mental impairment, the physician says that the Appellant requires periodic support in the 4 of the 5 listed tasks, and that he has difficulty to socially engage and control his impulses and his girlfriend assists him on a regular, at least weekly basis, to facilitate relationships. The physician says that the Appellant has marginal functioning in his relationship to his immediate social network and that is defined in part as little significant participation or communication. The physician says that in dealing with his extended social networks the Appellant also has marginal functioning, defined as little more than minimal acts. The physician provides an opinion that the Appellant would benefit from more mental health services and that present assistance is provided by friends and health authority professionals.

The panel finds that the help required is to facilitate relationships. The panel finds that the ministry’s decision that the appellant’s level of functioning is indicative of a moderate level of mental impairment and not a severe level of mental impairment is reasonably supported by the evidence.

Restrictions in Ability to Perform DLA

This criterion requires that in the opinion of a prescribed professional, in this case a physician, the Appellant must be directly and significantly restricted in his ability to perform DLA either continuously or periodically for extended periods and that as a result the applicant requires help to perform those activities.

Appellant’s Position

The Appellant’s position is that he has disabilities which restrict him in his ability to walk uphill, climb stairs, and perform those DLA set out in the AR.

Ministry Position

The ministry position was that while the Appellant may have impairments, and that his impairments may directly impact his ability to perform DLA, they do not significantly restrict him in performing DLA.

Panel Decision – Ability to Perform DLA

The panel notes that while the physician said in the MR that the Appellant was directly restricted in 3 of the 9 DLA dealing with physical functioning, he gave no opinion as to whether or not those restrictions significantly restricted the Appellant’s ability to perform those DLA. The physician did say that the Appellant remains very limited by his weakness, loss of muscle mass, deconditioning and his

and anxiety and OCD, but that does not rise to the level of whether or not the restrictions are significant restrictions.

The panel notes that in the Assessor Report, in the 9 DLA dealing with physical ability, the Appellant was Independent in 4 of the DLA, but

- In the DLA “Basic Housekeeping” the Appellant required continuous (daily) assistance in 1 of the 2 listed tasks.
- In the DLA “Shopping” the Appellant required periodic assistance in 1 of the 5 tasks (“going to and from stores”); however the physician stated the periodicity was “often” without further clarification as to what the specific periodicity was, and that the Appellant required continuous assistance with remaining task of “carrying purchases home”. The physician commented that the nature of the continuous assistance required was needing help to pack items.
- in the DLA “pay rent and bills”, the Appellant was independent in 2 of the 3 listed tasks, but required periodic assistance in the remaining 1 “banking”, because that task caused anxiety. The physician did not comment on the periodicity of the required assistance, so how often assistance was required is unknown.

In those 3 DLA where the Appellant required assistance, the impairment did not directly restrict the Appellant’s ability.

The panel further notes that in the AR the physician said that the Appellant requires daily assistance for the physical tasks of lifting, carrying and holding, but said in another part of the assessor report that he requires such help at least on a weekly basis, with no explanation for this contradiction in periodicity.

The panel is aware that of the 8 physical DLA and 1 Social Functioning DLA, in order to be designated as a Person with Disabilities, an applicant need not to be restricted in all of the tasks in all of the listed DLA. However, there must be evidence that the Appellant is significantly restricted in at least some of the tasks in two or more DLA.

The panel finds that the ministry’s determination that the level of functioning reported by the GP does not establish a severe physical impairment was reasonably supported by the evidence.

Requirement for Help to Perform DLA

Appellant’s Position

The Appellant did not say in his self-report in his initial application that he required help of any sort with any of his DLA. He relied on the MR and AR where the physician said he needs daily assistance in lifting, carrying and holding with the Mobility and Physical Ability DLA, needed help with laundry, and often needed help with from his girlfriend was going to and from stores as well as help to pack items. His position was that this evidence significantly restricted his ability to perform DLA.

Ministry Position

The ministry position was that the Appellant did not require a significant amount of assistance, did not require an assistive device or the services of an assistance animal, and did not otherwise characterize the amount of assistance required.

Panel Decision – Help to Perform DLA

The Appellant’s physician, in the MR, did give the opinion that the Appellant’s girlfriend has to do most (not all) of the shopping and assist him in most (not all) social situations to prevent him withdrawing. In the AR, the physician said that the Appellant requires daily assistance with the tasks

of lifting, carrying and holding (under the DLA Mobility and Physical Ability), said that the Appellant requires help daily from the girlfriend to carry his laundry (under the task of laundry in the Basic Housekeeping DLA) but did not say that the Appellant needs assistance with any other of the tasks normally associated with laundry, said the Appellant requires periodic assistance going to and from stores, which is often help from his girlfriend, but did not say how often that help is required, and said that the Appellant required continuous assistance under the task carrying purchases home (under the Shopping DLA) but that that help consisted of packing items.

The panel finds that the ministry's determination that the Appellant did not require an assistive device, the services of an assistance animal, or the significant help of another person was reasonably supported by the evidence.

Conclusion

The panel finds that the ministry's determination was a reasonable application of *EAPWDA* section 2(2) in the circumstances of the Appellant and was reasonably supported by the evidence, and therefore the Ministry's decision in denying the Appellant Person With Disabilities designation was a reasonable application of the evidence in the circumstances of the Appellant and was reasonably supported by the evidence.

The panel confirms the Ministry decision and the Appellant is not successful in his appeal.