

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 17 May 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; that a 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; or that 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**. The Application contained:
 - A Medical Report (MR) dated 19 January 2017, completed by the appellant's general practitioner (GP) who has known the appellant for 10 years and seen him 2-10 times in the past 12 months.
 - An Assessor Report (AR) dated 19 January 2017, completed by the appellant's GP.
 - A Self Report (SR) dated 2 November 2017 completed by the appellant.
2. A **Request for Reconsideration** dated 20 April 2017, in which the appellant states: *I believe that not seeing me in my daily living, that your decision is not accurate.*
3. A 1-page letter from the appellant's GP, dated 31 Mar 2017, in which the appellant is described as having a disabling skin condition that renders him unfit for work. As well, the GP provides diagnoses of underlying fibromyalgia with chronic daily pain and generalized anxiety disorder with phobia. The latter diagnosis is stated to have a negative effect on cognitive function. The combination of these, the GP states, renders the appellant disabled, unfit for any occupation and affects his normal daily living activities.
4. A 6-page letter prepared by the appellant's neighbor, who states that she has been asked to speak for him because he has difficulty organizing his thoughts. In this letter, the writer describes the appellant's deterioration over the past 5 years and his increasing need for assistance. The writer goes on to describe the appellant's medical conditions, including medical conditions not discussed in the PWD application, and their impacts.

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

- Chronic severe Dermatographism Urticaria – onset 5+ years
- Fibromyalgia – onset 10+ years
- Mood Disorder: Anxiety, depression – onset 10+ years

In the AR, the GP describes the appellant's mental or physical impairments as:

- Chronic pain
- Chronic itchy rash
- Anxiety and depression

Severity of mental impairment

MR:

The GP provides a mental health diagnosis of anxiety and depression, which is described as: *mostly secondary to [the appellant's other diagnoses]. Stress aggravates the skin problem. Social isolation.*

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

The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the area of emotional disturbance with the comment: *Stress, anxiety and depression secondary to skin problem and fibromyalgia pain. Social isolation.*

AR:

The GP assesses the appellant's ability to communicate as good in the areas of speaking, reading, and hearing. The appellant's writing ability is assessed as satisfactory.

The GP assesses the appellant's cognitive and emotional functioning as having no impact in the areas of bodily functions, consciousness, impulse control, insight and judgement, motor activity, psychotic symptoms and other neuropsychological problems. The GP assesses minimal impacts on daily functioning in the areas of memory, motivation and language. Moderate impacts on daily functioning are assessed for memory, attention/concentration and executive. The GP writes: *anxiety, depression.*

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

SR:

The appellant does not indicate that he suffers from a severe mental impairment or mental health condition. He describes his skin condition and fibromyalgia (see below).

Severity of physical impairment

MR:

Under Health History, the GP writes: *Chronic Dermatographism Neurodermatitis Urticaria. Chronic daily itchy skin with rash. Secondary flare-ups. Fibromyalgia with chronic daily pain, affecting [illegible] daily living activities.*

For functional skills, the GP indicates that the appellant can walk 1-2 blocks unaided, climb 2-5 steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated 1-2 hours.

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

AR:

The GP indicates the appellant's mobility and physical ability as independent for walking indoors, walking outdoors (takes significantly longer), climbing stairs (takes significantly longer), standing, lifting (periodic assistance from another person, *for heavy objects*) and carrying and holding (periodic assistance from another person, *for heavy objects*). The GP provides the comment: *Friends need to get firewood for him.*

SR:

The appellant writes: *My skin condition, they call it extreme psoriasis is most times almost disabling. The fibromyalgia is very exhausting, sometimes it takes a couple of hours to get mobile. Just fillings this form out is painful to my arms and hands.*

Ability to perform DLA

General

MR:

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

AR:

The GP indicates that the appellant is independent in all DLA except for carrying purchases home, which requires periodic assistance from another person. The GP provides the additional comment: *Fibromyalgia pain*.

Section 2(1)(a) DLA

Prepare own meals

AR:

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

Manage personal finances

AR:

The GP indicates that the appellant is independent in all pay rent and bills activities.

Shop for personal needs

AR:

The GP indicates that the appellant is independent in the following shopping activities: going to and from stores, reading prices and labels, making appropriate choices and paying for purchases. The GP indicates that the appellant requires periodic assistance carrying purchases home and provides the comment: *pain*.

Use public or personal transportation facilities

AR:

The GP indicates that the appellant is independent in all transportation DLA and provides the comment: *difficult, painful and takes longer*.

Perform housework to maintain the person's place of residence

AR:

The GP indicates that the appellant is independent with laundry and basic housework (*pain*).

Move about indoors and outdoors

MR:

The GP indicates that the appellant can walk 1-2 blocks unaided on a flat surface and can climb 2-5 steps unaided.

AR:

The GP indicates that the appellant is independent with walking indoors and outdoors, climbing stairs and standing. Walking outdoors and climbing stairs take significantly longer.

Perform personal hygiene and self-care

AR:

The GP indicates that the appellant is independent with the personal care DLA of dressing (takes significantly longer, *pain*), grooming, bathing, toileting, feeding self, and regulating diet and transfers in/out of bed and on/off chair.

Manage personal medication

AR:

The GP indicates that the appellant is independent in all medications DLA.

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

AR:

The GP indicates that the appellant is independent with the shopping DLA of readings labels, making appropriate choices, and paying for purchases; all meals DLA, including meal planning and safe storage; all pay rent and bills DLA; all medications DLA; and the transportation DLA of using transit schedules and arranging transportation.

Relate to, communicate or interact with others effectively

MR:

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

AR:

The GP assesses the appellant's ability to communicate as good for speaking, reading, and hearing and satisfactory for writing (*Hand pains (fibromyalgia)*).

The GP indicates that the appellant is independent in all social functioning DLA (appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to deal appropriately with unexpected demands, and able to secure assistance from others) and has marginal functioning in his immediate and extended social networks.

Help required

MR:

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

AR:

The GP indicates that the appellant receives assistance from friends for DLA, with the comment: *To get firewood, carry heavy objects*. In response to the prompt to specify what help is required but there is none available, the GP writes: *friends, ? [illegible] home support services*.

The GP indicates that the appellant does not receive assistance from assistive devices or assistance animals.

Notice of Appeal

In his Notice of Appeal dated 26 May 2017, the appellant gives as Reasons for Appeal: *I disagree because my condition is prolonged and disabling and does affect my daily living*.

The hearing

The appellant explained that he thinks the ministry decision is not correct. The reason he thinks it is not correct is because: the ministry does not see him in his daily life; his GP sees him only once a month; and his GP did not accurately fill out the forms. The appellant asked the Tribunal to rely on a letter from his friend and neighbor because he has a difficult time putting his ideas into words and the letter puts it better. This friend and neighbor, he explained, sees him frequently and the

letter is based on what she has observed over time about his ability and inability to do activities. The appellant explained that when he first moved to his community, he was able to provide help to his neighbors and now he can't do more than go to visit a neighbor for coffee.

The appellant clarified that the pain he experienced filling out the PWD forms resulted from his fibromyalgia and not his skin condition. He also explained that his fibromyalgia pain occurs daily and really affects him at night. He experiences flare-ups of his skin condition at random and the attacks he experiences can happen anytime and anywhere on his body. The unpredictable nature of these attacks makes being out in public uncomfortable. He has been prescribed a topical cream to help with the skin condition but it only helps a bit.

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

Admissibility of new information

The panel finds that the information provided by the appellant in the Notice of Appeal and at the hearing is consistent with and, therefore, in support of the information and records before the ministry at reconsideration. The panel therefore admits this information 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;
- 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 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 for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment. An impairment is a loss or abnormality of psychological, anatomical or physiological functioning causing restriction in the ability to function independently, appropriately, effectively or for a reasonable duration.

Severity of mental impairment

In the reconsideration decision, the ministry found that the information provided did not establish that the appellant has a severe mental impairment. The ministry first considered the GP’s indication of significant deficits with cognitive and emotional functioning in the area of emotion, as well as the diagnosis of secondary depression in the MR. The Ministry also considered the GP’s assessment of impacts on cognitive and emotional functioning in the AR, noting that there were three moderate impacts assessed, three minimal impacts assessed and no impacts assessed in the remaining areas. The ministry noted that the GP did not indicate any communication difficulties or any need for support/supervision in any aspects of social functioning.

The panel finds that the ministry’s determination that a severe mental impairment has not been established was reasonable. The panel notes the absence of any major impacts on cognitive and emotional functioning assessed by the GP. As well, the panel notes that there are no safety concerns noted by the GP in the MR or AR and, while the GP provides comments about social isolation, he assesses the appellant as independent with all aspects of social functioning. The panel further notes the absence of any mention of a mental impairment in any of the documents prepared by the appellant himself. The panel acknowledges that, at the hearing, the appellant described difficulty putting his experiences into words and some difficulty with being out in public due to his skin condition. The panel also notes that the letter provided by the appellant’s neighbor describes “lack of focus, and problems with memory and cognitive coordination.” In the AR, the GP assesses the impact on the appellant’s attention/concentration as moderate, the impact on the appellant’s memory as minimal and the impact on the appellant’s executive functioning as moderate. The panel finds that the ministry reasonably concluded that the information provided does not establish a severe mental impairment and that this criterion was not met.

Severity of physical impairment

In the reconsideration decision, the ministry found that the assessments provided by the appellant's medical practitioner (GP) speak to a moderate rather than a severe physical impairment. In making this determination, the ministry considered the functional skills assessed by the GP, noting that the appellant can walk 1-2 blocks unaided, climb 2-5 steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated 1-2 hours. The ministry also considered the GP's assessment of mobility and physical ability, noting that the appellant is independent with standing and walking indoors; takes significantly longer walking outdoors and climbing stairs; and requires periodic assistance with lifting and carrying and holding. The ministry noted that information had not been provided in relation to how much longer than typical it takes the appellant to manage walking outdoors and climbing stairs. The ministry also noted that the GP had provided additional comments indicating that the appellant had been seen by a dermatology specialist and that there were very little treatment options for his skin condition and fibromyalgia.

The panel finds that the ministry's determination that a severe physical impairment has not been established was reasonable. The panel notes that the information provided in the GP's letter confirms the diagnoses in the PWD application and offers the opinion that the combination of these conditions render the appellant disabled and unfit for any work. However, the panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA, nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR. The panel acknowledges that the letter provided by the appellant's neighbor also discusses chronic breathing problems, hip pain and chronic calcium deficiency. However, the panel finds that there is no medical diagnosis provided to confirm these conditions. The panel notes that the appellant experiences some difficulties with physical function, as acknowledged by the ministry, but finds that the ministry's determination that a severe physical impairment has not been established is reasonable.

Direct and significant restrictions in the ability to perform DLA

The legislation – section 2(2)(b)(i) of the EAPWDA – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. The legislative language makes it clear that a prescribed professional's evidence is fundamental to the analysis. 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 panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion not established in this appeal.

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 continuously or periodically for extended periods. The ministry noted that no medications/treatments that interfere with the appellant's ability to perform DLA had been prescribed. The ministry considered the GP's assessment that the appellant requires periodic assistance to carry purchases home and that the appellant takes significantly longer with dressing, basic housekeeping and getting in and out of a car; however, the ministry noted an absence of information about how much longer the appellant requires for these activities.

The panel finds that the ministry's determination that the assessments provided by the medical practitioner do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes that the GP has assessed the appellant as independent and taking significantly longer in some DLA, but

finds that the GP has not responded to the prompt to “describe how much longer”. As well, the panel notes that the GP indicates that the appellant requires periodic assistance with carrying purchases home; however, the panel notes that the GP’s comment “*pain*” does not provided sufficient explanation/description in response to the prompt to “include a description of the degree and duration of support/supervision required”. The panel notes that the GP’s letter provided at reconsideration states “it affects his normal daily living activities” but otherwise does not discuss the appellant’s ability to perform DLA. The panel finds that the GP has not provided sufficient information in relation to the degree and duration of the assistance required by the appellant to establish that there are significant restrictions for extended periods in the appellant’s ability to perform DLA. The panel acknowledges that the letter provided by the appellant’s neighbor speaks rather extensively to the appellant’s difficulties with DLA and, in many instances, contradicts the assessments provided by the GP. The panel finds, however, that the legislation requires that direct and significant restrictions in DLA must be “in the opinion of a medical practitioner”. As such, the panel concludes that the ministry’s determination that this criterion was not 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. While the AR indicates that the appellant benefits from help from friends with firewood and heavy lifting, the panel finds that the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

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 was reasonably supported by the evidence. The panel therefore conforms the ministry’s decision. The appellant is not successful on appeal.