

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 11 April 2017, which denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on alternative grounds. The ministry further 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:

- The appellant's **PWD Application**. The Application contained:
- A Medical Report (MR) dated 9 February 2017, completed by the appellant's general practitioner (GP) who has known the appellant for 13 months years and seen him 11 or more times in the past 12 months.
- An Assessor Report (AR) dated 9 February 2017, completed by the appellant's GP.
- A Self Report (SR) dated 8 February 2017, completed by the appellant.
- A **Request for Reconsideration** dated 30 March 2017, in which the appellant states: *I cannot work. My neck and knees are not getting better. They're not going to get better. The symptoms and pain are getting worse.*
- A 2-page letter from the appellant's chiropractor, dated 24 March 2017. The chiropractor explains that he has had limited exposure to the appellant, having treated him twice in 2016. The chiropractor describes the symptoms experienced by the appellant and provides his opinion that degenerative changes in the appellant's spine are a likely source of the neck pain and headaches he experiences. The chiropractor states that he is not in a position to judge the appellant's functional capacities or the effects of the impairments on his normal activities of daily living.

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:

- Neck degenerative disk disease – onset 1998
- Left knee distal quadriceps rupture – onset April 2015

In the AR, the GP describes the appellant's mental or physical impairments as: *migraines and muscle spasms, neck pain, knee pain.*

Severity of mental impairment

MR:

The GP has not provided a mental health diagnosis.

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 areas of emotion and motivation.

AR:

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

The GP assess the appellant's cognitive and emotional functioning as having major impacts on

emotion, motivation and motor activity. The GP assesses no impacts in the remaining areas of cognitive and emotional functioning.

The GP indicates that the appellant is independent in all social functioning DLA and has good 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 neck and knee conditions (see below).

Severity of physical impairment

MR:

Under Health History, the GP writes: *Tingling sensation in both hands R>L when reaches something above head, pruning, working with computer and stretching. Bending, lifting, repetitive work, standing for less than an hour causes pain to both knees R>L.*

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, and remain seated 1-2 hours. The GP has selected both “no lifting” and “unknown” in the assessment of the appellant’s abilities with lifting.

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, climbing stairs and standing. The GP indicates that the appellant requires periodic assistance from another person for lifting and carrying and holding.

SR:

The appellant explains that he has degenerative osteoarthritis in his spine, fractured his C7 vertebra in 1998 and has a permanently displaced C6 vertebra. These conditions cause him to suffer from pain, spasms, decreased range of motion, head/neck aches, loss of mobility and tingling and numbness in his arms and hands. The appellant explains that he is no longer able to work in his previous occupation.

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.

The GP indicates that the appellant requires periodic assistance with personal self-care and meal preparation and, in response to the request to explain “Periodic” provides the comment: *when gets full-blown neck pain, cannot and does not want to do anything.* In response to a request for additional comments regarding the degree of restriction the GP comments: *neck pain & headache happen once a week.*

AR:

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

Section 2(1)(a) DLA

Prepare own meals

MR:

The GP indicates that the appellant requires periodic assistance with meal preparation.

AR:

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

Manage personal finances

MR:

The GP indicates that the appellant's ability to manage finances is not restricted.

AR:

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

Shop for personal needs

MR:

The GP indicates that the appellant's ability to perform daily shopping is not restricted.

AR:

The GP indicates that the appellant is independent in all listed shopping activities, including: going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home.

Use public or personal transportation facilities

MR:

The GP indicates that the appellant's ability to use transportation is not restricted.

AR:

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

Perform housework to maintain the person's place of residence

MR:

The GP indicates that the appellant's ability to manage basic housework is not restricted.

AR:

The GP indicates that the appellant is independent with laundry and basic housekeeping.

Move about indoors and outdoors

MR:

The GP indicates that the appellant is not restricted in relation to mobility inside the home and mobility outside the home.

AR:

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

Perform personal hygiene and self-care

MR:

The GP indicates that the appellant requires periodic assistance with personal self care.

AR:

The GP indicates that the appellant is independent with all personal care DLA, including: dressing, grooming, bathing, toileting, feeding self, and regulating diet and transfers in/out of bed and on/off chair.

Manage personal medication

MR:

The GP indicates that the appellant's ability to manage medications is not restricted.

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

MR:

The GP indicates that the appellant is independent with management of medications, daily shopping, use of transportation, management of finances and social functioning.

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; the transportation DLA of using transit schedules and arranging transportation; and all social functioning DLA.

Relate to, communicate or interact with others effectively

MR:

The GP indicates that the appellant has no difficulties with communication and his ability to perform social functioning DLA is not restricted. In response to the prompt for explanation if social functioning is impacted, the GP has noted: N/A

AR:

The GP assesses the appellant's ability to communicate as good for all areas, including speaking, reading, and hearing and writing.

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

SR:

The appellant does not mention requiring or receiving any assistance with DLA.

Notice of Appeal

In his Notice of Appeal dated 31 May 2017, the appellant gives as Reasons for Appeal: *the medial meniscus in my right knee has deteriorated to bone on bone and will need replacement. Any standing, walking continuously will only worsen the pain and further deterioration. My neck hurts continuously. The damage from previous fractures of C-7 and osteoarthritis now cause me very painful head/neck nerve pain on a daily basis. Also, the affected nerves cause pain and numbness in my shoulders/arm and hands. And it's not going to improve. Ever. I am [omitted] years old with degenerative neck/spine and knees that have had a total of 6 surgeries. No one will hire and old labourer with bad knees and a worse neck.*

The hearing

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

The ministry relied on its reconsideration decision.

Admissibility of new information

The panel finds that the information provided by the appellant in the Notice of Appeal 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 impairment of his mental functioning. The ministry first noted that the GP has not provided a diagnosis or mental injury. The ministry then considered the GP’s indication of significant deficits with cognitive and emotional functioning in the area of emotion and motivation 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 major impacts assessed in the areas of emotion, motivation and motor activity. The ministry noted that the GP had indicated that the appellant is independent in all areas of social functioning with good functioning in immediate and extended social networks and no safety issues are identified. The ministry went on to consider that the GP has not indicated that the appellant requires any assistance with decision making about personal, activities, care or finances or relating to, communicating or interacting effectively with others. The ministry found that, despite the assessment of impacts to cognitive and emotional functioning, there is no diagnosis that correlates. As well, the ministry found that the assessment of impacts to cognitive and emotional functioning is not consistent with the assessments 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 safety concerns noted by the GP as well as indications, in both the MR and AR, that the appellant is independent with all aspects of social functioning and all DLA applicable to a person with a severe mental impairment. The panel further notes the absence of any mention or assertion of a mental impairment in the documents prepared by the appellant himself. 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 indicated that, because the chiropractor noted he had had limited exposure to the appellant and was not in a position to assess functional capacities or DLA, the ministry would rely on the information found in the assessments provided by the appellant’s

GP in the PWD application. Given the chiropractor's acknowledgement of the limitations in his ability to provide information, the panel finds this determination by the ministry to be reasonable.

The ministry determined that the information provided by the appellant's medical practitioner (GP) does not establish the presence of a severe physical impairment. In making this determination, the ministry considered the functional skills assessed by the GP, noting that the appellant can walk 4+ blocks unaided, climb 5 steps unaided, and remain seated 1-2 hours. The ministry also considered the GP's assessment of lifting in the MR, noting that the GP had indicated both "unknown" and "no lifting", which the ministry determined made it difficult to assess the appellant's ability in this area. The ministry considered the GP's assessment in the AR, noting that the GP indicated that the appellant requires periodic assistance with lifting, carrying and holding but had not provided information about the frequency or type of assistance required. The ministry noted that the appellant is assessed by the GP as independent in all other physical ability and mobility areas. The ministry determined that requiring assistance with lifting, carrying and holding some of the time did not establish a severe physical impairment.

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 chiropractor's letter is consistent with the diagnoses in the PWD application and does not offer an assessment of the appellant's functional capacity or ability to perform DLA. The panel further notes that the GP's assessments of the appellant's functional capacity are mostly at the top end of the range, except for lifting, carrying and holding. With respect to lifting, the panel notes that there does not appear to be any reflection of the indicated need for periodic assistance with carrying, lifting and holding in the AR with the appellant's ability to perform DLA, which are all assessed as independent in the AR. Furthermore, the panel notes that the information provided by the appellant in his SR, Request for Reconsideration and Notice of Appeal discusses the appellant's inability to work or obtain employment; the letter from the chiropractor also mentions the appellant's conviction that he is unable to 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 notes that the appellant experiences some difficulties with physical functioning as a result of his medical conditions, 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 and chiropractor are prescribed professionals. 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 provided to establish 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 comment that *migraines, muscle spasms, neck pain and knee pain* impact the appellant's ability to perform DLA. The ministry considered the GP's MR assessment that the appellant requires periodic assistance with personal self care and meal preparation; however, the ministry that the GP had assessed the appellant as independently able to perform all DLA, including those related to meal

preparation and self care. The ministry found that these assessments were in conflict. The ministry further determined that the appellant's GP had not indicated how long periods of *full blown neck pain* last. The ministry determined that these factors made it difficult to determine the significance of the appellant's restrictions and difficult to determine that the appellant requires periodic assistance for extended periods for the DLA of personal self care and meal preparation.

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 letter from the chiropractor explicitly states that he is not able to comment *on the effects his impairments have had on his normal activities of daily living*. The panel acknowledges that the appellant, in the SR, indicates that he is able to manage normal/basic household activities on good days. The panel finds that the GP has assessed the appellant as requiring periodic assistance with some DLA in the MR but has assessed the same DLA as independent in the AR. The panel finds that the legislation requires that direct and significant restrictions in DLA must be "in the opinion of a medical practitioner" and that the information provided by the chiropractor does not speak to DLA, meanwhile the information provided by the GP in the MR conflicts with the information provided by the GP in the AR. The panel notes that the GP has commented in the MR: *when gets full blown neck pain cannot and does not want to do anything and neck pain & headache happens once a week*. The panel finds that the GP has not provided sufficient information in relation to the nature, 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. 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 GP has indicated in the AR that the appellant benefits from help from friends, 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 confirms the ministry's decision. The appellant is not successful on appeal.