

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated May 30, 2017, which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – Summary of Facts

Evidence before the Ministry at Reconsideration

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's self report (SR) dated October 17, 2016, a medical report (MR) and an assessor report (AR) dated January 15, 2017, both completed by the appellant's general practitioner (the GP), who has known the appellant since October 18, 2016 and who has seen the appellant 2 to 10 times in the past 12 months.

The evidence at reconsideration also included the following documents:

- Request for Reconsideration received by the ministry on May 1, 2017;
- July 22, 2016 letter from Service Canada regarding the appellant's CPP disability benefit application;
- January 25, 2017 medical employability report signed by the GP, listing the appellant's restrictions as difficulty walking, sitting, daily activities migraines, diabetes, hypertension all contributing to chronic pain;
- April 27, 2017 letter from Canada Revenue Agency (CRA) regarding appellant's entitlement to a disability tax credit;
- October 18, 2016 letter written by the appellant describing his trauma arising from a fatal motor vehicle accident (MVA), injuries he has sustained over the past 40 years, treatment and medication he has received, and medical conditions he suffers, including type II diabetes, heart problems, stomach ulcer, migraines, carpal tunnel syndrome, disintegrating left hip and pain in shoulders, neck, hip, arms and hands;
- November 17, 2016 letter from the GP to a medicinal cannabis supplier;
- May 10, 2016 list of appellant's injuries and WCB claims, written by the appellant;
- April 27, 2017 letter from the appellant to CPP supporting his application for a federal disability benefit;
- March 3, 2016 CRA form mailed to appellant's former general practitioner in another province (Dr. M) in support of the appellant's CPP disability tax credit program application. Dr. M writes that:
 - due to substantial neck and back injuries , progressive debilitating pain, exhaustive, painful ambulation the appellant is unable to walk 100 metres using any devices or medication;
 - has to stop frequently due to pain
 - at least 90% of the time he requires 3 times longer than an average person to walk, and if he walks faster his back and neck pain is exacerbated;
 - the limitations began in 2002.

Diagnosis

In the MR the GP notes that the appellant has been diagnosed with diabetes type II migraine headaches, coronary artery disease/ischemic heart disease, multiple musculoskeletal injuries resulting from accidents, major depression and anxiety.

Physical Impairment

In his SR and amended SR (together referred to in this decision as the SR) the appellant writes :

- if the pain is bad he has to roll over to get out of bed, and he doesn't walk;
- Dr. H recommended a hip replacement;
- if he is in too much pain, migraines, etc., when he walks he feels a driving pain in his shoulders, arms and hands. He swells up;
- he has carpal tunnel syndrome in both hands, making it difficult to write;
- usually he cannot sit for more than 20 minutes before he must get up and walk around due to

- pain in neck and hip;
- he is always in pain and the degree of pain that dictates how his day goes;
- his MVA injuries include a fractured pelvis, broken right thumb, fractured skull, steel plates in right arm;
- he has a peptic ulcer;
- he has government approval to take medical cannabis to help alleviate the pain.

In the MR the GP reported that the appellant is able to:

- walk 1-2 blocks unaided on a flat surface;
- climb 5+ stairs unaided;
- lift less than 5 lbs;
- remain seated less than 1 hour.

In the AR the GP reports that the appellant is periodically restricted with mobility inside his home and continuously restricted with mobility outside the home. He notes that the appellant routinely uses a cane for a mobility aid and will require occupational therapy to assess his home. He also notes that the appellant is independent with walking indoors, walking outdoors, climbing stairs and standing, but requires both periodic and continuous assistance from another person when lifting and carrying ("*some shoulder and back pain*").

Mental Impairment

In his SR the appellant indicates that he has suffered depression and PTSD as a result of 3 fatal MVAs.

In the MR the GP notes that the appellant has no difficulties with communication but has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance, motivation and attention/sustained concentration.

In the AR the GP notes that the appellant has:

- good communication skills;
- major impacts in the areas of emotion and motivation;
- moderate impacts in the areas of bodily functions, impulse control, executive function, memory, motor activity and other emotional or mental problems (*severe depression, anxiety and possible PTSD*);
- minimal impacts in the areas of consciousness, insight and judgment, attention/concentration, language, psychotic symptoms, and other neurological problems.

Daily Living Activities (DLA)

In the MR the GP notes that the appellant has not been prescribed medications that interfere with his ability to manage DLA.

In the AR the GP notes that the appellant:

- is independent with personal care and shopping (other than carrying purchases home), meal planning and safe storage of food, paying rent and bills, taking and handling medication, getting in and out of vehicles;
- requires periodic assistance from another person with laundry, basic housekeeping, carrying purchases home, food preparation, cooking, filling prescriptions and using transit schedules.
- requires periodic support/supervision in developing and maintaining relationships and dealing appropriately with unexpected demands;
- is independent in his ability to make appropriate social decisions, interacting appropriately with others and securing assistance from others;

- has marginal functioning with his immediate and extended social networks due to the impact of his mental impairment;
- comments: "*brother helps, withdrawn presently, depression/anxiety possible social disorder*".

Assistance Required

In the MR the GP writes that the appellant requires a cane for use as a mobility aid.

In the AR the GP indicates that:

- help for DLA is provided by the appellant's family ("*lives with brother*");
- the appellant routinely uses a cane to compensate for his impairments;
- the appellant will require an occupational therapy assessment of his home.

Additional Information at the Hearing

At the hearing the appellant provided the following oral evidence:

- his new GP in British Columbia did not have enough information to complete the MR and PR because it took 3 months to get the medical records from the office of Dr. H;
- he has now been referred for an MRI, to a pain clinic and to a neurosurgeon;
- even taking a step can set off a migraine;
- a few weeks ago he sneezed and put his neck out, and still has pain and numbness in his right hand;
- on some days the pain in his shoulder is so severe he can't lift his elbow to shave, and he can't accomplish basic toileting;
- he takes Tylenol 3 for pain, but the codeine is hard on his stomach;
- he can no longer fish, play guitar, ride horses;
- he received a disability allowance in his former province for physical impairments, but now his mental state has deteriorated. Dr. H put him on sleeping pills, and he was supposed to see a psychiatrist, but never did;
- he has been prescribed anti-anxiety medication but doesn't take it;
- he gets mixed up when trying to fill out forms, and can't pay attention to his task;
- he lives with two brothers and a sister-in-law. One of his brothers is mentally handicapped and a real handful, and his sister-in-law has dementia;
- the 3 MVAs have destroyed his life.

Admissibility of Additional Information

The ministry did not object to the admissibility of the appellant's oral evidence. The panel admitted all of the information under EAA Section 22 (4)(b) as evidence in support of the information that was before the ministry at reconsideration because it added further description to information already considered by the ministry and contained no new substantive material of which the ministry was not aware.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision of May 30, 2017 that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The relevant legislation is as follows:

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.

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

(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.

Severe Physical Impairment

The appellant argues that he suffers from several physical impairments, including Type II diabetes, migraine headaches, high blood pressure, fractured vertebrae, a damaged rotator cuff, carpal tunnel syndrome, visual impairment and a peptic ulcer. He is in pain all of the time, but his ability to function depends on the degree of pain he experiences on any given day. On some days he has difficulty getting out of bed, and can sit for only 20 minutes at a time.

The ministry's position is that the physical impairments described by the GP in the MR and AR are insufficient to establish a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an “impairment” and its severity. “Impairment” is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person’s ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or a “prescribed professional” – in this case, the appellant’s GP. The legislation requires that for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment.

In the MR the GP writes that the appellant can walk 1-2 blocks on a flat surface, climb 5+ stairs unaided, lift less than 5 lbs, and remain seated for less than 1 hour. Although the GP indicates that the appellant experiences periodic restrictions within the home, he does not provide an explanation, as requested on the form. The GP also states that the appellant is continuously restricted with mobility outside the home and requires the use of a cane, but does not suggest what assistance the appellant needs in performing DLA.

In the AR the GP indicates that the appellant is independent in his ability to walk indoors and outdoors, which contradicts the information he provided in the MR and differs substantially from Dr. M’s March 3, 2016 report, which states that the appellant cannot walk more than 100 metres and takes 3 times longer to walk than the average person.

The evidence contained in both the MR and AR indicate that the appellant is limited in his ability to lift more than 5 lbs, but in the AR the GP completes both the “periodic” and “continuous” assistance needed boxes, without providing an explanation as to the frequency, duration and degree of assistance required or why the appellant requires both periodic and continuous assistance.

With respect to the appellant’s ability to remain seated, in the MR the GP indicates that the appellant can remain seated for less than 1 hour, which is the most restricted category in that section of the MR form. The GP did not offer any additional comments to support the appellant’s SR, in which he states that he can remain seated for 20 minutes only.

In conclusion, the information in the SR, MR, AR and the letter from Dr. M contains inconsistencies as to walking and lifting and lacks explanatory information from the GP which might resolve those inconsistencies. Although the evidence indicates that the appellant is severely impaired in his ability to remain seated, the panel finds that the ministry reasonably determined that the evidence submitted does not establish that the overall restriction of basic physical functional skills of the appellant is sufficient to establish a severe physical impairment.

Severe Mental Impairment

The appellant argues that he suffers from depression, anxiety and an inability to remain focused on tasks such as filling out forms. He also believes that he suffers from PTSD resulting from 3 fatal MVAs.

The ministry's position is that the information provided by the GP in the MR and AR is indicative of a moderate, not severe, mental impairment.

Panel Decision

As with physical impairment, a diagnosis of a mental disorder is not by itself sufficient to establish a severe mental impairment. The nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted, must be determined.

In both the MR and AR the GP assesses the appellant's communication abilities as unimpaired. Cognitive and emotional functioning is described in the MR as significant in the areas of emotional disturbance, motivation and attention or sustained concentration, but in the AR the GP indicates that the appellant experiences a major impact only in the areas of emotion and motivation. He assesses a minimal impact on the appellant's attention and concentration, and does not explain the contradiction between this finding and the one set out in the MR. Also there is a contradiction between the MR and the AR in the areas of impulse control, executive functioning, memory and motor activity, none of which are noted in the MR as causing a significant impact to the appellant's functioning. In the AR the GP comments that the appellant suffers from "severe depression, anxiety and possible PTSD" but does not provide a further explanation of the impact of these conditions on the appellant's functioning which might resolve the contradictions between the MR and AR. Further, in the AR the GP indicates that the appellant is able to function independently with most aspects of social functioning, but periodically requires support in developing and maintaining relationships and dealing appropriately with unexpected demands. However, the GP does not describe the degree or frequency with which the appellant requires assistance. Although the GP indicates that the appellant has marginal functioning within his immediate and extended social networks, he comments only that "*brother helps, withdrawn presently, depression/anxiety, possible social phobia*", which does not assist the ministry in determining the degree and frequency of assistance required.

In conclusion, although the evidence of the appellant and of the GP indicates that the appellant suffers from depression, anxiety and possible PTSD, the panel finds that the ministry reasonably determined that a severe mental impairment was not established due to the contradictory findings made by the GP in the MR and AR, together with the GP's assessment that the appellant is able to function independently with most aspects of social functioning.

Restrictions in Ability to Perform DLA

The appellant argues that at times he is unable to perform several DLA, including shaving, toileting, laundry, basic housekeeping and carrying purchases home.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professional is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered, the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from

prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

Part E “Daily Living Activities” contains the following instruction: “If you are completing the Assessor Report – Section 3, in addition to this Medical Report, do not complete this page”. Part E of the MR is found on Page 51 of the appeal record. It appears that the GP initially completed Part E, and then crossed it out by drawing a diagonal line across the length of the page when he discovered that he was not supposed to complete the section. At the hearing the appellant confirmed that he had not drawn a line across the page. It is not appropriate, therefore, for the ministry to construe inconsistencies between Part E of the MR and that section of the AR that asks for the GP’s assessment of DLA (Part C).

In the AR the GP assesses the appellant as independent in his ability to attend to all area of personal care and shopping activities, other than carrying purchases home, and comments: “*chronic neck/chest pains, physical disability diff certain movements lifting, cleaning, shopping*”. He also indicates that the appellant is independent in meal preparation, paying rent and bills, taking and handling medications safely, getting in and out of a vehicle and using public transit. In the area of social functioning the GP assesses the appellant as independent in making appropriate social decisions, interacting appropriately with and securing assistance from others. The GP does note that the appellant requires periodic assistance with laundry and basic housekeeping (“*brother helps*”), food preparation, cooking, filling/refilling prescriptions, arranging transportation and using transit schedules. The GP does not describe the type and amount of assistance required or the degree and duration of support required where asked to do so in Part C of the AR.

Because the GP indicates that the appellant is independent in most of the DLA listed in the AR and does not describe the degree, frequency and duration of those DLA with which the appellant requires periodic assistance the panel finds that the ministry reasonably determined that the information fails to establish that the appellant suffers from a severe impairment that in the opinion of a prescribed professional directly and significantly restricts DLA continuously or periodically for extended periods.

Help in Performing DLA

The appellant argues that he routinely uses a cane for mobility, and that he needs his brother’s help with laundry, basic housekeeping and carrying purchases home.

The ministry’s position is that although the appellant uses a cane and requires periodic assistance with some of his DLA activities, because it has not been established that his DLA are significantly restricted as a result of a severe impairment it cannot be determined that significant help is required from other people.

Panel Decision

Section 2(2) (b) (ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA. Although in the MR and AR the GP indicates that the appellant uses a cane and his brother provides assistance for DLA, he does not provide sufficient additional details to establish the extent to which the brother’s help is required.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. Because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and confirms the decision. The appellant is not successful on appeal.