

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 29 May 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 Physician Report (PR) dated 14 December, completed by the appellant's general practitioner (GP) who has known the appellant for 6 months years and seen him 2-10 times in the past 12 months.
 - An Assessor Report (AR) dated 14 December 2016, completed by the appellant's GP.
 - A Self Report (SR) dated 17 September 2016, signed by the appellant indicating that he chose not to complete the self report.
- Medical records submitted with the PWD application included:
 - Laboratory results reports
 - Diagnostic imaging reports
 - Electrocardiogram reports
 - Emergency department records
- A **Request for Reconsideration** dated 1 May 2017, in which the appellant states that he has always worked until 2 years ago when he started having the breathing problems he is experiencing. His doctor says he will not get better. He cannot do anything for more than 10 minutes because he has difficulty breathing and he cannot walk long distances. He explains that he is getting worse everyday and is under a lot of stress.
- Documents submitted with the request for reconsideration include:
 - A referral letter dated 3 May 2017, from the appellant's GP to a respirologist
 - Pulmonary function tests report dated 28 September 2016
 - Consultation report dated 30 September 2016 from the respirologist
 - A printout of the appellant's prescriptions
 - A note from the appellant's GP dated 3 May 2017, in which she states: *I am attempting to get an urgent follow up with respirologist Dr. [omitted] for [appellant] as I am uncertain what else it will take to apply successfully for a PWD disability income for [appellant]. I cannot see his COPD lung issue improving to the degree that he will be able to re-enter the work force in any capacity. He is on maximal medical therapy that he can afford at this point and cannot walk 50 meters before having to stop and catch his breath.*

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

Diagnoses

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

- Type II diabetes [illegible] controlled– onset 2013
- COPD moderately severe (bullous emphysema)– onset 2010
- PAD – vascular compromise left front foot (embolism)– onset August 2016
- Diverticulosis moderately severe – onset 2010

In the AR, the GP describes the appellant's mental or physical impairments as: *patient has severe lung disease that limits his energy, his mobility, his exercise [illegible]. He has been unable to work [in his previous occupation] since 2014.*

Severity of mental impairment

PR:

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 memory, emotional disturbance and attention.

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 moderate impacts on bodily functions, consciousness emotion and attention/concentration; minimal impacts on executive and memory; and no impacts on 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 social networks and marginal functioning in extended social networks.

SR:

The appellant has not completed the SR.

Severity of physical impairment

PR:

Under Health History, the GP writes: *patient was involved in [his previous occupation] for years and has been unable to work in the last two years due to significant emphysema/COPD recently exacerbated by peripheral arterial insufficiency with development of gangrene in his left foot. He has developed uncontrolled hypertension.*

For functional skills, the GP indicates that the appellant can walk less than 1 block unaided, climb 2-5 steps unaided (*then stops*), lift 5-15 lbs. unaided and remain seated without limitation.

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 and outdoors (*has to stop every 50 feet to catch breath, rest legs*), climbing stairs (*but has to stop after 4-5 stairs*), lifting, and holding and carrying.

SR:

The appellant has not completed the SR.

Ability to perform DLA

General

AR:

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 laundry, basic housekeeping carrying purchases home, meal planning, food preparation, cooking and refilling prescriptions. The GP indicates that the appellant requires continuous assistance with paying for purchase and paying rent and bills. The GP assessed the appellant as independent in all other DLA and, in response to a request for additional comments regarding the degree of restriction the GP comments: *[appellant] relies on his brother for financial assistance and they share household/housekeeping.*

Section 2(1)(a) DLA

Prepare own meals

AR:

The GP indicates that the appellant is independent in the meals DLA of safe storage of food and requires periodic assistance with meal planning, food preparation and cooking.

Manage personal finances

AR:

The GP indicates that the appellant is independent with banking and budgeting and requires periodic assistance with paying rent and bills (*he cannot afford rent*).

Shop for personal needs

AR:

The GP indicates that the appellant is independent in the shopping activities of: going to and from stores, reading prices and labels and making appropriate choices. The GP indicates that the appellant requires continuous assistance paying for purchases and periodic assistance carrying purchases home (*he and his brother share these duties*).

Use public or personal transportation facilities

AR:

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

Perform housework to maintain the person's place of residence

AR:

The GP indicates that the appellant requires periodic assistance with laundry and basic housekeeping (*he and his brother share these duties*).

Move about indoors and outdoors

AR:

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

Perform personal hygiene and 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

AR:

The GP indicates that the appellant is independent in the medications DLA of taking as directed and handling and safe storage. The GP indicates that the appellant requires periodic assistance with filling/refilling prescriptions (*he cannot afford meds most of the time*).

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, and making appropriate choices; the meals DLA of safe storage; the pay rent and bills DLA of banking and budgeting; the medications DLA of taking as directed and handling and safe storage; all transportation DLA; and all social functioning DLA.

The GP indicates that the appellant requires continuous assistance paying for purchases and paying rent and bills (*he cannot afford rent*) and periodic assistance with meal planning and filling/refilling prescriptions (*he cannot afford meds most of the time*).

Relate to, communicate or interact with others effectively

PR:

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

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 social networks and marginal functioning in extended social networks.

Help required

PR:

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

Notice of Appeal

The Notice of Appeal dated 7 June 2017, included a letter from the appellant's advocate. The letter indicated that the appellant did not complete the SR portion of the PWD application because he was unsure that he needed to and had relied on the professional's input. The advocate also indicated that the appellant did not have support in the preparation of the PWD application or at reconsideration but has now found an advocate. The advocate emphasized the appellant's breathing difficulties and his inability to return to the workforce. The advocate referred to the GP's assessment of moderate impacts to bodily functions, orientation and depression as well as the GP's report that the appellant needs to stop to catch his breath every 50 feet and 4-5 stairs. The advocate noted the GP's indication that the appellant receives help from his brother.

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 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 physical impairment

In the reconsideration decision, the ministry found that the assessments provided by the appellant’s GP do not establish a severe physical impairment. In making this determination, the ministry considered the functional skills assessed by the GP in the PR, noting that the appellant can walk less than 1 block unaided, climbs 2-5 steps unaided, lift 5-15 lbs. and his ability to remain seated is not limited. The ministry considered the GP’s assessment in the AR, noting that the GP indicated that the appellant is independent in all physical ability and mobility areas as well as the GP’s comments about the appellant needing to stop to catch his breath and rest his legs. The ministry concluded that the information provided demonstrates that the appellant experiences some limitations due to shortness of breath, but that the assessments provided speak to a moderate rather than 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 GP has indicated that the appellant requires a rest break every 50 feet while walking to rest his legs, the GP also indicates in the note provided at reconsideration that the appellant requires a rest every 50 meters, and the respirologist states that the appellant is short of breath when walking about one block at his own pace; however, in the referral letter to the respirologist the GP states that the appellant walks everywhere as he does not have a vehicle or driver’s license. As well the panel notes that the GP has assessed the appellant as being able to climb 4-5 steps and then requiring a break; however the respirologist’s consultation report states that the appellant lives on the third floor and experiences shortness of breath but does not have to stop. The panel further notes that the GP indicates that the appellant is independent in all mobility and physical ability areas; the appellant is reported to require breaks to catch his breath and rest his legs but there are no reported areas that require assistance. The panel notes that at the hearing the ministry clarified its position that, when determining severity, being able to do things alone, with rest or taking more time is not considered to be severe.

Furthermore, the panel notes that the information provided by the appellant's advocate and GP discusses the appellant's inability to work or re-enter the work force. 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.

Severity of mental impairment

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 of mental injury. The ministry then considered the GP's indication of significant deficits with cognitive and emotional functioning in the area of emotional disturbance, memory and attention/concentration as well as the GP's comments that the appellant experience depression and anxiety due to extreme financial duress. The Ministry also considered the GP's assessment of impacts on cognitive and emotional functioning in the AR, noting that there were moderate impacts assessed in the areas of bodily functions (*sleep disturbances*), consciousness (*orientation*), emotion (*depression*), and attention/concentration; minimal impacts in the areas of executive and memory; and no impacts in the remaining areas. The ministry noted the GP's assessment of communication indicated no problems with communication and assessed communication abilities as good in all areas. 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 help is required to maintain the appellant in his community.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes that the ministry has erred in its recounting of the GP's assessment of the appellant's functioning in his extended networks as good; the GP indicated that the appellants functioning in his extended networks is marginal. However, the panel also notes the absence of safety concerns reported by the GP as well as indications that the appellant is independent with all aspects of social functioning. The panel further notes that while the appellant indicates that he is under stress, there is no mention or assertion of a mental impairment or brain injury in the documents prepared by the appellant. 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.

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. 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 assessment that the appellant requires continuous assistance with paying for purchases (*he and his*

brother share these duties) and paying rent and bills (*he cannot afford rent*) and noted that restrictions to DLA must be directly related to an impairment, whereas the GP indicated that the appellant's financial issues are the reason for his difficulty in these DLA. The ministry also considered the DLA which were reported as requiring periodic assistance and noted that there was no information provided about the frequency and duration of assistance required, which would be necessary to determine if they represent a significant restriction to the appellant's overall functioning. The ministry also noted that the information provided did not establish that assistance from the appellant's brother is required as a result of an impairment.

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's comments indicate that the appellant requires continuous assistance in some areas for financial reasons. The panel further notes that some DLA are assessed as requiring periodic assistance. The panel notes that the comments provided by the GP suggest that the appellant and his brother share at least some of these tasks, rather than indicating the appellant is unable to do them some or all of the time without assistance. Furthermore, the GP does not specify what assistance is necessary and how often it is required. 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. The panel notes that the GP has indicated that no assistive devices are required. While the GP has indicated that the appellant benefits from help from his brother, 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.