

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 13 June 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 the appellant's ability to perform daily living activities (DLA) either continuously or periodically for extended periods; or that as a result of those restrictions, the appellant 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 20 January 2017, completed by the appellant's general practitioner (GP) who has known the appellant since January 2014 months years and seen the appellant 2-10 times in the past 12 months.
 - An Assessor Report (AR) dated 20 January 2017, completed by the appellant's GP.
 - A Self Report (SR) dated 20 April 2016, completed by the appellant.
- A **Request for Reconsideration** (RFR) dated 28 April 2017, in which the appellant states that he has recently had ultrasound and MRI scans and new information is available through his doctor in relation to the to his left shoulder and lower back. He explains that he has been in contact with his doctor's office and they are prepared to provide information to the ministry. The appellant describes the difficulties that result from his medical conditions and explains that he is in too much pain to do work at a job and is trying to survive on \$658 per month. The appellant describes being unable to have crucial dental surgery, not having been able to access physiotherapy for years and being unable to afford anti-inflammatory medication. He states that he has discussed the issue with his doctor on several occasions and they have both determined that he should go onto full disability.

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:

- degenerative disc disease lumbar – onset 1994
- arthritis back/sacroiliitis – onset 1994

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

- *back pain*
- *anxiety/depression*

Severity of mental impairment

PR:

The GP has not provided a mental health diagnoses

Under Health History, the GP writes:

- *sleep is severely disrupted by pain*
- *lack of interaction due to social isolation due to pain*

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 emotional disturbance with the comment: *due to chronic disorder has depression and anxiety.*

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 in the areas of bodily functions, emotion, and attention/concentration; moderate impacts in the areas of consciousness, executive and memory. The GP assesses no impacts in the remaining areas of cognitive and emotional functioning. The GP provides the comment: *severe sleep impairment due to pain and medication; decreases memory, orientation, concentration and planning ability; he is obviously depressed and anxious due to his chronic disorder.*

The GP indicates that the appellant is independent in all social functioning DLA and has marginal functioning in 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 a number of physical conditions and the associated difficulties he experiences (see below).

Severity of physical impairment

PR:

- The GP has degenerative disc disease lumbar and arthritis back/sacroiliitis.

Under Health History, the GP writes:

- *Patient is unable to lift, bend, sit/stand well for any period*
- *Unable to try and exercise*
- *All conservative therapies and injectable therapies have failed*
- *Chronic condition from falling off roof in 1994*
- *Sudden onset muscle spasms, unable to control*

For functional skills, the GP indicates that the appellant can walk 1-2 blocks unaided on a flat surface, climb 2-5 stairs unaided and can remain seated for less than one hour. The GP has indicated no 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, standing, lifting and carrying and holding. The GP indicates that the appellant takes significantly longer with all of these activities and provides the comment: *he is in pain constantly and is sometimes unable to walk or lift anything or bend/squat.*

SR:

The appellant describes severe damage to his back. He explains injuries to his left shoulder as well as loss of strength and twitching in that arm. He states that he has been diagnosed with damage to both hips and sacrum as well as degenerative osteoarthritis and a ruptured disc. He

describes having a serious skin condition that causes severe itching and rough skin and leaves small "paper cuts" on his hands and feet.

Ability to perform DLA

General

PR:

The GP indicates that the appellant has been prescribed medication that affects cognitive function as well as sleep. The anticipated duration of this medication is likely permanent.

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 (takes significantly longer), reading prices and labels, making appropriate choices and paying for purchases. The GP has not indicated whether or not the appellant is independent with carrying purchases home but has indicated that he takes significantly longer than typical. The GP has provided the comment: *the pain sometimes makes him unable to lift anything or even leave the house.*

Use public or personal transportation facilities

AR:

The GP indicates that the appellant is independent in all transportation DLA and takes significantly longer with the comment: *depending on level of pain that day patient may be unable to drive or get on a bus.*

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 and provides the comment: *due to pain needs help with household work.*

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. The GP indicates that the appellant takes significantly longer with dressing, bathing and transfers in/out of bed and on/off chair. The GP provides the comment: *due to pain is intermittently unable to or takes longer with self-care.*

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

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 (*no support but difficult due to pain and isolation*), 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

PR:

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

AR:

The GP indicates in the section of the AR dealing with help required for daily living activities that help is provided by health authority professionals and community service agencies with the comment: *help from other doctors/practitioners*. In response to a prompt for help that is needed but not available the GP writes: *help with groceries and household work*. The GP indicates that the appellant does not receive assistance from assistive devices or assistance animals.

Notice of Appeal

In his Notice of Appeal (NOA) dated 14 June 2017, the appellant gives as Reasons for Appeal: *I disagree with this decision as it states the ministry does not have enough information on the amount of time that I am unable to move about. I have made this information available to my doctor, and requested that you contact her to get any information that you might require. I have been at all times prepared to help the doctor's office and the government get any medical data or whatever is required by the ministry. I have little use of both my hands now and 3 limbs are seriously impaired. I cannot hope to fend for myself very well in future years.*

The hearing

The appellant stated that he and his doctor agree that he cannot work and he has spent a lot of time getting this information together. He stated that both hips and his left arm are damaged and he cannot carry things and cannot shop. He doesn't know what to do as he is behind with emergency dental work and it isn't possible to meet all of his expenses on \$658 per month. It has been years since he was able to afford physiotherapy. He explained that he fell off a roof a long time ago and has injuries from that fall. He described a normal day as needing to lay flat on his back until about 3pm, he is able to sit up for a while but gets spasms that force him to lay flat. He explained that since an injection about 10 days ago, he is able to perform most daily tasks slowly. He described being unable to do shopping, as it leaves him very sore the next day. He stated that a friend used to help him but now he does not receive any help. The appellant also described a skin condition that causes his hands to be very sore. The appellant explained that he is trying to be fair and honest, completing everything to the best of his ability providing the most information possible.

The ministry relied on the reconsideration decision.

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 four 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 medical practitioner, is likely to continue for at least 2 years;
- 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 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 noted that the GP had not provided a mental health diagnosis, arguing that if the appellant had a severe mental health condition it would be expected that the GP would provide a diagnosis. The ministry considered the GP's indication that pain severely disturbs the appellant's sleep and has a major impact on his daily functioning. The ministry noted that the GP described a lack of interaction with others and social isolation due to pain. In the reconsideration decision, the ministry noted that the GP describes depression and anxiety due to the appellant's chronic disorder, and argues that if these conditions were considered severe they should be included on the list of diagnoses. The ministry noted that the GP assessed major impacts on emotional functioning and experiences decreased memory, orientation, concentration, and planning ability. The ministry noted that the GP has not indicated that support is needed to maintain the appellant in his community. As well the ministry took note of the lack of information from the GP about referral to a mental health specialist, which the ministry argues would be expected if the appellant's mental health conditions were severe. The ministry concluded that, while the appellant does experience some degree of mental impairment secondary to his physical conditions, it was not satisfied that a severe mental impairment had been established.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. In addition to the considerations discussed by the ministry, the panel notes the absence of safety concerns noted by the GP and, while the GP provides comments about social isolation, she assesses the appellant as independent with all aspects of social functioning and all DLA applicable to a person with a severe mental impairment. The panel further notes that the appellant's communication abilities have been assessed as good in all areas. Finally, the panel notes the absence of any mention of a mental impairment in any of the documents prepared by the appellant himself or in the appellant's arguments at the hearing. 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

The ministry determined that it was not satisfied that the information provided is evidence 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 1-2 blocks unaided, climb 2-5 steps unaided, cannot do any lifting and can remain seated for less than 1 hour. The ministry considered the GP's description of the appellant as being unable to lift, bend, sit/stand well for any period and his severely disturbed sleep due to pain. The ministry noted that while the GP indicated no lifting, she had also assessed the appellant as independent in several DLA that would require at least minimal lifting. The ministry also noted that while the GP has described the appellant as sometimes unable to walk, lift, bend/squat, she has not provided how often 'sometimes' means. As well, the ministry noted that the GP has not provided a description of the efficacy of the appellant's medications and to what extent it enables him to perform DLA. The ministry noted that the GP has indicated that the appellant doesn't require any aids or prostheses and argued that, if the appellant's physical condition were considered severe, it would be expected that he would benefit from basic aids such as a cane, walker or grab bars for his bathroom. The ministry further noted that the GP has indicated that the appellant requires periodic assistance with laundry and basic housekeeping but has not indicated how often this assistance is required and to what degree. The ministry further noted that the GP has not specified how often the appellant is in too much pain to access transportation. The ministry concluded that the appellant experiences some degree of restriction due to his impairment, but was not satisfied that the information provided is evidence of a severe physical impairment.

The panel notes that the appellant has stated that he suffers from a severe skin condition; however, a medical practitioner has not confirmed this diagnosis.

The panel finds that the ministry's determination that a severe physical impairment has not been established was reasonable. In addition to the considerations discussed above, the panel notes that the GP has assessed the appellant as independent with all areas of mobility and physical ability and takes significantly longer. The panel also notes that the appellant stated at the hearing that he is independently able to perform his daily activities albeit slowly. The panel notes that the appellant did state that shopping is a problem for him, causing pain the day after he does this task. The panel notes that the information provided by the appellant in his SR, and Request for Reconsideration discusses the appellant's inability to work. The appellant also argued at the hearing that he and his doctor agree that he is not able to work. The panel notes 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 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 GP is the prescribed professional. 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 the information from the appellant's prescribed professional did not establish that the appellant's impairment significantly restricts his ability to perform DLA continuously or periodically for extended periods. The ministry noted that the GP had assessed the appellant as generally independently able to perform all DLA but his ability to perform them varies depending on the appellant's pain levels. The ministry noted that the GP had not provided information about the how often the appellant can perform DLA compared to when he is unable. The ministry argued that, despite not being required by the legislation, information regarding the frequency and degree of restrictions experienced by the appellant is valuable to determine the significance of restrictions. The ministry noted that the GP has indicated no lifting and has also indicated that the appellant is independent with tasks that involve at least some lifting. The ministry also noted that the GP has indicated that the appellant requires periodic assistance with laundry and basic housekeeping, but has not explained how often the appellant requires assistance and to what degree.

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 indicated a need for periodic assistance in relation to basic housekeeping and laundry. However, 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 well, the panel notes that the appellant has stated that he is independently able to perform these tasks. The panel also notes that the GP reported that the appellant is independently able to manage all areas of social functioning. 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 would benefit from help with groceries and household work, the appellant has stated that he is independently able to manage housekeeping and laundry albeit slowly. The panel notes that the appellant also stated that he does not receive assistance with shopping but would benefit from assistance in this area. As the panel has 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 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.