

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 26 July 2017, which denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the criteria for PWD designation 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; and 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 information and records before the ministry at reconsideration consisted of the following:

1. The appellant's **PWD Application** comprised of:
 - A Medical Report (MR), completed by the appellant's general practitioner (GP) who has known the appellant for 3 years and has seen him 2-10 or more times in the past 12 months.
 - An Assessor Report (AR) dated 13 April 2017, completed by the appellant's GP.
 - A Self Report (SR) dated 8 March 2017 completed by the appellant.
2. An MRI report dated 6 November 2016, which provides an impression of mild to moderate multi-level changes to the appellant's spine with the most prominent changes apparent in his lumbar spine.
3. A **Request for Reconsideration** dated 1 July 2017, signed by the appellant.
4. A two-page typed letter, which is undated and unsigned, detailing the difficulties experienced by the appellant as a result of his back pain and depression. The letter primarily discusses the appellant's abilities and restrictions in relation to physical functioning and daily living activities (DLA).

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

Diagnoses

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

- Left-sided L4-5 disc disease– onset September 2015 (*This condition is permanent. He is not a candidate for surgery*)
- Depression – onset September 2015 (*he struggles to afford medication for his mood disorder*)

Severity of mental impairment

MR:

The GP indicates that the appellant has become depressed due to mechanical back pain and physical restriction and he struggles to afford paying for medications.

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

The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the area of emotional disturbance and provides the comment: *Due to his chronic pain and inability to do physical activities, he has become depressed.*

AR:

The GP describes the appellant's mental impairments as Depression.

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

The GP assess the appellant's cognitive and emotional functioning as having no major impacts, moderate impact in the area of emotion, minimal impact in the area of motivation and no impact in the remaining areas. The GP provides the comment: *low mood and lack of motivation due to pain.*

SR:

The appellant indicates that his pain has/can make him depressed, making life difficult.

Severity of physical impairment

MR:

The GP indicates that the appellant has chronic neuropathic pain in his left leg causing difficulties with walking, standing or sitting for more than 30 minutes at a time and this restricts him from doing any physical work.

For functional skills, the GP indicates that the appellant is able to walk less than 1 block unaided, climb 5+ steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated for less than 1 hour.

The GP indicates that the appellant does require aids or prostheses for his impairment and explains that the appellant uses a cane at times to walk greater than 100 meters at a time.

AR:

In relation to mobility and physical ability, the GP assesses the appellant as: requiring periodic assistance from another person walking indoors and walking outdoors (*needs a cane at times*); requiring continuous assistance or unable in relation to climbing stairs (*cannot climb > 10 stairs*); uses as assistive device for standing (*needs a cane to stand > 30 min.*); requiring periodic assistance with lifting (*no more lifting > 7 kg*); and requiring periodic assistance carrying and holding (*no more than 7 kg*). The GP comments: *his biggest disability is his physical restrictions, due to his neuropathic pain in his [left] leg.*

SR:

The appellant describes his physical impairment as an injury to his lower back in the L4/L5 region. He states that he has a lot of pain in the injured area; it affects the nerves in his legs, left mostly, causing pain and loss of sensation all the way to his feet. He explains that his disability affects his life in many ways, including: his ability to work, he cannot sit or stand for extended periods, he is limited in bending to pick up objects greater than 15 lbs. without discomfort. He explains that when his back is inflamed, swelling blocks sensation to his legs and feet causing him to walk with a cane. The pain affects his daily life as well as his sleep, causing him to be sleep deprived many nights. He also states that it is challenges to raise his 2 boys and there are limits to the actions and activities he can do with them.

Ability to perform DLA

General

MR:

The GP indicates that the appellant has not been prescribed medications that interfere with her ability to perform DLA.

EAPWDR - Section 2(1)(a) DLA

Prepare own meals

AR:

The GP indicates that the appellant is independent with the meals activities of meal planning, food preparation, cooking and safe storage of food.

Manage personal finances

AR:

The GP indicates that the appellant is independent all pay rent and bills activities, including banking, budgeting, and paying rent and bills.

Shop for personal needs

AR:

The GP indicates that the appellant is independent in all shopping activities, including: going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home (*as long as it is <7 kg*).

Use public or personal transportation facilities

AR:

The GP indicates that the appellant is independent in all transportation DLA: getting in and out of a vehicle (*most of the time (> 90%)*), using public transit and using transit schedules and arranging transportation.

Perform housework to maintain the person's place of residence

AR:

The GP indicates that the appellant requires continuous assistance or is unable with laundry and basic housekeeping, commenting: *cannot do this without help from family*.

Move about indoors and outdoors

MR:

The GP indicates that the appellant is able to walk less than 1 block unaided on a flat surface and can climb 5+ to climb stairs unaided.

AR:

The GP indicates that the appellant is requires periodic assistance with walking indoors and outdoors, continuous assistance climbing stairs and uses an assistive device for standing.

Perform personal hygiene and self-care

AR:

The GP indicates that the appellant is independent with the personal care DLA of grooming, bathing, toileting, feeding self, regulating diet and requires periodic assistance with dressing (*only at certain times, when his pain is bad*) and transfers in/out of bed and on/off chair (*needs a cane when his pain is not well controlled*).

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 reading labels, making appropriate choices, and paying for purchases; all meals DLA, including safe storage of food; all pay rent and bills DLA; all medications DLA; and the transportation DLA of using transit schedules and arranging transportation.

Relate to, communicate or interact with others effectively

MR:

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

AR:

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

The GP indicates that the appellant is independent in all of the 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. The GP has not assessed the appellant's functioning in immediate and extended social networks.

Help required

MR:

The GP indicates that the appellant requires a cane at times.

AR:

The GP indicates that the appellant receives assistance from family.

The GP indicates that the appellant receives assistance from assistive devices (cane and braces), with the comment: *back brace at times for back support and cane for standing or walking > 30 min at a time*. The GP indicates that the appellant does not receive assistance from assistance animals.

Notice of Appeal

In his Notice of Appeal dated 8 August 2017, the appellant gives the following as Reasons for Appeal: *my impairment does significantly restrict [my] ability to perform daily living activities, as well as I require significant help or supervision of another person to perform daily living activities!*

At the Hearing

The appellant argued that he feels that he does have a severe impairment. He explained that he has problems functioning because he is in constant pain, his sleep is affected, he is on anti-depressant medication and has suicidal thoughts. He is scheduled for a mental health assessment in December 2017. The appellant rearticulated much of the content of the 2-page letter submitted at reconsideration. He explained that he is not able to participate in outdoor aspects of life, such as gardening or the family farming business. He stated that he cannot go shopping alone as he is unable to reach anything below waist height, cannot lift items out of the cart, and cannot carry groceries from the store to the car or the car to the house. The appellant argued that he requires assistance. He explained that he has difficulty rising from sitting on a toilet, bed, chair or car and this can take 1-5 minutes. He described being unable to wash below the waist in the shower and sometimes needing

assistance to dress below the waist (pants, socks and shoes). He stated that he needs help with laundry and one load can take an hour or more. He explained that he is able to do light housekeeping activities, such as wiping and dusting surfaces above the waist, but has difficulty with other activities, such as using a broom and dustpan. He explained that he receives help from his children (9 & 13 years old) and his parents who live upstairs from where he lives. He described difficulty sleeping due to constant pain, which sometimes impacts his ability to drive his children to school. He explained that he has lost quite a few of his friends since the injury and mostly socializes via social media. He described difficulty with family socialization as well, due to an inability to travel in the car for more than 1-2 hours without a break.

The appellant submitted 2 documents at the hearing:

1. A copy of the 2-page letter submitted at reconsideration that had been signed by the appellant and dated 29 June 2017. He explained that he had signed and dated the request for reconsideration but did not do the same with the letter.
2. A 1-page letter dated 29 August 2017 from the appellant's doctor, in which the doctor stated that he knows the appellant very well, the appellant has been struggling with constant back pain for which surgery is not an option. The doctor also indicated his support for the appellant's PWD application.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided by the appellant in the Notice of Appeal, the information provided by the appellant at the hearing, and the documents submitted at the hearing are all in support of the information and records before the ministry at reconsideration as they provide reiteration and elaboration on the appellant's medical conditions and the associated difficulties he experiences. The panel, therefore, admits this information in accordance with section 22(4)(b) of the *Employment and Assistance Act*. The panel notes that the ministry made no objection to the admission of the documentary information presented, and indicated that its position was that the documents did not contain any new information.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration 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 of the evidence, including that of the appellant. The diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine the severity of an impairment. Impairment is defined in the PWD application as 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 considered the GP's comment that the appellant's biggest disability is his physical conditions and observed that there are no areas of cognitive and mental functioning that have a major impact on the appellant's daily functioning. The ministry noted that the GP has described the appellant's depression as a result of this back pain and physical restrictions.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes that no major impacts to cognitive and emotional functioning were assessed by the GP. The panel also notes that there are no safety concerns noted by the GP in the MR or AR and he assesses the appellant as independent with all aspects of social functioning and all DLA involving decision-making. The panel notes that the information provided by the appellant at the hearing and in the 2-page letter at reconsideration state that the appellant has withdrawn from his social circle and has experienced a significant decrease in concentration, focus, motivation and memory; however, the panel notes that this self-assessment is not consistent with the information provided by the GP in the PWD application where the GP assesses minimal impact to motivation and no impacts to memory and concentration. As such, the panel finds that the ministry reasonably concluded that the information provided does not establish a severe mental impairment and that this criterion was not met.

Severity of physical impairment

In the reconsideration decision, the ministry found that the information provided did not establish that the appellant has a severe physical impairment. The ministry considered the GP's assessments of functional skills and mobility and physical ability in the MR and AR, finding that use of a cane "at times" and a capacity for mobility up to 30 minutes does not confirm a severe impairment. The

ministry recognized that the appellant's leg pain limits his physical abilities, but argued that if his condition were severe it would be expected that he would benefit from a more substantial aid such as a walker with a seat. The ministry noted the GP's assessment of independence in several DLA that require standing and mobilizing. The ministry also considered the appellant's MRI report, concluding that the impression of "mild" or "moderate" issues does not suggest a severe impairment.

The panel notes that the appellant's 2-page letter was before the minister at reconsideration, but was given no weight as it was undated and unsigned. The panel finds that the decision to give the letter no weight at reconsideration was reasonable, and notes that it is now apparent that the appellant is the author of the letter. The panel notes that the information provided by the appellant at the hearing and in the 2-page letter at reconsideration conflicts significantly with the GP's assessments in the PWD application. The appellant's arguments and the letter state that the appellant's functional skills, mobility and physical abilities are far less than what the GP reports. The appellant stated at the hearing that he has shown the letter to his doctor and the doctor agrees with the content of the letter. However, the panel notes that the doctor's letter submitted at the hearing does not articulate agreement with the appellant's self-assessment. Rather the letter indicates the physician's support for the appellant's PWD application. The appellant also argued, at the hearing and in the 2-page reconsideration letter, that the PWD application does not adequately reflect his current circumstances as he continues to experience a decline in functioning. The ministry argued that if the appellant's circumstances have changed the appropriate course of action would be to reapply with accurate information from his doctor. The panel acknowledges the appellant's assertion that his condition is worsening, but recognizes the reasonableness of the ministry's argument that its staff must make decisions based on the information before them. The panel also notes that the information provided by the GP and the appellant discussed his inability to work. However, as noted by the ministry, 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 reasonably concluded that the information provided does not establish a physical 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. The legislation is clear that a prescribed professional's opinion is fundamental to the analysis of restrictions with DLA. 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. Regarding the degree of the restriction, section 2(2)(b)(i) of the EAPWDA requires activities to be directly and significantly restricted either continuously or periodically for extended periods. 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 acknowledged that the appellant experiences some limitations but found that the information provided did not establish that the appellant's impairment significantly restricts his ability to perform DLA continuously or periodically for extended periods. The ministry noted the GP's assessment that the appellant requires continuous or periodic assistance for mobility and explains that he uses a cane "at times", cannot climb more than 10 stairs and needs a cane to stand for more than 30 minutes. The ministry found that this information did not reflect significant restriction as the appellant is capable of basic mobility and only requires a cane at times. The ministry acknowledged that the GP indicates that the appellant requires periodic assistance with dressing, but noted that the GP did not explain how often help is required. The ministry considered the GP's assessment that the appellant requires continuous assistance with housekeeping and laundry, but found that it was not clear why he would require continuous assistance when the

assessments indicate he is capable of carrying up to 15 lbs. and standing for 30 minutes. The ministry accepted that the appellant does receive assistance from family, but found that the evidence did not establish that help was required as a result of the appellant's impairment.

The panel finds that the ministry's determination that the information provided does not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The GP has, in the PWD application, assessed the appellant as independent in most DLA. The panel notes that the GP has indicated that continuous assistance is required for basic housekeeping. The panel also notes that the GP has indicated that the appellant requires periodic assistance with dressing and transfers. However, the panel finds that the GP has not provided sufficient information in relation to the degree and duration of the assistance required by the appellant to establish that there are significant restrictions for extended periods in the appellant's ability to perform these activities. The panel notes that the information provided by the appellant at the hearing and in the 2-page reconsideration letter does speak more extensively to the appellant's ability to manage DLA and provides a more nuanced picture of the appellant's abilities. The panel notes that the appellant describes himself as an individual who struggles physically performing many DLA and requires assistance from family and assistive devices in accomplishing these activities. The panel finds, however, that the legislation requires that direct and significant restrictions in DLA must be "in the opinion of a prescribed professional". Without sufficient detail from the GP to confirm that DLA are directly and significantly restricted either continuously or periodically for extended periods, the panel finds that the ministry reasonably determined that this legislative criterion was not met.

Help required

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The confirmation by a prescribed professional of direct and significant restrictions with DLA under section 2(2)(b)(i), is a precondition to 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 DLA.

In the reconsideration decision, the ministry concluded 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 appellant argued that he does require help with DLA; he uses a cane and receives assistance from his family. The panel also notes that the information provided by the GP in the PWD application indicates that the appellant does receive assistance from a back brace and cane at times.

The panel has concluded (above) that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As a result, the panel also finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA that 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.