

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated August 2, 2017 made by the Ministry of Social Development and Poverty Reduction (the ministry) which determined that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that:

- the appellant had a severe physical or mental impairment,
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLAs) either continuously or periodically for extended periods, and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLAs.

PART D – Relevant Legislation

The relevant legislation is section 2 of the EAPWDA and section 2 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

PART E – Summary of Facts

The information before the ministry at the time of the reconsideration decision consisted of the following:

1. A persons with Disabilities Designation Application consisting of a self-report (SR), a physician's report (PR) and an assessor's report (AR), the latter two both completed by the appellant's physician on April 5 and April 13, 2017, respectively.

In the SR the appellant describes his disability as severe sleep apnea which impacts his ability to concentrate, caused him to be admitted to the hospital with hallucinations, means he is very tired all the time and falls asleep often and means he cannot use tools such as knives for fear of injuring himself. He also states that he avoids public transit because he falls asleep and misses his stop.

The PR diagnoses the appellant with excessive daytime sleepiness (since 2007) and severe sleep apnea. The physician writes that the appellant requires high pressures on his BIPAP (nighttime breathing assistance device) which makes it hard to get a tight fit with the mask meaning that his sleep continues to be interrupted. The appellant sliced his finger with a knife at his work as a chef due to sleepiness. He cannot drive and has difficulties using public transport because he falls asleep. He has allergies with significant nasal congestion which impacts the effectiveness of the BIPAP.

It is noted that the appellant has not been prescribed any medication although he uses steroid nasal sprays.

Under functional skills the PR indicates that the appellant can walk 4+ unaided and climb 5+ stairs, but it is unknown how much he can lift. It indicates he can remain seated for 2-3 hours. The PR indicates no difficulty with communication and deficits in cognitive and emotional functioning in the areas of memory, psychotic symptoms and attention or sustained concentration with "excessively sleepy" specified under "Other".

Under Daily Living Activities, the PR indicates that none of the appellant's DLAs are restricted except "Use of Transportation", commenting that the appellant is "Too sleepy to safely drive".

Under Additional Comments, the physician notes that the appellant was hospitalized with delerium related to lack of sleep.

The AR indicates that the appellant's mental or physical impairments are "sleepiness" and "comments: "When really bad it is hard to tell whether he is awake or asleep – 'dreaming while awake'". His ability to communicate is satisfactory and is independent in his mobility and physical ability. Regarding the impact of the appellant's cognitive and emotional functioning on his DLAs, the AR indicates that the appellant suffers major impacts in the areas of sleep disturbance, drowsiness, confusion, attention/concentration and executive functions. There is moderate impact on emotion, memory and motivation. There is minimal impact in insight and judgement and psychotic symptoms. And no impact in impulse control, motor activity, language and other neuropsychological problems.

Regarding DLAs, the AR indicates that the appellant is independent in all areas. Good functioning is indicated in immediate social networks while extended social networks is left blank.

2. A letter dated June 30, 2016, from a specialist to the appellant's physician describing the appellant's medical condition related to his nasal issues and allergies.

3. A lab report dated January 6, 2017, regarding the appellant's sleep apnea indicating that he has severe sleep apnea and recurrent sinusitis the former of is being addressed with a BIPAP.
4. A letter dated May 10, 2016, from another specialist to the appellant's physician indicating that the appellant suffers from severe nasal issues, has had septal reconstruction and may have infection requiring antibiotics.
5. A report from a diagnostic clinic dated "Nov 17" detailing the appellant's overnight polysomnography which indicates "severe sleep apnea".
6. A letter dated November 29, 2016, written by the appellant's physician stating that the appellant has been diagnosed with severe sleep apnea, has excessive daytime sleepiness affecting his ability to carry out daily activities, has significant nasal congestion, requires a BIPAP machine at very high pressures and has been advised not to work or drive.
7. A disability tax credit form dated November 11, 2016, completed by the appellant's physician indicating that the appellant has severe sleep apnea, is extremely sleepy, cannot work or drive, has very bad nasal congestion, is seeing a specialist, struggles to use his BIPAP which requires very high pressures and cannot use public transit because he falls asleep and misses his stops.
8. A letter dated July 21, 2017, written by the appellant's physician and submitted at reconsideration again outlining the appellant's medical conditions and reiterating that he is not safe to drive or work.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria of section 2 of the EAPWDA for designation as a PWD was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement and that his impairment was likely to continue for at least 2 years had been met, but was not satisfied that:

- the appellant had a severe mental or physical impairment,
- the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLAs either continuously or periodically for extended periods, and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLAs.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;

"health professional" repealed

"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.

(4) The minister may rescind a designation under subsection (2).

Section 2 of the EAPWDR provides further clarification:

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.

This appeal was held by written hearing by consent of the parties in accordance with section 22(3)(b) of the *Employment and Assistance Act*.

The Appellant's Position

In his notice of appeal the appellant writes: "Based on my Doctor's professional opinions. She clearly stated that my conditions are indeed affecting my daily activity and the only reasons for the denial were she didn't state the details on how my daily activities were affected."

The Ministry's Position

The ministry relied on its reconsideration decision.

Panel Decision

Employability

The panel notes that both the appellant and the appellant's physicians placed significant emphasis on the fact that the appellant is not able to return to work. As employability is not a legislated criteria when assessing eligibility for PWD status, the fact that the appellant is not able to return to work is irrelevant.

Severe Physical Impairment

In making its determination that the appellant does not suffer from a severe physical impairment the ministry distinguished between a severe physical *condition* and a severe physical *impairment* and noted that the former does not meet the legislative criteria while an assessment of the latter must take into consideration the *impact* of a physical condition on the appellant. In this regard, the ministry

observed that both the PR and the AR indicate that there is little or no impairment to the appellant caused by his physical condition in that those reports indicate that the only activity in which he is restricted is driving, that his ability to communicate is satisfactory and his mobility and physical ability indicators are all independent. There was no additional information in any of the evidence before the ministry that addressed the issue of a mental impairment.

Given the lack of evidence of significant impacts of the appellant's physical condition in the PR and AR, the ministry was reasonable to find that the appellant was not suffering from a severe physical impairment.

Severe Mental Impairment

The evidence before the ministry regarding whether the appellant was suffering from a severe mental impairment is more complicated. The ministry notes that the PR indicates significant deficits in cognitive and emotional functioning in a number of areas, while the AR indicates major impacts in 4 areas and moderate impacts in 3 areas of cognitive and emotional functioning. However, neither report, notes the ministry, indicates any significant impact on the appellant's ability to carry out his DLAs or on his social interactions due to his mental condition. There appears to be some inconsistency in this instance. Based on this the ministry found that the appellant is suffering from a *moderate* rather than *severe* mental impairment. There was no additional information in any of the evidence before the ministry that addressed the issue of a mental impairment.

Given the lack of evidence of significant impacts of the appellant's mental condition and the apparent inconsistencies in the PR and AR, the ministry was reasonable to find that the appellant was not suffering from a severe mental impairment.

Daily Living Activities

The ministry notes that both the PR and the AR indicate that the appellant's ability to carry out his DLAs is not significantly restricted by his medical conditions. The PR indicates that his only restriction is in use of transportation. The AR indicates that he can carry out all of his DLAs independently. There was no additional information in any of the evidence before the ministry that addressed the issue of a DLAs.

Given the evidence in the PR and AR, the ministry was reasonable to find that the appellant was not significantly restricted in carrying out his DLAs.

Help is Required to Perform DLAs

The ministry noted that the appellant's physician does not indicate whether the appellant requires a prosthesis or aid and that the appellant is assisted by his family. On this basis the ministry determined that the appellant does not require help to perform his DLAs.

Given the evidence in the PR and AR, the ministry was reasonable to find that the appellant does not require assistance in carrying out his DLAs.

Conclusion

The panel finds that the ministry's decisions that it could not determine that:

1. the appellant has a *severe* physical or mental impairment;
2. the appellant's impairment directly and significantly restricts DLAs, and
3. the appellant requires assistance with DLAs were reasonable;

Accordingly, the panel concludes that the ministry's decision that the appellant does not qualify for PWD was a reasonable application of the relevant legislation and reasonably based on the facts before it. The panel therefore confirms the ministry's decision.