

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated 24 October 2017 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in section 2 of 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 physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he 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.

The ministry also found that it has not been demonstrated that the appellant is in one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation*. As there was no information or argument provided by the appellant regarding alternative grounds for designation, the panel considers this matter not to be at issue in this appeal.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – sections 2 and 2.1.

PART E – SUMMARY OF FACTS

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 21 June 2017. The Application contained:
 - A Self Report (SR).
 - A Medical Report (MR) dated 11 July 2017, completed by a general practitioner (GP) who has known the appellant since May 2017 and seen him 3 times during that period.
 - An Assessor Report (AR) dated 11 July 2017, completed by the same GP.
2. The appellant's Request for Reconsideration dated 04 October 2017, to which is attached an advocate prepared questionnaire completed by the GP, a medical imaging report, and a letter from the appellant (see below).

In the MR, the GP provides the following diagnoses related to the appellant's impairment: degenerative disc disease (onset July 2016) and sciatica-like pain down right leg.

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

Severity/health history

Physical impairment

MR:

Under Health History, the GP writes that the appellant joined his office in May 2017. The GP does not have any medical records of the appellant. The appellant had a CT of the lumbar spine on 19 August 2017 and the film is being obtained. The GP reports that the appellant has full flexion of the lumbar spine – can touch toes; normal lumbar lateral and extension of the lumbar spine; SLR [slight leg raise] 80° left and right leg; and full ROM [range of motion] hips and knees.

Regarding functional skills, the GP reports that the appellant can 1 to 2 blocks unaided on a flat surface, can climb 2 to 5 steps unaided, his limitations in lifting are “no lifting” and there are no limitations to remaining seated.

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. He also indicates that the appellant does not require any prostheses or aids to compensate for his impairment.

AR:

Respecting mobility and physical ability, the GP assesses the appellant as independent for walking indoors, standing, lifting and carrying and holding; and taking significantly longer than typical for walking outdoors (commenting, “If walking for more than 10 min. reports has to stop due to pain.”) and for climbing stairs, indicating the use of an assistive device (commenting, “Has to use handrail.”)

Mental impairment

MR:

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

The GP indicates that the appellant has no significant deficits with cognitive and emotional function, and none are indicated in any of the listed areas.

AR:

The GP assesses the appellant's ability to communicate as good for speaking, writing, and hearing, and poor for reading, commenting, "Left school in grade 10."

The GP marks as "N/A" the section on impacts of mental impairment on daily functioning.

Ability to perform DLA

MR:

The GP assesses the appellant as independent for all listed activities requiring physical effort except mobility outside the home, for which the GP indicates the restriction is periodic, commenting, "Has to have periods of rest to relieve the pain down the right leg." The GP provides no assessment for social functioning

AR:

The GP provides the following assessments of the assistance the appellant requires in performing DLA (the GP's comments in parentheses):

- Personal care – independent for grooming, bathing (short showers [due to] pain), toileting, feeding self, regulating diet, transfers in/out of bed, and transfers on/off chair; uses an assistive device for dressing (sits to dress).
- Basic housekeeping – independent for laundry and basic housekeeping.
- Shopping – uses assistive device and takes significantly longer than typical for going to and from stores (shops with cart for support; takes about twice as long).
- Meals – independent for all tasks: meal planning, food preparation, cooking, and safe storage of food.
- Pay rent and bills – continuous assistance from another person required for banking, budgeting, and paying rent and bills (no bank account; has to use [payday loan company]; in financial difficulty).
- Medications – independent for all tasks: filling/refilling prescriptions, taking as directed, and safe handling and storage.
- Transportation – independent for getting in and out of a vehicle; N/A for using public transit, and using transit schedules and arranging transportation.

With respect to social functioning, the GP gives as N/A the support/supervision required in all listed areas. Similarly, the GP provides no assessment of the impact of the appellant's impairment on his immediate and extended social networks.

Help provided/required

MR:

The GP indicates that the appellant does not require any prostheses or aids to compensate for his impairment.

AR:

The GP indicates that assistance is provided by friends ("Support").

Regarding assistive devices, the GP indicates that the appellant routinely uses hand rails, commenting, "Handrails and sitting when able").

Self Report

In his SR, dated 21 June, completed with the assistance of an advocate, the appellant describes his disability by writing that he started a new job and injured his back within the first hour on the job nine months ago. He now suffers from sciatica with numbness down his right side

The appellant describes how his disability affects his daily life as follows

- Ability to communicate – he has difficulty reading as he quit school at a young age and has a low-level of reading.
- Mobility and physical ability – he is unable to walk over one block at a time, taking him 2 times longer than typical to complete. It takes him 2 times longer than typical to climb stairs, and he is only able to climb 3 stairs before having to use a handrail.
- Personal care – he has to sit to get dressed, and is only able to have short showers as standing in the shower causes pain in his right ankle.
- Shopping – he has to use a shopping cart for support when shopping. It takes him at least 2 times longer than typical to complete.
- Paying rent and bills – he does not have a bank account and has to rely on a payday the loan company to cash his cheques. He is currently in financial difficulties and behind on his bills, including MSP.

Request for Reconsideration

Attached to the appellant's Request for Reconsideration are the following:

1. Advocate-prepared questionnaire completed by the GP, dated 05 October 2017.
 - The GP agrees with the statement that the appellant is able to walk only up to one block before he has to stop and take a break. The GP comments, "I have not seen him walk outside the office."
 - The GP neither agrees nor disagrees with the statement that the appellant is in need of continuous assistance or is unable to do the following DLA due to his medical conditions: banking, budgeting, and paying rent and bills. The GP comments, "Can not comment."
 - GP agrees with the comment that when grocery shopping the appellant needs to use a shopping cart for support, commenting, "Suspect that this is the case."
2. Medical Imaging Report of a CT of the lumbar spine taken on 11 August 2016.
Findings:
 - Moderate to marked disk space reduction at L4, L5 and L5-S1 with vacuum phenomena, consistent with degenerative disease. No invasive focal bony lesions are seen. Paraspinal soft tissues are within normal limits.
 - At L3-4 there is generalized annular bulge causing mild central canal stenosis. Minimal bilateral facet hypertrophy is seen. No foraminal stenosis is noted.
 - At L4-5 there is a broad central disc protrusion and osteophytic lipping causing mild central canal stenosis. Disc material is making contact with the traversing bilateral L5 nerve roots. No significant displacement or compression of the nerve roots is noted. There is mild bilateral facet hypertrophy. No foraminal stenosis is noted.

- At L5-S1 there is generalized annular bulge and minimal osteophytic lipping. There is mild to moderate bilateral hypertrophy. No significant central canal stenosis is seen. There is mild bilateral foraminal stenosis due to far lateral disc osteophyte complex making contact with the existing L5 nerve roots without any significant compression.

3. Letter from the appellant, undated. The appellant writes that he is a carpenter, describing the range of tasks he performs and the 23 lbs. of tools that he must carry in a pouch. This can become 55 to 60 lbs. of weight to carry doing certain jobs. Now he cannot walk for 40 feet with this weight because the back of his calf and ankle are on fire. He has to sit for 10 minutes with his right leg hanging with no pressure on it. The situation is even worse when working on a roof due to the pitch, and he can only last five minutes and therefore it is not safe for him being on a roof. Similarly, he is unable to do other jobs because his right leg starts burning and his ankle feels like someone is twisting it. The appellant concludes by writing that is been at this work for 43 years – it requires “hustle,” and because of the injury to his back, he can't do it anymore.

Notice of Appeal

In his Notice of Appeal, dated 31 October 2017, the appellant writes:

“I am a carpenter. I can't carry materials to do my job, can't even dig a fence posthole, can't walk too far before right leg goes numb and burning feeling. Plus doctor's report.”

The hearing

With the consent of both parties, the hearing was conducted in writing pursuant to section 22(3)(b) of the *Employment and Assistance Act* (EAA).

The appellant did not provide a submission for the hearing.

In an email to the Tribunal dated 17 November 2017, the ministry stated that its submission is the reconsideration summary provided in the Record of Ministry Decision.

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 physical or mental impairment that, in the opinion of a prescribed professional,

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he 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.

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.

Analysis

Severity of physical impairment

In the reconsideration decision, the ministry found that the assessments provided by the GP are reflective of a mild to moderate, rather than a severe, impairment of the appellant's physical functioning. In reaching this determination, the ministry reviewed the information provided by the appellant and the GP.

The ministry noted that in his reconsideration letter the appellant describes how his medical condition impacts the work that he does as a carpenter. The ministry noted that employability or vocational ability is not a criterion used in determining eligibility for PWD designation. As the focus of the legislation in section 2(b) of the EAPWDA is on whether an impairment "directly and significantly restricts the person's ability to perform daily living activities ...", and as employability or ability to work is not listed in section 2(1) of the EAPWDR as a DLA, the panel finds that ministry was reasonable in not taking into account any reported employability restrictions.

As the ministry noted, those who are unable to work because of restrictions caused by a medical condition that has existed for one year and may continue for two or more years have the option of applying for the persons with persistent multiple barriers (PPMB) category. Those eligible for this category receive a higher rate of assistance as well as access to health supplements.

The legislation is clear that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence. The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the independent and professional medical practitioner and prescribed professional (in this case the GP) completing the application provides the minister with a comprehensive overview of the nature and extent of the impacts of the person's medical conditions on daily functioning. It is therefore reasonable for the minister to expect that the MR and the AR include explanations, descriptions or examples in the spaces provided.

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. To assess the severity of impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations/restrictions of physical functioning, mental functioning, ability to perform DLA, and help required with DLA.

Consistent with this approach, the ministry reviewed the information provided in the MR by the GP regarding the appellant's basic physical functioning. The ministry noted that the GP assessed the appellant as able to walk 1 to 2 blocks unaided and climb 2 to 5 steps, with no limitation as to how long he can remain seated. The ministry noted the "no lifting" indicated in the MR and stated that the information provided in the AR does not correlate with the indication of "no lifting" in the MR. The ministry stated that this assessment may therefore be construed as "no limitation to lifting." The panel has reservations as to the reasonableness of the ministry replacing the "no lifting" assessment with its opposite "no limitations." However, considering that in the AR the GP assessed the appellant as independent for lifting and carrying and holding, and independent for such DLA tasks requiring some lifting as food preparation, laundry and basic housekeeping, and carrying purchases home, and taking into account the inconsistency with the "no lifting" assessment in the MR, the panel concludes that there is insufficient evidence to establish whether, and to what degree, the appellant's ability to lift (and carry and hold) is restricted by his impairment.

Under section 2(1) of the EAPWDA, an assistive device is "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." In the reconsideration decision, the ministry noted that in the AR the GP indicated that the appellant requires the use of an assistive device for climbing stairs ("has to use hand rail"). The ministry found that a handrail is not an assistive device as defined in the legislation, as it is not specifically designed to assist a person with an impairment perform a daily living activity. As a handrail is usually mandated by a building code for the safety of all persons using stairs, it cannot be said to be designed specifically for a person with a physical impairment for use when climbing stairs. The panel therefore finds that the ministry was reasonable in not considering a handrail as an assistive device. Similarly, the ministry found the use of the shopping cart while shopping or sitting while dressing is not considered as use of an assistive device. Since shopping carts are available to the shopping public, and a bed or chair to sit on while dressing are everyday items, the panel also finds that the ministry was reasonable in not considering these articles to be assistive devices under the legislation.

The ministry also reviewed the assessments provided by the GP in the AR of the appellant's ability to manage activities requiring mobility and physical ability. The GP reported that the appellant takes significantly longer than typical with walking outdoors ("If walks for more than 10 minutes reports has to stop due to pain") and climbing stairs. The ministry noted that, although prompted in the application form, the GP does not describe how much longer it takes. The ministry stated, reasonably in the panel's view, that without this information, it is difficult to determine whether the extra time taken constitutes a significant restriction to his ability to manage these activities.

The ministry also noted that the GP indicated that the appellant is independently able to manage all other activities requiring mobility and physical ability including walking indoors, standing, lifting, and carrying and holding. While the GP has indicated that the appellant takes significantly longer with walking outdoors and climbing stairs, as noted above, the extra time taken is not described. In addition there is no indication that the appellant requires assistance from another person with any of these mobility and physical ability activities. The ministry further

noted that the additional information provided by the GP at reconsideration regarding the appellant's physical functioning does not differ substantially from that which was provided in the application.

Based on the foregoing analysis respecting the level of independent physical functioning reported by the GP, the panel finds that the ministry was reasonable in determining that the functional abilities assessed in the PWD application demonstrate limitations to physical functioning due degenerative disc disease and sciatica-like pain down the right leg that speak to a mild to moderate, rather than a severe, impairment of physical functioning.

Severity of mental impairment

The appellant did not expressly advance an argument with respect to a severe mental impairment. The ministry's position is that the information provided by the GP does not establish a severe mental impairment. As the ministry noted, the GP has not diagnosed a medical condition consistent with a mental disorder and indicated that the appellant does not have any significant cognitive and emotional deficits. Additionally, the GP marks as "N/A" the sections in the AR on impacts of mental impairment on daily functioning, and the support/supervision required for social functioning, and provides no information on the impact of the appellant's impairment on his immediate and extended social networks.

For the foregoing reasons, the panel finds that the ministry was reasonable in its determination that the evidence has not established a severe mental impairment.

Direct and significant restrictions in the ability to perform DLA

In the reconsideration decision, the ministry held that it is not satisfied that the appellant has a severe impairment that, in the opinion of the prescribed professional, directly and significantly restricts his ability to perform the DLA set out in the legislation. The ministry noted that while the legislation does not specifically require the frequency and duration of restrictions to be explained, the ministry finds such information valuable in determining the significance of the restrictions.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be the result of a severe impairment, a criterion not established in this appeal. The legislation – section 2(2)(b)(i) of the EAPWDA – requires the minister to assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the GP. This does not mean that other evidence should not be factored in as required to provide explanation of the professional evidence, but the legislative language is clear that a prescribed professional's evidence is fundamental to the ministry's determination whether it is "satisfied." And for the minister to be "satisfied," it is reasonable for the ministry to expect that a prescribed professional provides a clear picture of the extent to which the ability to perform DLA is restricted, as assessed in terms of the nature and duration of help required, in order for the ministry to determine whether the restrictions are "significant."

In reaching its conclusion regarding this criterion, the ministry reviewed the information provided by the GP in the MR and AR (see Part E above under Ability to perform DLA). In particular, the ministry referred to the GP assessing the appellant as requiring continuous assistance with all activities associated with the DLA of management of finances (banking, budgeting, paying rent and bills), stating that the appellant has no bank account, needs to use a payday loan company, and is in financial difficulties. The ministry found that the need for assistance with DLA must result from an impairment that is directly related to a medical condition. The fact that the

appellant does not have a bank account and relies on a payday loan company to cash his cheques does not appear to have any relation to his medical condition. The ministry explained that the fact that the appellant is encountering financial difficulties may be indirectly related to his medical condition in that he is no longer able to work. However, as previously discussed in the decision, employability or vocational ability is not a criterion used in assessing eligibility for PWD designation. While increased financial assistance may be an outcome of PWD designation, the need for such assistance is not a criterion for eligibility and given the ministry's explanation, the panel finds that the ministry was reasonable in not considering the need for continuous assistance for this DLA to be a factor regarding the section 2(2)(b)(i) criterion.

The ministry also noted that the GP had indicated that the appellant needed to use an assistive device for dressing ("sits to dress") and going to and from stores ("shops with cart for support"). The ministry found that neither sitting to dress nor using a shopping cart reflect the use of an assistive device as defined in section 2(1) of the EAPWDA. Considering the discussion above under "Severity of physical impairment," the panel finds that the ministry was reasonable in concluding that these tasks did not involve the use of an assistive device as defined in the legislation.

The ministry further noted that the GP indicated that the appellant takes significantly longer for going to and from stores ("takes about twice as long"). The ministry took the position that it does not consider taking twice as long to complete an activity as indicative of a *severe* restriction to one's ability to manage it. The panel finds the ministry's position reasonable, considering that the legislation requires any restriction to be significant, and there is no information provided as to the total amount of time involved that would enable the ministry to determine how significantly it factored into the appellant's daily routine.

The ministry then noted that the GP assessed the appellant as independently able to complete all other daily living activities, including: all those associated with personal care, except dressing as noted; basic housekeeping; all those associated with shopping for personal needs, except taking twice as long going to and from stores; and all those associated with meal preparation, managing medications and getting into and out of a vehicle.

Given that a severe impairment has not been established, and considering the above analysis and the overall level of independence reported by the GP, the panel finds that the ministry was reasonable in determining that the information provided did not confirm that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods, and that this legislative criterion has therefore not been met.

Help required

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is 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. That is, 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, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the GP reports that the appellant benefits from the assistance of friends, though without any further explanation, since the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, 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 reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant is thus not successful.