

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 8 December 2017, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because he had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*. The ministry determined that the appellant had demonstrated that 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 further determined that the appellant had not demonstrated that he has a severe mental or 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 direct and significant restrictions, he requires help to perform those activities.

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

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 20 March 2017, completed by the appellant's general practitioner (GP) who has seen the appellant 2-10 times in the past 12 months and known the appellant for 10 years.
- An Assessor Report (AR) dated 18 July 2017, completed by the appellant's GP.
- A Self Report (SR) undated, including 1-page typed document also undated signed by the appellant.

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 MR, the GP specifies the following diagnoses as related to the appellant's impairment:

- Major depression
- Chronic Lumbar facet syndrome

Severity of mental impairment

MR:

The GP indicates that the appellant suffers from major depression.

The GP has responded "no" to whether there are difficulties with communication other than lack of fluency in English.

Under Health History, the GP writes: *his mood disorder has active since 2004 and has led to alcohol abuse and failed relationships. Presently residing with his parents, impulsive nature.*

The GP indicates that the appellant had significant deficits with cognitive and emotional functioning in the areas of executive, emotional disturbance, impulse control and attention or sustained concentration.

AR:

The GP assesses the appellant's ability to communicate as good in the areas of speaking, reading and writing and satisfactory in the area of hearing.

The GP assesses the appellant's cognitive and emotional functioning as having no impact in the areas of consciousness, insight and judgment, attention/concentration, memory, language, psychotic symptoms and other neuropsychological problems. The GP assesses minimal impacts on daily functioning in the areas of bodily functions. Moderate impacts on daily functioning are assessed in the areas of impulse control and other emotional or mental problems. Major impacts are assessed in the areas of emotion, motivation and motor activity. The GP has commented: *Frustrated [illegible]*

SR:

The appellant reports that as a result of an inability to have pain relief he suffers from depression because he cannot work or enjoy his life and has low self-esteem.

Severity of physical impairment

MR:

Under Health History, the GP writes: *patient is known to do physical labour in his occupation [...]. He has tried to go back to work and could not manage the rigours of [his profession] citing ongoing back pain and sciatica. He feels, and I agree that he is fit to work in a less physically demanding environment. He has not been able to find that balance.*

For functional skills, the GP indicates that the appellant can walk 1-2 blocks unaided, climb 2-5 steps unaided, lift 2 to 7 kg (5 to 15 lbs.), and remain seated 1-2 hours.

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 taking significantly longer for walking outdoors (*if walking further than a block*), climbing stairs (*takes much longer with [illegible]*), standing (*after 5 mins [illegible]*), lifting (*does not lift more than 20 lbs*) and carrying and holding (*less than a block*) and independent for walking indoors.

SR:

The appellant states that he was injured in a car accident several years ago. As a result, he took significant time away from work and received physiotherapy. He states that all physical activities increase his pain and he has had to leave multiple jobs because of this. He reports that he has taken non-prescription medications to get through the day and has been diagnosed with an enlarged liver as a result of pain medication over the years. He is now unable to take pain medication, and this has resulted in impacts to his life including interrupted sleep because of back pain and walking, sitting, standing, lifting and bending are all painful or he is not able to do them. He states that a spring 2017 CT scan shows that his lower back up to 5th disc has deteriorated and are no longer there. He reports that his doctor advises that if his physical activity does not decrease he will be in a wheelchair.

Ability to perform DLA

MR:

The GP indicates that the appellant has been prescribed medication that interferes with his ability to perform DLA but does not provide details.

The GP indicates that the appellant's impairment does not directly restrict his ability to perform DLA.

AR:

The AR indicates that the appellant is independent in all listed personal care activities; all basic housekeeping activities; the shopping activities of going to and from stores, reading prices and labels, making appropriate choices and paying for purchases; all meals activities; and all medications activities.

The AR indicates that the appellant requires periodic assistance with the shopping activity of carrying purchases home and the transportation activity of getting in and out of a vehicle.

The AR indicates that the appellant takes significantly longer with all pay rent and bills activities. The GP has commented: *Able to bank independently* beside which the appellant has written: *I have no money and can't work*).

The AR indicates that the appellant takes significantly longer with using public transit and using transit schedules and transportation. The appellant has commented: *I don't take the bus*.

The panel notes that it is unclear who has completed this assessment as comments appear to have been provided by both the GP and the appellant.

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 AR indicates that the appellant is independent with shopping activities of readings labels, making appropriate choices, and paying for purchases; the meals activities of meal planning and safe storage; and all medications DLA. The AR indicates that the appellant does not use transit.

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 in the areas speaking, reading and writing and satisfactory in the area of hearing.

In assessing social functioning activities, the AR indicates that the appellant is independent with appropriate social decisions and interacting appropriately with others. The AR indicates that the appellant requires periodic support dealing appropriately with unexpected demands and securing assistance from others and requires continuous support/supervision to develop and maintain relationships. The AR indicates that the appellant has marginal functioning in her immediate and extended social networks. The GP has provided the additional comment: *has to stay with his mother to [illegible] overhead.*

Help required

MR:

The GP indicates that the appellant does not require any aids or prostheses.

AR:

The AR indicates that the appellant receives assistance from family and friends.

In response to the prompt to specify what help is required but there is none available, the appellant writes: *I HAVE NO MONEY: CAN'T WORK!! VERY FRUSTRATING, I USE TO BE VERY ACTIVE. NOW ALL I DO IS LAY ON THE COUCH CAN'T SIT OR STAND. "NO LIFE."* The GP has written: *Endorse this comment.*

The AR does not indicate an assistance provided through assistive devices. The appellant has added the comment: *IT JUST TAKES ALONG TIME TO DO ANYTHING.*

The AR indicates that the appellant does not receive assistance from assistance animals.

2. Request for Reconsideration

The appellant's Request for Reconsideration provides the following reasons: *[MINISTRY WORKER'S NAME]: I don't know how you think I'm not "DISABLED"? I can hardly walk anymore, I can't stand for more than 5 minutes, I can't lift or go up stairs without using a railing. I used to be very active, work, sports, do yard work, etc.; now nothing. I'm still waiting for shots in my back and to see the back surgeon. My lifestyle is nothing anymore. I can't have a relationship, no social life. It has played major head games with my mind. I take meds for depression. I don't know if you're a "DOCTOR" but I wouldn't want this on my worst enemy! Everybody's pain threshold is different and I'm tired of being in pain. I only take "TYLENOL" when it gets unbearably. I'm pretty much stuck on the couch now!*

Additional information before the panel on appeal consisted of the following:

Notice of Appeal

In the Notice of Appeal dated 18 December 2017, the appellant wrote as reasons for appeal: *I guess I haven't expressed to you how much I am disabled in general everyday activities. My mom helps me a lot. On the couch for days at a time. Hunched over to walk. I can't work because of my back. I lay on the couch for days. I don't have any type of lifestyle!*

Appeal Submissions

At the hearing the appellant submitted several documents:

- A whole-body bone scan report dated 9 August 2017
- A lumbar spine CT scan report dated 11 February 2017
- A cervical and lumbar spine X-ray report dated 22 January 2009
- A chiropractic Patient Report dated 9 February 2018

At the hearing, the appellant was accompanied by his mother who spoke as a witness. She stated that her son has been living with her for two years and prior to that she lived with him in another community. She stated that she has seen him need to lay down and has seen him drop to the ground when his legs give out. She has been providing him with all necessities because he cannot work, and it is a lot of pressure on her. As well, she reported that her son has tried working in jobs where there is less sitting and standing but cannot manage. She also reported that he has started going to a chiropractor.

At the hearing the appellant stated that his back pain is due to a car accident in the 90's as well as sports and lots of manual labour. He cannot work anymore despite trying. He does not want to do "heavy drugs" and takes only over the counter pain killers. He reports that his discs are deteriorating away and there is bone on bone. He argued that his doctor did not report how bad his back really is, and he himself tends to 'bluff' because he is not a 'whiner'.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided by the appellant's mother at the hearing is admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because this information speaks to the appellant's back pain and is in support of information and records before the ministry at reconsideration. The panel also finds that the information provided in the appellant's Notice of Appeal documents and at the hearing is admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because this information provides some reiteration and explanation in support of information and records before the ministry at reconsideration. Finally, the panel finds that the documents provided at the hearing are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because this information provides some additional detail in relation to the appellant's back pain and is support of information and records before the ministry at reconsideration. In reaching this conclusion on admissibility, the panel notes that the ministry stated that it had no objection to the admission of the documents.

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 PWD designation 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;
- that the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her 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:

Persons with disabilities

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 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).

The following section of the *EAPWDR* applies to this appeal:

2 (1) For the purposes of the Act and this regulation, **"daily living activities"**,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, **"prescribed professional"** means a person who is

- (a) authorized under an enactment to practise the profession of
- (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
- (b) acting in the course of the person's employment as a school psychologist by
- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
- if qualifications in psychology are a condition of such employment.

Severity of impairment

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

Severity of physical impairment

In the reconsideration decision, the ministry determined that it was not satisfied that the information established severe impairment. In making this determination, the ministry considered the functional skills assessment by the GP and the physical ability and mobility assessment in the AR. The ministry argued that while the GP has identified some limitations, he has not provided any information as to how much longer the appellant requires to manage those activities. The ministry noted that no aids or prostheses were required. The ministry concluded that while the appellant has some limitations and experiences pain the limitations described by the GP reflect a moderate rather than severe impairment.

At the hearing the ministry argued that no weight should be given to the portions of the chiropractic report that were based on a questionnaire completed by the appellant as these did not reflect the medical opinion of the chiropractor. As well, the ministry argued that the imaging reports provided at the hearing primarily used the language of 'mild' and 'moderate' rather than 'severe' and this did not support a finding of a severe physical impairment.

The panel finds that the ministry's determination was reasonable. The panel notes that the assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR reflect an individual who can manage independently but takes significantly longer with some activities. As well, the panel notes that the appellant's SR and testimony at the hearing are not consistent these assessments. The appellant argues that his impairment is much more severe than what is reflected in the assessments. The panel notes that the imaging reports provided at the hearing speak to the appellant's medical conditions but do not provide any information about a physical impairment resulting from his medical conditions. As well, the panel notes that much of the information provided in the chiropractor's Patient Report is based on questionnaire answers provided by the appellant. The panel finds that the sum of the information provided reflects an individual with serious medical diagnoses but does not provide a clear, consistent and detailed account of the impacts of these diagnoses. The panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

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 noted that the GP's assessment in the MR did not indicate that the appellant has difficulties with communication. The ministry considered that in the MR the GP indicates deficits in the areas of executive, emotional disturbance, impulse control and attention or concentration. The ministry also considered that major impacts to cognitive and emotional functioning were assessed in the areas of emotion, motivation and motor activity and moderate impacts in impulse control and other emotional or mental problems. The ministry noted that there were minor, or no impacts assessed in the remaining areas. The ministry concluded

that while there are some deficits to the appellant's cognitive and emotional functioning as a result of his condition, most areas are not severely impacted.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes the absence of communication difficulties, safety concerns and a need for support or supervision to maintain the appellant in his community. The panel notes that the GP's assessments relating to decision-making indicate that the appellant is independent in these areas. As well, the panel notes that while the appellant has mentioned depression in the SR and mentioned medications for depression at reconsideration, he did not argue in Notice of Appeal or at the hearing that he suffers from a mental impairment or that the ministry was unreasonable in concluding that a mental impairment had not been established. The panel finds that the ministry's conclusion that the information provided does not establish a severe mental impairment and that this criterion was not met is reasonably supported by the evidence.

Direct and significant restrictions in the ability to perform DLA

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment 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 ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA continuously or periodically for extended periods. In reaching this conclusion, the ministry noted that the GP has indicated that the appellant's impairment does not restrict his ability to perform DLA. The ministry considered that the GP indicated that the appellant takes significantly longer with banking and transportation but noted that there is no explanation as to how much longer. As well the ministry noted that the GP's comments indicate he is independently able to manage banking activities. The ministry noted that periodic assistance was indicated for carrying purchases home and getting in and out of a vehicle but that no information as to the type, frequency or duration of such assistance was provided. The ministry noted that all other DLA were assessed as independent. The ministry also considered the GP's assessment of social functioning, noting the indication of continuous assistance for developing and maintaining relationships and periodic assistance with unexpected demands and securing assistance from others but that no information was provided regarding the degree and duration of support/supervision required. The ministry concluded that there was not enough evidence to demonstrate that this criterion was met.

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 panel finds that, in relation to the areas where some periodic restriction is assessed, 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 finds that the assessments provided by the GP in the PWD application are not sufficiently detailed to reflect significant restrictions to DLA. The panel also notes that there are some inconsistencies in the commentary that accompanies the assessments, with some comments apparently provided by the appellant and some comments provided by the GP. The panel finds that it is unclear whether the GP, rather than the appellant, completed all of the assessments provided. The panel notes that the appellant has argued that his mother does all of the cooking and shopping and dishes. However, the panel notes that the legislation requires that direct significant restrictions to DLA must be in the opinion of a prescribed professional. The panel notes that the appellant also argued that he has gotten worse in the past year since the PWD application was prepared. The panel finds that the assessments provided indicate that the appellant is primarily independent in performing DLA with some restrictions. However, the information provided regarding these restrictions is not sufficient to establish direct and significant restrictions to DLA as required by the legislation. Given the limitations in the information before the ministry, the panel concludes that the ministry's determination that this criterion has not been met is reasonably supported by the evidence.

Help required

The legislation 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 determined that as it had not been established that appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. While the information provided demonstrates that the appellant does receive some assistance from other people, the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the appellant and reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.