

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated December 15, 2017, which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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

The evidence before the ministry at the time of the reconsideration decision included:

- Persons With Disabilities (PWD) Application comprised of a medical report (MR) and an assessor report (AR) both dated July September 7, 2017 and both completed by the appellant's family physician ("the GP"), who has known the appellant since April 2017 and who has seen the appellant 2 to 10 times in the past 12 months;
- December 7, 2017 letter from the GP;
- Appellant's Request for Reconsideration received by the ministry on December 12, 2017 with the following enclosures:
 - December 5, 2017 typewritten submission by the appellant (SR):
 - numerous medical reports submitted by the appellant, including:
 - August 1, 2013 diagnostic imaging report re chest, lumbosacral spine and sacroiliac joints;
 - August 12, 2013 hospital discharge summary;
 - August 13, 2013 diagnostic imaging report re lumbar spine;
 - November 8, 2013 diagnostic imaging report re thoracic spine;
 - May 2, 2016 diagnostic imaging report re head injury;
 - March 12, 2017 hospital discharge summary;
 - psychiatric consultation dated June 2017;
 - neuropsychological evaluation by Dr X dated July 10, 2017;
 - July, 19, 2017 letter from gastroenterologist Dr. Y to the GP
 - September 7, 2017 letter from a hepatitis clinic to the GP.

PWD Application

Diagnoses

In the MR the GP noted that the appellant suffers from neuropsychological impairment (delayed recall, poor complex reasoning), depression/anxiety, history of alcohol abuse, cirrhosis (onset April 2017), peptic ulcer (onset April 2017), Hepatitis C, spinal stenosis- lumbar. Other than as noted herein he GP does not specify dates of onset for the majority of these conditions but adds: "*onset of some issues in teens; more severe impairment for last 3 years*".

Physical Impairment

In the MR the GP noted that the appellant can walk 2-4 blocks unaided ("*1 km maximum on best day, back and hip pain on some days limit walking to ½ block*"), climb 5+ steps unaided, has no limitations with lifting if of short duration but is limited to lifting 2-7 kg if repetitive or for longer duration, can remain seated for 1-2 hours ("*needs to move after about 1 hour*"). In Part B of the MR the GP commented that the patient was hospitalized in April 2017 with cirrhosis, ascites (cirrhosis-related abnormal accumulation of fluid in the abdomen), moderate spinal stenosis, duodenal and gastric ulcers. She added that specialized Hepatitis C treatment is pending.

In the AR the GP indicated that the appellant is independent in all areas of mobility and physical ability. She adds that all bodily functions are fine except that the appellant experiences sleep disturbance due to joint, muscle, back pain and restless legs.

In her December 7, 2017 letter the GP wrote that the original PWD application may reflect his highest/best level of physical functioning but may not reflect his bad days, which occur frequently according to the appellant.

In his SR (which was submitted with the request for reconsideration) the appellant reported that all of his medical conditions impact his ability to complete DLA. On his "bad" days, which occur approximately 2-5 days per month he rates his pain as 5/10, whereas on his "worst" days ("*the vast majority of the month*") the pain level is 8.5-

10/10. Depending on the day any exertion causes significant pain. He feels pain when walking indoors or outdoors and forces himself to walk beyond pain thresholds. He can walk only ½- 1 block on worst days. He avoids walking whenever possible and relies on transit or rides from friends. The appellant also reported that due to the pain in his back, hips and knees he avoids climbing stairs, although he can climb independently by holding the handrail and going very slowly. He can climb 5-7 stairs before taking a break. He can stand for only 5 minutes at a time. Repetitive lifting is limited to a maximum of 15 pounds, and is only comfortable when he carries 2-4 pounds.

Mental Impairment

In Section B of the MR the GP referred to the July 2017 neuropsychological assessment by Dr. X which concludes that the appellant is not likely competitively employable due to his neuropsychological impairments. She indicated that the appellant has several significant deficits with cognitive and emotional function, namely: executive, memory, perceptual psychomotor, emotional disturbance, motivation, impulse control, motor activity and attention or sustained concentration and listed the deficits identified the neuropsychological evaluation: low average global intellect, visual scanning, visuo-spatial constructional analysis, copy/planning of geometric figure, new learning, visual memory, delayed recall of contextual verbal information, complex verbal reasoning and problem solving.

In the AR the GP indicated that the appellant experiences restrictions/impacts on all listed areas of daily functioning:

- major impacts upon emotion (anxiety/depression), attention/concentration, motivation, and other (*“sleep disturbance”*)
- moderate impacts upon bodily functions, executive ability, memory and other neuropsychological problems;
- minimal impacts upon consciousness, impulse control, motor activity and language.

In the area of social functioning the GP indicated that the appellant is independent in all areas except the following: he requires continuous support/supervision in maintaining abstinence from alcohol and periodic support/supervision in developing and maintaining relationships. He has marginal functioning with both immediate and extended social networks.

Daily Living Activities (DLA)

In the AR the GP indicated that the appellant is independent with all listed areas of DLA. In her July 10, 2017 letter she wrote that the information related to day-to-day functioning contained in the PWD application may not accurately affect the appellant’s frequent bad days.

In his SR the appellant wrote that dressing and personal hygiene take much longer to complete, and he sleeps for only 3-4 hours at night at best, which exacerbates his symptoms. Housekeeping tasks take significantly longer than they used to (a 2 minute dusting job now takes 5-15 minutes), and he must do frequent small loads of laundry because he cannot carry a large load. He also has trouble gripping kitchen utensils because his hands are often very stiff. He avoids going to and from stores, and relies on friends to drive and carry goods. If he must shop on his own he limits his purchase to 1 or 2 items because he can’t carry a heavy load.

Assistance Required

In the MR the GP reported that the appellant does not require aids or prostheses for his impairments.

In the AR the GP indicated that the appellant receives assistance from community service organizations such as Alcoholics Anonymous and from the addiction recovery centre in which he resides. He also uses elbow braces and shoe orthotics.

Evidence submitted at the Hearing

The appellant submitted a revised MR dated February 22, 2018 from a psychiatrist from whom he has recently begun to receive care. The appellant's oral evidence at the hearing consisted of argument and a reiteration of material already contained in the appeal record.

Admissibility of Evidence

The ministry representative objected to the admission of the additional MR completed by the psychiatrist on February 22, 2018 on the grounds that it contained new material that was not before the reconsideration officer. The panel considered the admissibility of the additional MR and determined that it was not admissible under EAA Section 22 (4) (b) as evidence in support of the information that was before the ministry at reconsideration because the patient was not seeing a psychiatrist at the time of reconsideration and information provided by the psychiatrist constituted new information that did not form part of his original PWD application or request for reconsideration.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision of December 15, 2017 that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* 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. The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

Relevant legislation:

EAPWDA:

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 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.

EAPWDR:

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.

Severe Physical Impairment

The appellant argues that he suffers from several medical conditions including cirrhosis, peptic ulcer, Hepatitis C, and lumbar spinal stenosis that severely impair his functional skills, mobility and ability to perform daily tasks.

The ministry's position is that the physical impairments described by the appellant and his GP are insufficient to establish a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. "Impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or a "prescribed professional" – in this case, the appellant's GP. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

In his SR the appellant wrote that his pain levels are in the 8.5-10/10 range on his worst days, which occur "the

vast majority of the month". He also indicated that although his mobility and functional skills take much longer than they used to he is able, although in pain and with frequent rests, to walk unaided indoors and outdoors, climb stairs, lift items if not repetitively or for long periods and remain seated for at least an hour.

In the MR the GP indicated that the appellant can walk 2-4 blocks unaided (*"1 km maximum on best day, back and hip pain on some days limit walking to ½ block"*), climb 5+ steps unaided, has no limitations with lifting if of short duration but is limited to lifting 2-7 kg if repetitive or for longer duration, can remain seated for 1-2 hours (*"needs to move after about 1 hour"*). She did not ascribe limits to functional abilities caused by cirrhosis, ascites, duodenal and gastric ulcers or hepatitis C. In the AR the GP reported that the appellant is independent in all areas of mobility and physical ability.

In her December 7, 2017 letter the GP asked the ministry to pay close attention to the appellant's SR because her MR and AR "may" not accurately reflect the appellant's worst days. Her letter was based entirely upon the appellant's SR, and did not include her amended professional assessment of the appellant's mobility and functional skills and the extent to which they are impaired.

The panel accepts that the appellant's abilities to walk, lift and carry out daily tasks are impaired by pain and take longer than they did in the past. He carries out his daily functioning despite the pain because he is determined to remain independent. However, based on the functional skills assessments by the GP and the appellant's own assessment of his ability to move, lift, sit and carry out daily tasks, albeit slowly and painfully, the panel finds that the ministry reasonably determined that a severe physical impairment was not established.

Severe Mental Impairment

The appellant argues that he suffers from neuropsychological deficits, depression, anxiety and history of alcohol abuse which severely impair his cognitive and emotional functioning.

The ministry's position is that the information provided does not establish a severe mental impairment.

Panel Decision

The July 10, 2017 neuropsychological assessment by Dr. X lists several impairments which were referenced by the GP in the MR. These impairments include: low average global intellect, visual scanning, visuo-spatial constructional analysis, copy/planning of geometric figure, new learning, visual memory, delayed recall of contextual verbal information, complex verbal reasoning and problem solving. However, the conclusions made by Dr. X indicate that the majority of impairments fall within the low average to average range, and his recommendations refer primarily to employability, which is not a factor considered by the ministry when determining eligibility for PWD designation.

In the MR the GP indicated that the appellant has significant deficits to cognitive and emotional functioning in executive ability, memory, psychomotor skills, emotion, motivation, impulse control, motor activity, attention and sustained concentration but her comments on the next page do not address the impact of these deficits upon the daily functioning of the appellant. In the AR the GP indicated that executive, memory and other neuropsychological problems only moderately impacted the appellant's daily functioning, and motor activity and impulse control were only minimally impacted. She reported that the appellant's social functioning was independent in all areas except ability to develop and maintain relationships, where he requires periodic support/supervision, and in abstaining from alcohol, where he requires continuous support/supervision. She does not describe the degree and duration of support/supervision required in developing and maintaining relationships as required by the PWD application. She describes the appellant's functioning with immediate and extended social networks as marginal, but does not elaborate in the comments section provided. The panel also notes that

the GP assessed the appellant as independent in several DLA which require cognitive ability, including shopping, meal planning, food preparation, cooking, safe storage of food, paying bills, filling and taking prescription medication and transportation.

Due to the low-average/average impairment conclusions by Dr. X, the inconsistencies in cognitive and emotional functioning assessments between the MR and AR, and the appellant's high degree of independence in DLA the panel finds that the ministry reasonably concluded that the information provided does not establish a severe mental impairment.

Restrictions in Ability to Perform DLA

The appellant argues that his ability to perform DLA is significantly restricted as a result of his severe physical and mental conditions.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professional is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered, the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

The GP reported that appellant has not been prescribed medications that interfere with his ability to perform DLA. In the AR she indicated that the appellant is independent in all listed areas of DLA. Although in her December 7, 2017 letter she suggested that her MR and AR may not have accurately assessed the appellant's ability to perform DLA she did not provide a supplementary assessment or reassessment of the DLA set out in the PWD application form. Assessment/reassessment of specific areas of DLA is important because these activities are specified in the legislation, specifically in EAPWDR Section 2 (1)(a).

A severe impairment was not established in the appellant's circumstances. Because this precondition was not met and because the GP indicated that the appellant is independent in all areas of DLA listed in the AR the panel finds that the ministry reasonably determined that the information fails to establish that the appellant suffers from a severe impairment that in the opinion of a prescribed professional directly and significantly restricts DLA continuously or periodically for extended periods.

Help in Performing DLA

The appellant argues that he requires an assistive device and the significant help of other people to perform DLA.

The ministry's position is that because the information did not establish that the appellant's DLA are significantly restricted it cannot be determined that an assistive device or significant help is required.

Panel Decision

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. Because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, 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, and confirms the decision. The appellant is not successful on appeal.