

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) reconsideration decision dated February 20, 2018, 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

The evidence before the Ministry at the time of the Reconsideration Decision included the PWD Application comprised of the applicant information and self report (SR) dated July 7, 2017, a medical report (MR) dated July 19, 2017 and completed by the Appellant's family physician (FP) who has seen the Appellant once in the past year but who reviewed the records of the Appellant's previous FP in completing the application, and an assessor report (AR) dated July 19, 2017, also completed by the FP.

The evidence also included the Appellant's Request for Reconsideration, signed on February 5, 2018, included:

- an undated four page letter prepared and submitted by the Appellant's advocate (the Advocate's Letter) summarizing the information provided in the Appellant's PWD application and arguing that the information submitted with the application in its entirety supports the requirements of a PWD designation; and,
- an undated one page hand-written letter prepared by the Appellant's Landlord (the Landlord's Letter) providing information regarding the help that she provides to the Appellant with respect to his DLA.

Diagnoses

In the MR, the FP diagnosed the Appellant with Osteoarthritis of the spine and right wrist with an onset of October 2008, with the comment "*patient attributes this to an accident from 2008 (Oct)*".

Physical Impairment

In the MR and the AR, the FP reported that [*FP's comments provided in parentheses*]:

- in terms of functional skills, the Appellant can walk four or more blocks on a flat surface unaided [*"ambulation occurs in sporadic efforts (frequent rest periods)"*], climb 5 or more stairs unaided [*"takes significantly longer than a regular individual"*], and is limited to lifting 5 to 15 lbs. The FP did not indicate whether the Appellant had any limitations to the length of time he could remain seated;
- the Appellant has difficulty gripping with his right hand as the result of a fractured wrist suffered in an accident in October 2008, which restricts his ability to carry objects and to prepare food (cutting chopping and stirring); and
- regarding mobility and physical ability, the Appellant was independent with all of the listed activities but that the Appellant takes significantly longer than typical with walking outdoors and climbing stairs [*"restricted due to spinal arthritic pain & stiffness"*], and standing, lifting and carrying and holding [*"restricted due to arthritis"*].

In the SR, the Appellant stated that:

- he has difficulty getting in and out of the shower and in performing basic kitchen duties like chopping, cutting, peeling or mixing and standing for any period of time;

- he has difficulty going up stairs and getting out of furniture;
- he cannot carry things for long due to the pain it causes his back and shoulders;
- his pain keeps him awake at night and is always worst in the morning;
- walking any distance is really hard because his back and upper shoulders hurt and he has a hard time bending; and
- sitting is also uncomfortable because he begins to stiffen up.

In the Landlord's Letter, the Landlord wrote that the Appellant has trouble carrying things and standing for a long period of time, and when walking with the Appellant they have to watch where he is going because if he makes a misstep he can put out his back and not be able to move for days.

Mental Impairment

In the MR and the AR, the FP reported that:

- the Appellant has no significant deficits with cognitive and emotional function and no difficulties with communication other than that his writing skills are poor [*“Reading affected by learning ability (sic). Writing restricted due to learning ability (sic) as well as arthritis.”*]; and
- in the section of the AR that the prescribed professional is asked to complete for any applicant with an identified mental impairment or brain injury, wrote “N/A”.

The Appellant did not claim a mental impairment in the SR, and no evidence of a mental impairment was provided in the Advocate's Letter or the Landlord's Letter.

Restrictions in the Ability to Perform DLA

In the MR and the AR, the FP reported that the Appellant is:

- restricted in his DLA involving showering, making the bed, food preparation, reading above his head, standing for extended periods and gripping and carrying with his right hand [*“(Appellant) is right hand dominant”*];
- independent in his ability to perform personal self care, although he took significantly longer than typical with dressing, grooming, bathing [*“only showers, cannot get in and out of the bath tub”*], and transferring in and out of bed;
- unable to do any basic housekeeping, and that his Landlord does his laundry and other basic housekeeping;
- independent in shopping except for going to and from stores, for which he requires periodic assistance [*“Landlord assists”*], and in carrying purchases home, for which he requires continuous assistance from another person [*“Landlord does purchases”*];

- independent in meal planning and the safe storage of food, but requires continuous assistance and takes significantly longer in food preparation [*“prepared by Landlord”*, *“(Appellant) can prepare simple meals - toast, tea, coffee”*] and cooking; and
- independent in paying rent and bills, medications (except that he need assistance in opening containers) and transportation (except that it takes him significantly longer than typical to get in and out of a vehicle).

In the SR, the Appellant stated that he finds it hard to do any house cleaning duties and as a result does not do them.

Need for Help

In the MR and the AR, the FP indicated that the Appellant:

- requires a significant amount of support from his Landlord to clean, cook and buy groceries;
- does not have an assistance animal or require any prosthesis or aids for his impairment; and
- in terms of equipment that is not currently being used, requires grab bars for the shower and toilet and a raised toilet seat.

In the SR, the Appellant wrote that his Landlord does the housekeeping and shopping for him.

In the Landlord's Letter, the Landlord wrote that she does all of the cooking and cleaning for the Appellant on a daily basis and has to shop for him. She stated that they heat their house with a wood stove and she has to cut and carry the firewood. She also wrote that she has to do all of the yard work and help him bring in the fishing net when they go fishing.

Additional Information submitted after reconsideration

In his Notice of Appeal dated February 27, 2018, the Appellant stated that his disability is getting worse.

Evidence Presented at the Hearing

The Ministry did not attend the hearing. After confirming that the Ministry was notified of the hearing, the Panel proceeded with the hearing pursuant to Section 86(b) of the Employment and Assistance Regulation.

At the hearing, the Appellant was accompanied by the Advocate. The Appellant stated that the October 2008 accident involved a truck backing over him and immediately following the accident he received little help from the ambulance attendants or the doctors who saw him at the hospital. It was not until a week after the accident that he had to drive to the hospital and was fitted for a cast on his injured right wrist. He also stated that his Osteoarthritis sometimes causes his neck to lock-up, that on occasion he is unable to pick things up or make coffee and he is forced to lie on the couch all day. He said that if he turns his head quickly he almost blacks out. He explained that he had been a heavy equipment operator all his life, that his co-workers were like an extended family, and that it is hard for him because he is

unable to work now. The Appellant also explained that the FP completed the MR and the AR in a separate room in his office without the Appellant present following the FP's examination, and that because of the time that had passed between the date that his application for the PWD designation was completed in July 2017 and the date that the application was submitted to the Ministry in November 2017 he had considered going back to the doctor for a more current assessment but had not arranged for another visit with the FP despite the fact that his impairment had worsened since the MR and AR had been completed.

The Advocate summarized the observations she had made in the Advocate's Letter. She stressed that there were several places in the MR and the AR where the FP had indicated that the Appellant had restrictions and made specific reference to a number of those instances. The Advocate also stated that the evidence provided by the FP was supported by the commentary he had provided and that the legislation does not specify how many boxes on the form had to be ticked before an impairment could be confirmed as severe or how many DLA had to be impacted. With regard to need for help, she stressed that he faced significant restrictions and that the Landlord completes a number of DLA on his behalf.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and "oral and written testimony in support of the information and records" before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. These limitations reflect the jurisdiction of a panel established under section 24 of the EAA, which is to determine whether the Ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. Therefore panels are limited to determining if the Ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The Panel notes that in the SR the Appellant stated "... *the reality is that my pain is increasing and I have less and less ability to take care of the stuff I need to do every day.*" Therefore, the Panel admitted the additional testimony in the Notice of Appeal regarding his statement that his disability is getting worse as being in support of information and records that were before the Ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the EAA.

The Panel also admitted the Appellant's oral testimony presented at the hearing as evidence in support of information and records that were before the Ministry at the time of the reconsideration.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the Ministry's Reconsideration Decision, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant. The Ministry found that the evidence does not establish that the Appellant has a severe mental or physical impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform his DLA, either continuously or periodically, for extended periods. Also, as a result of those restrictions, the Ministry found that it could not be determined that 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.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

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 EAPWDR provides as follows:

Definitions for Act

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 ...

Severity of Impairment

The Panel acknowledges the Ministry's position that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a "severe" impairment. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD the Ministry must be satisfied that the individual has a severe physical or mental impairment. The Cambridge Dictionary defines a medical impairment as "*a deterioration in the functioning of a body part, organ, or system that*

can be temporary or permanent and can result from injury or disease". With respect to assessing the severity of an impairment, Section 2(2)(b)(i) of the EAPWDR requires that a mental or physical impairment *directly and significantly* restrict the person's ability to perform DLA either *continuously*, or *periodically for extended periods*. Therefore, to assess the severity of an impairment, the Ministry must consider both the nature of the impairment and the extent to which it impacts daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant's FP.

Physical Functioning

The Ministry's position is that when impairments are periodic or episodic rather than continuous, the nature, frequency and duration of those periodic impairments is useful in assessing the severity of the impairment. In its Reconsideration Decision, the Ministry was not satisfied that the information provided establishes a severe physical impairment. The Ministry argued that, while the FP stated in the MR that the Appellant's ambulation was sporadic and that he required frequent rest, he did not describe the frequency or duration of the rest required. In addition, the Ministry noted that even though the FP indicated that the Appellant took significantly longer with climbing stairs than typical and with all areas of mobility and physical ability listed in the AR, he does not describe how much longer. The Ministry also noted discrepancies between the evidence provided in the MR and the AR with respect to several physical functions, including walking and climbing. Specifically, while in the MR the FP stated that the Appellant could walk more than 4 blocks unaided and climbing more than 5 steps unaided, in the AR he said that walking and climbing were restricted. In addition, the Ministry states that in the AR the FP indicates that lifting and carrying are restricted, while in the MR the FP states that the Appellant can lift up to 15 lbs., and argues that the ability to lift 15 lbs. is not considered a severe impairment of physical functioning and is considered sufficient ability to lift a variety of household and shopping items. The Ministry also acknowledged that although the Appellant had limitations to the use of his right hand and with standing, the FP did not describe limitations to the use of his left hand, and it concluded that a severe impairment of his physical functioning had not been established.

The Appellant's position is that he has difficulty with some aspects of personal care, preparing and cooking food, standing for any period of time, going up stairs and getting out of furniture. In addition, he cannot carry things for long due to the pain it causes his back and shoulders, his pain keeps him awake at night, and walking any distance is really hard due to the pain his back and upper shoulders. For these reasons, he argues that he has a severe physical impairment.

Panel Decision

The Panel notes that, when asked to indicate the severity of the Appellant's medical conditions in the MR, the FP reported that the Appellant required frequent rest periods when walking but was able to walk more than 4 blocks unaided, and that while he takes significantly longer than a "regular individual", he is able to climb 5 or more stairs unaided. In addition, the Panel notes that the FP does not indicate how often rest periods are required while walking or how much longer it takes to climb stairs and acknowledges the Ministry's argument that the nature, frequency and duration of periodic impairments is useful in assessing the severity of a periodic impairment. The Panel further notes that there are some

discrepancies between the evidence provided by the FP in the MR and the AR, as identified by the Ministry in its Reconsideration Decision and as summarized above. Therefore, while acknowledging that the evidence shows that the Appellant has a physical impairment, the Panel finds that the Ministry's determination that there is not sufficient evidence to establish that the Appellant has a *severe* physical impairment which directly and significantly restricts the Appellant's ability to perform DLA either *continuously or periodically for extended periods* was reasonably supported by the evidence before the Ministry at reconsideration.

Mental Functioning

The Ministry's position is that a severe impairment of the Appellant's mental functioning has not been established. In its Reconsideration Decision, the Ministry found that the FP's assessments in the MR did not provide evidence of significant deficits with respect to cognitive and emotional functioning. In addition, while the Ministry acknowledged that the FP had indicated in the AR that the Appellant had poor writing skills, which he attributed to his osteoarthritis and a learning disability, the Ministry noted that the FP had indicated in the AR that the Appellant had no difficulties with communication and described no restrictions to social functioning.

The Appellant does not argue that he has a mental impairment.

Panel Decision

Based on all of the available evidence, including the fact that in the section of the AR that the prescribed professional is asked to complete for any applicant with an identified mental impairment or brain injury the FP wrote "N/A, and the fact that the Appellant did not argue that he has a severe physical impairment, the Panel finds that the Ministry reasonably determined that a *severe* mental impairment was not established pursuant to Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The Ministry's position is that the Appellant is independent with the majority of listed areas of DLA, and that for the DLA that is identified by the FP as being periodically impacted (going to and from stores) the FP does not describe the frequency or duration of the periodic assistance required. In addition, the Ministry argues that the FP indicates in the MR that the Appellant is able to lift up to 15 lbs. and walk more than 4 blocks unaided, whereas in the AR several DLA that rely on those physical abilities are identified as requiring continuous assistance (laundry, basic housekeeping, carrying purchases home and cooking). Therefore, the Ministry concludes that it is difficult to establish significant restrictions to DLA.

The Appellant's position is that he has a severe impairment which results in restrictions in his ability to perform a significant number of DLA, and that the legislation does not specify how many DLA have to be severely impaired in order for a person to be designated as a PWD.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In this case, the FP is the prescribed

professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Therefore, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods, and to further elaborate so that the nature and extent of the restrictions to DLA are clear.

The Panel notes that the FP has indicated that the Appellant does not require any prostheses or aids for his impairment and did not elaborate on the frequency or duration of the single DLA identified as being periodically impaired (going to and from stores). In addition, the Panel notes that, while the FP states that the Appellant requires continuous assistance with basic housekeeping, carrying purchases home and food preparation and cooking (except for preparing simple meals), there is no indication that he is restricted in the use of his left hand and the FP does state that he is capable of lifting up to 15 lbs. The Panel also notes that the FP indicates in the AR and the MR that the Appellant is independently able to perform all aspects of the personal hygiene and self care DLA, the manage personal medication DLA, the manage personal finances DLA, the move about indoors and outdoors DLA, and the use public or personal transportation facilities DLA. In addition, the FP states that the Appellant can independently perform most of the shopping for personal needs DLA and the meal planning and safe storage of food components of the prepare own meals DLA. Therefore, the Panel finds that the Ministry reasonably concluded that there is not enough evidence to establish that the Appellant's impairment *significantly* restricts his ability to manage his DLA either continuously or periodically for extended periods.

Help with DLA

The Ministry's position is that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted.

The Appellant's position is that he has to rely on his Landlord to do all of the housekeeping and shopping for him.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions* in the ability to perform DLA, a person requires 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.

The Panel finds that the Ministry reasonably determined that, as direct and significant restrictions in the Appellant's ability to perform DLA have not been established, it cannot be determined that the Appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) 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 under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.