

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 January 31, 2018, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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 those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, 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

Information before the ministry at reconsideration

- 1) The appellant's PWD application comprised of:
 - A Medical Report (MR) dated October 2, 2017, completed by the appellant's general practitioner (GP) of 5 years, who had seen the appellant 2 to 10 times in the past 12 months;
 - An Assessor Report (AR) dated October 25, 2017, completed by a social worker (SW) who had known the appellant for one week and met with the appellant once prior to completing the AR. The SW relied on an office interview, "other legal advocate in office" and "Doctor's assessments" to complete the AR.
 - The appellant did not complete the self-report section of the PWD application, though the reader is directed to "See page 23 - Additional Information." This comment in in the SW's handwriting and refers to the SW's comments on page 23 of the AR, which are summarized below.
- 2) A note from the GP dated January 16, 2018.
- 3) The appellant's Request for Reconsideration dated January 17, 2018.

Documents provided on appeal

- 4) The appellant's Notice of Appeal (NOA), which did not introduce any new evidence, received by the tribunal on February 6, 2018.

No additional evidence or argument was provided on appeal by either party.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses

In the MR, where asked to provide a specific diagnosis and provide health history, the GP writes:

- Diabetes Mellitus
- Anxiety
- Hypertension
- Cervical Degenerative Disc Disease
- Osteoarthritis

Multiple comorbidities but most of his issues impacting his day to day living are his chronic disc issues and osteoarthritis which have no permanent treatment and management is symptomatic.

In the subsequent note, the GP writes that the appellant "suffers from chronic illness (DM, HTN + osteoarthritis). He reports of intermittent struggles with daily activities. He may occasionally need assistance from others."

The SW comments that the appellant presents as extremely stressed, cannot handle sitting still to answer questions, is restless and anxious, with no insight at times. Signs of self-neglect. Will be homeless soon probably. Listening skills poor. Cannot properly express himself for Part 1 [the panel understands this to be the self-report section of the PWD application] due to extreme tension and anxiety.

Physical Impairment

The GP reports:

- Able to walk 4+ blocks unaided on a flat surface and climb 5+ stairs unaided.
- Limited to lifting 15 to 35 lbs. and remaining seated for 2 to 3 hours.
- No aids or prostheses required.

The SW reports:

- Walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding require periodic assistance from another person and take significantly longer than typical. "Most days (4, 5 times) one day, every day too much tension, anxiety and pain to perform. If done 2-3 slower than normal."

In his reconsideration submission, the appellant writes that his body is full of arthritis, type 2 diabetes, high blood pressure, and degenerative disc disease. He struggles with daily activities. Sometimes he needs help but cannot get help around the house. He tries to get by the best he can. He is unable to work. In his Notice of Appeal, the appellant reiterates that he can't work, that he has arthritis and disc disease, and that his back is very bad.

Mental Impairment

In the MR, the GP reports:

- Significant deficit with cognitive and emotional function in 2 of 11 specified areas: emotional disturbance and motivation.
- No difficulties with communication.
- Social functioning is not restricted.

In the AR, the NP reports:

- Satisfactory ability to communicate in the areas of writing and hearing. Poor ability with speaking and reading "At times unable; too much stress, hypertension."
- Major impact on daily functioning for 8 of 14 listed areas of cognitive and emotional functioning: bodily functions (sleep disturbance), consciousness (confusion), emotion (excessive or inappropriate anxiety, depression), attention/concentration, executive, motivation, motor activity (extreme tension), and other emotional or mental problems. Anxiety, hypertension severely restrict cognitive and emotional functioning causing mental and physical impairments most if not all days. Keeps to himself, isolates, cannot cope with stressors of coping with people. Mentally too stressed to perform marked functioning. No concentration, extreme tension, depression, anxiety issues.
- Moderate impact on daily functioning for memory and minimal to moderate impact for impulse control (painkillers).
- Minimal impact for language. No information is provided for insight and judgement, psychotic symptoms and other neuropsychological problems.
- Social functioning:

- All areas require continuous support/supervision: appropriate social decisions; ability to develop and maintain relationships; interact appropriately with others; ability to deal appropriately with unexpected demands; and, ability to secure assistance from others. “Hypertension, anxiety and depression. Isolates at home, withdrawn. Cannot stand being close to others around him. Too much anxiety, nervous. Can lash out verbally, verbally abusive for no reason.”
- No description of the help required is provided.
- Very disrupted functioning with immediate and extended social networks (Withdrawn from society, isolated.)

In his reconsideration submission, the appellant writes that he suffers from depression.

DLA

The GP reports the following:

- The appellant has not been prescribed any medication and/or treatments that interfere with the ability to perform DLA.
- Basic housekeeping is periodically restricted. “Would occasionally require assistance with housecleaning.”

The SW reports the following:

- No information is provided for the DLA medications.
- All but one listed task of the DLA personal care, one task of the DLA shopping (carrying purchases home), as well as all listed tasks for the DLA basic housekeeping, meals, paying rent and bills, and transportation require continuous assistance from another person and take significantly longer than typical.
- The tasks for the DLA move about indoors and outdoors, feeding self (DLA personal care), and the remaining listed tasks for the DLA shopping require periodic assistance from another person and take significantly longer than typical.
- The pain and condition of hypertension, anxiety cause him to neglect himself, get distracted, no motivation or even insight to perform marked ADL’s most days of the week. If performed, some DLA take 4-5 times longer than normal and others 2-3 times longer. Physically (pain) and mentally, no interest, drive, motivation or insight due to hypertension and pain.
- The DLA social functioning is as described above under Mental Impairment.

Need for Help

The SW does not identify help currently provided and indicates that home care support and counselling are required.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. That is, was the ministry reasonable when determining that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, 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 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).

EAPWDR

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, 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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

Panel Decision

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the MR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant is diagnosed by a medical practitioner, the GP, with Diabetes Mellitus, hypertension, cervical degenerative disc disease, and osteoarthritis.

The appellant's position is that he is severely physically disabled due degenerative disc disease and osteoarthritis as well as diabetes and high blood pressure. The ministry's position is that a severe impairment of physical functioning is not established by the information provided by the GP, SW and the appellant. In reaching this conclusion, the ministry argues that the information provided in the PWD application is problematic as the SW, who had only known the appellant for one week at the time the AR was completed, describes impacts and restrictions to physical functioning that do not correlate with the assessments provided by the appellant's GP of 5 years. Based on the inconsistencies, the ministry concludes that it is difficult to develop a clear and coherent picture of the appellant's impairment and that a severe physical impairment is not established by assessments of the prescribed professionals and the appellant's own information. The ministry notes that while the appellant has described impacts to his ability to work, employability or ability to work is not taken into consideration when establishing PWD eligibility. The ministry also argues that the GP's assessment of being able to walk 4+ blocks and climb 5+ steps unaided, lift 15 to 35 lbs., and remain seated for 2-3 hours is not indicative of an impairment of physical functioning. Furthermore, in the subsequent note, the GP does not revise the assessment of physical functional skills in the MR only commenting that the appellant reports that he "struggles" with daily activities and that the appellant "may occasionally" require assistance from others. Respecting the information from the SW, the ministry notes that the SW does not describe the frequency or duration of the periodic assistance required with all listed areas of mobility and physical ability and argues that taking 2-3 times longer than typical with these activities is not considered indicative of a severe impairment of physical functioning.

The panel concludes that the ministry's determination that a severe physical impairment has not been established is reasonable. In reaching this conclusion, the panel finds that the appellant's physical functioning is assessed by the GP at the higher levels of independent functioning options specified in the MR and that, consistently, the MP indicates in both the MR and the subsequent letter that only "occasional" assistance is required with daily activities. Additionally, the panel finds the ministry was reasonable to view the information from the SW as insufficient to establish a severe degree of restriction with physical functioning given the lack of detail as to the periodic assistance required, and as taking 2-3 times longer, while reflective of impairment, is reasonably assessed as not indicating severe impairment. The panel also notes that the SW's narrative respecting mobility and physical ability is unclear as it describes the impacts in terms of "most days", "one day" and "every day" and relates the appellant's physical limitations, in part, to tension and anxiety. The appellant's own information indicates that he struggles with daily activities but provides little detail other than he is unable to work, which is not a criterion for PWD eligibility. For these reasons, the panel concludes that the ministry reasonably determined that the information from the prescribed professionals and the appellant does not establish a severe physical impairment.

Mental Impairment

The appellant is diagnosed by a medical practitioner, the GP, with anxiety.

In his reconsideration submission, the appellant mentions that he suffers from depression but does not describe any impact. The appellant does not address the diagnosed condition of anxiety in either his reconsideration submission or his Notice of Appeal. The ministry notes that significant deficits with emotional disturbance and motivation are reported by the GP but that significant deficits are not assessed for the majority of areas of cognitive and emotional functioning, and that the GP reports no difficulties with communication or restrictions with social functioning. Additionally, the GP does not address mental impairment in the subsequent note. In contrast, the ministry notes that the SW reports poor communication abilities for speaking and reading, major impacts on daily functioning in most of the 14 listed areas of cognitive and emotional functioning, and that continuous support/supervision is required for all listed areas of social functioning. Given these inconsistencies, the ministry concludes that it is difficult to establish a severe impairment of mental functioning based on the SW's assessments and that when considering all of the information, a severe mental impairment is not established.

The panel considers the ministry's conclusion to be reasonable. The ministry has reasonably viewed the information from the GP as not indicative of severe mental impairment given that significant deficits are not assessed for most areas of cognitive and emotional function and as the appellant is assessed as having no difficulties with communication or restrictions with social functioning. Furthermore, as noted by the ministry, the GP does not mention mental health issues in the subsequent note. The panel finds that the information from the appellant does not describe impacts on his daily functioning due to a mental health condition, with the appellant's only information being "I also suffer from depression." Rather, both the appellant's reconsideration submission and Notice of Appeal focus on his physical medical conditions, which is consistent with the emphasis on physical functional limitations by the GP. In sharp contrast, the SW indicates that the appellant's cognitive, emotional and social functioning is severely impacted in almost all aspects. Given these inconsistencies between the information of the appellant and his GP and that of the SW, the panel finds that it was reasonable for the ministry to conclude that these discrepancies make it difficult to obtain a clear and coherent picture of mental functioning and that a severe mental impairment has not been established by the available information.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant's position is that he struggles with daily activities as his body is full of arthritis and his back is very bad and that while he tries to get by the best he can, he sometimes needs help around the house but none is available. The ministry points to the GP's assessment in the MR of a periodic restriction with one DLA, basic housekeeping, for which "occasional" assistance is required, and the GP's comment in the subsequent note that the appellant reports intermittent struggles with DLA for which he may occasionally need assistance. The ministry notes that there is no further description of the "struggles" and that the GP does not revise the assessment of DLA in the MR. The ministry notes that the assessment by the SW identifies restrictions, and the need for mostly continuous assistance or support, with DLA where none were identified by the GP (personal care, shopping, meals, paying rent and bills, transportation, and social functioning). Given these inconsistencies, the ministry concludes that there is not enough evidence to confirm a severe impairment that significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods.

The panel considers the ministry's conclusion to be reasonable. In reaching this conclusion, the panel again notes that employability is not at issue when assessing eligibility for PWD designation as the ability to work is not addressed in the relevant legislative provisions and is not one of the prescribed DLA. The GP assesses the appellant as independently managing all but one DLA, basic housework, for which only occasional assistance is required. The appellant's own information is that he struggles with daily activities, does the best he can to get by, and sometimes needs assistance. In contrast, the SW assesses the appellant as being unable to independently manage any DLA and as requiring continuous assistance for most. Given the marked discrepancy between the information provided by the GP, which the panel finds is more in keeping with the appellant's own information, and the information provided by the SW, the panel considers that the ministry reasonable to conclude that it was not satisfied that in the opinion of a prescribed professional the appellant's impairment *significantly* restricts his ability to perform DLA either *continuously or periodically for extended periods*.

Help to perform DLA

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. 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 DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As 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

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 a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.