

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (Ministry) reconsideration decision dated February 15, 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 November 9, 2017, a medical report (MR) dated September 1, 2017 and completed by the Appellant's general practitioner (GP) who has known the Appellant for 2 years and who has seen the Appellant 11 or more times in the past year, and an assessor report (AR) dated November 7, 2017, completed by the GP.

The evidence also included a Request for Reconsideration signed on January 29, 2018 referencing a two page attachment in the form of an assistance letter, also dated January 29, 2018, prepared by a community social services agency and completed by the GP (Assistance Letter).

Diagnoses

In the MR, the GP diagnosed the Appellant with blindness in the left eye with an onset of July 2017, and chronic left leg pain due to a work-related injury, with an onset of July 2015.

Physical Impairment

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

- in terms of health history, the Appellant has complete life-long left eye blindness and chronic left leg pain affecting his mobility;
- in terms of functional skills, the Appellant can walk four or more blocks on a flat surface unaided and climb 5 or more stairs unaided, had no limitations to the length of time he could remain seated and that his limitations in lifting were unknown;
- the Appellant is unable to stand for long periods due to his chronic left leg pain;
- regarding mobility and functional ability, the Appellant was independent in walking indoors, lifting and carrying and holding, but took significantly longer than typical walking outdoors, climbing stairs and standing "related to chronic left leg injury", but the GP did not describe how much longer than typical it took the Appellant to perform these activities, whether he needed periodic or continuous assistance, and the GP did not specify whether the Appellant required any assistive devices.

In the SR, the Appellant wrote that he had suffered a stroke which had resulted in permanent blindness to his left eye and he had suffered a work-related lower calf injury to his left leg that makes it "almost impossible to stand or walk for extended periods of time".

In the Request for Reconsideration, the GP indicated that he agreed with the statement "(Appellant) states that he is not able to walk more than one block due to the severity of the pain in his left leg" without providing any additional commentary.

Mental Impairment

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

- he did not know whether the Appellant had any defects in cognitive and emotional functioning;
- the Appellant had no known difficulties with communication;
- the Appellant had no mental impairments impacting his daily cognitive and emotional functioning; and,
- the Appellant had good functioning with both his immediate and extended social networks.

The Appellant did not identify any mental impairments in the SR.

In the Request for Reconsideration, the GP indicated that he agreed with the statement “(Appellant) states since his stroke his memory is significantly impaired”.

Restrictions in the Ability to Perform DLA

In the MR, the GP reported that the Appellant had an impairment which directly and continuously restricted his ability to perform personal self care, meal preparation, management of medications, basic housework and daily shopping DLA, without providing any additional comments regarding the degree of restriction or what help from another person was required.

In the AR, the GP indicated that the Appellant was independent with respect to all DLA.

In the SR, the Appellant wrote that his hand/eye coordination is off, which “makes daily tasks such as preparing food and doing dishes very difficult”.

Need for Help

In the MR and the AR, the GP indicated that the Appellant lives with his brother on whom he relies for the help he requires with his DLA, and that he does not have an assistance animal or require any prosthesis or aids for his impairment.

In the Request for Reconsideration, the GP indicated that he agreed with the statements “(Appellant) states that he is not able to shop without the help of another person as he cannot read prices and labels and is not capable of carrying his groceries to/from the bus stop” and “(Appellant) states (as a result of his stroke) he does not cook most of the time due to safety issues ... and has left items cooking and burned pots because he’s forgotten he’s cooking.” The GP also indicated that he agreed that the combination of the Appellant’s visual impairment, leg pain and poor memory was severe, that the Appellant had significant restrictions in his DLA, and as a result required the assistance “most of the time” from another person in performing his DLA,

Additional Information submitted after reconsideration

In his Notice of Appeal dated February 23, 2018, the Appellant stated that he was unable to live by himself without help from someone else.

Neither the Appellant nor the Ministry attended the hearing. After confirming that both parties were notified of the hearing, the Panel proceeded with the hearing pursuant to Section 86(b) of the Employment and Assistance Regulation.

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: 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.

The Panel considered the information in the Notice of Appeal to be argument in support of written testimony that was before the Ministry when the decision being appealed was made.

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 applicable enactment 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, 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, as a result of any mental or physical restrictions, 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 to be “*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 GP.

Physical Functioning

In its Reconsideration Decision, the Ministry was not satisfied that the information provided establishes a severe physical impairment. The Ministry argues that the GP has assessed the Appellant as being independent in his ability to undertake most activities of mobility and physical activity (walking, climbing, and standing). The Ministry further notes that the GP has not indicated whether the Appellant has any difficulties with lifting, and that, while he indicates that the Appellant takes significantly longer with walking outdoors, climbing stairs and standing, he does not provide any information to indicate how much longer the Appellant takes with these activities. The Ministry also argues that the GP provided no additional comments to explain the Appellant’s ability to manage his mobility and physical ability in the Assistance Letter. The Ministry also notes that the GP has reported that the Appellant does not require the use of any aids to manage his physical functioning, and it concludes that the functional limitations described by the GP are more in keeping with a moderate degree of physical impairment. The Appellant’s position is that he has permanent blindness in his left eye as the result of a stroke and he has suffered a lower calf injury to his left leg that makes it “almost impossible to stand or walk for extended periods of time”, and that he is unable to walk more than one block due to the severity of the pain in his left leg.

Panel Decision

The Panel acknowledges that the information contained in the Appellant’s original application for the PWD designation and subsequently presented at reconsideration indicated that, although it took the Appellant significantly longer than typical walking outdoors, climbing stairs and standing, the GP assessed reasonably good levels of independent function for these activities. In addition, the Panel notes that both the GP and the Appellant described any such limitations as relating to “long” or “extended” periods of standing or walking. The Panel also notes that the Assistance Letter indicates that the GP agrees with the statement “*(The Appellant) states he is not able to walk more than one block ...*”, which is not consistent with the evidence regarding the distance the Appellant is able to walk provided by the GP in the MR. As a result the evidence was reasonably considered by the Ministry to be insufficient in establishing a severe physical impairment. Therefore the Panel finds that the Ministry’s determination that there is not sufficient evidence to establish that the Appellant has a *severe* physical impairment pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence before the Ministry at reconsideration.

Mental Functioning

In its Reconsideration Decision, the Ministry found that the GP's assessments in the MR did not provide evidence of significant deficits with respect to cognitive and emotional functioning. The Ministry notes that the GP reported in the MR that it was unknown whether the Appellant had any significant deficits with cognitive and emotional function, whereas in the AR he reported that there was no impact of cognitive and emotional functioning on any of the Appellant's DLA. Other than indicating in the Assistance Letter that his stroke has significantly impaired his memory and made him more forgetful, the Appellant did not argue that he has a mental impairment.

Panel Decision

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

In its Reconsideration Decision, the Ministry notes discrepancies between the assessments made by the GP in the MR and the AR. The Ministry points out that the GP states in the MR that the Appellant is continuously restricted in his ability to perform personal self care DLA, meal preparation DLA, management of medications DLA, basic housekeeping DLA and daily shopping DLA, but does not provide any information to explain the degree of restriction. In addition, the Ministry points out that in the AR the GP states that the Appellant is independently able to complete *all* DLA, including the ones for which he had indicated in the MR required continuous assistance. The Ministry further notes that the Appellant is independently able to manage all areas of social functioning and reports good functioning with both his immediate and extended social networks. The Appellant's position is that because his hand/eye coordination is off, daily tasks such as preparing food and washing dishes are "very difficult".

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 DLA, continuously or periodically for extended periods. In this case, the GP 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. Prescribed professionals are further encouraged to elaborate on the nature and extent of the limitations or restrictions in the instructions provided in those sections of the forms. For example, in Part C of the AR the assessor is instructed to identify whether assistance is required in each case with respect to the full range of DLA, and if the applicant is not independent, to describe the type and amount of assistance required.

The Panel finds that the Ministry's decision that this criterion is not met is a reasonable application of the legislation as the information provided by the GP is inconsistent for specific areas DLA, as outlined above. In addition, where the GP has indicated the need for continuous assistance with specified DLA,

the nature of the assistance required, and method by which continuous assistance is provided is not given. Therefore, the Panel finds that the Ministry reasonably concluded that the evidence is insufficient to show that the Appellant's overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help with DLA

In its Reconsideration Decision, the Ministry states 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 is unable to live by himself because he need someone else's help with his DLA. He is unable to shop without the help of another person because he cannot read prices and labels and cannot carry groceries to and from the bus stop. He also states that he has to rely on his brother to do most of the cooking as he has burned pots because he has forgotten that he has left them on the stove.

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.