

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 7 March 2018, which determined that the appellant was not eligible for persons with disabilities designation (PWD). The ministry's reason for that determination was that the appellant had not met all five of the legislated criteria under section 2 of the *Employment and Assistance for Persons with Disabilities Act*. The ministry determined that the appellant had met some of the criteria, specifically that he demonstrated that he has reached 18 years of age and that his impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry also determined that the appellant had demonstrated that he has a severe mental but not physical impairment. However, the ministry found that the appellant had not demonstrated that he has a severe mental or physical impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, he requires help to perform 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 consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 14 November 2017, completed by the appellant's general practitioner (GP) who has seen the appellant 2-10 times in the past 12 months and known the appellant for 14 years.
- An Assessor Report (AR) dated 23 November 2017, completed by the appellant's former respirologist.
- A Self Report (SR) dated 23 November 2017, signed by the appellant and accompanied by 2 typed pages (undated) also signed by the appellant.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

Diagnoses

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

- Asthma – onset 2005
- Sleep apnea – onset 2017
- Narcolepsy – onset 2017
- Bilateral rotator cuff tendonitis – onset 2014
- C7 vertebral compression fracture – onset 2010

Ability to perform DLA

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with his ability to perform DLA and provides the comments: *intolerant to narcolepsy drugs; follow up with respirologist for meds.*

The GP indicates that the appellant's impairment directly restricts his ability to perform DLA. Specifically, his ability to perform personal self care, use transportation and social functioning are restricted on a periodic basis. All other DLA are assessed as independent.

The GP explains 'periodic' with the following: *narcolepsy fatigue affects driving, bathing, social interaction variably from day to day.*

The GP explains impacts to social functioning with the comments: *alcohol exacerbates issue; falls asleep at movies, plays, etc.*

The GP explains the assistance required with the comment: *wife helps with bathing.*

AR:

The AR indicates that the appellant is independently able to manage the personal care activities of dressing, grooming, feeding self and transfers on/off bed and in/out of chair. Periodic assistance is required with regulating diet and continuous assistance is required for bathing (*falls asleep*).

The AR indicates that the appellant requires periodic assistance with the basic housekeeping activities of laundry and basic housekeeping.

The AR indicates that the appellant is independently able to manage the shopping activities of reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home. Periodic assistance is required going to and from stores (*has to be careful to drive only on a good day*).

The AR indicates that the appellant is independent in all listed meals activities.

The AR indicates that the appellant is independent in all pay rent/bills activities.

The AR indicates that the appellant is independent in all listed medications activities.

The AR indicates that the appellant is independent in all listed transportation activities.

Section 2(1)(b) DLA

The following DLA are applicable to a person who has a severe mental impairment:

Make decisions about personal activities, care or finances

AR:

The AR indicates that the appellant is independent with shopping activities of readings labels, making appropriate choices, and paying for purchases; the meals activities of meal planning and safe storage; all pay rent/bills activities; and all medications activities and the transportation activities of using transit schedules and arranging transportation.

Relate to, communicate or interact with others effectively

MR:

The GP indicates that the appellant has no difficulties with communication.

AR:

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

In assessing social functioning activities, the AR indicates that the appellant is independent with developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. Periodic support/supervision is required with appropriate social decisions (*night driving*).

The AR indicates that the appellant has good functioning in his immediate social network and good functioning in his extended social network.

SR:

The appellant does not speak to DLA in his self report.

Help required

MR:

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

AR:

The AR indicates that the appellant receives assistance from family.

The AR indicates that the specialist would like the appellant to try a CPAP machine in the future.

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

SR:

The appellant does not speak to help required in his self report.

2. Request for Reconsideration

The appellant's Request for Reconsideration dated 5 February 2018, included the following document:

- A 2-page letter from the appellant's new respirologist ("specialist") indicating that the specialist supports the PWD application. The specialist states that the appellant's excessive daytime sleepiness causes him to be dysfunctional and unable to work and carries additional risk of injury and death to the appellant and others.

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

Notice of Appeal

In the Notice of Appeal dated 16 March 2018, the appellant wrote as reasons for appeal: *because I can't work or live my daily life without the constant support of my wife or anyone else! I fall asleep very easily and can harm myself or someone else. I am also allergic to the medication that treats my disorder.*

Appeal Submissions

Prior to the hearing the appellant submitted the following:

- 1-page letter from the appellant's specialist, dated 17 March 2018.
- 1-page letter from the appellant's GP, dated 4 April 2018.

Hearing Submissions

At the hearing, the appellant's wife spoke on his behalf. She argued that the appellant cannot even sit in a chair without falling asleep and cannot bathe or shower alone. She reported that he falls asleep standing up, eating meals and having conversations. This comes out of nowhere and it does not matter how much sleep he gets. She stated that she has concerns about him being out in public. She reported that he needs constant supervision; he cannot cook, drive or take the bus, or be with their child safely on his own. She reported that treatment attempts, including medications and CPAP trials, have failed. She also reported that his condition is worsening with age and the new specialist is investigating alternate treatment options.

The appellant stated that his micro sleep episodes occur 30-50 times per day. He reports that he has fallen asleep while driving in the past, causing 2 motor vehicle accidents. He stated that medical treatments are not working for him. The CPAP trial did not was not successful as it interfered with his nighttime sleep. He reported that medications have also not been successful due to allergic reactions, habituation and side effects.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided in the appellant's appeal submissions, dated 17 March and 4 April 2018, are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because the information provided in both letters is in support of information and records that were before the ministry at reconsideration. The panel notes that the ministry did not object to the admission of the appeal submissions.

The panel finds that the information provided by the appellant and his wife at the hearing consisted of reiteration and/or explanation of facts that were either before the ministry at reconsideration or in support of information that was before the ministry at reconsideration, as well as some argument. The panel finds that this information is admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act*.

The panel finds that the information provided in the appellant's Notice of Appeal consists of argument and will be considered as such.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet two of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, he requires help to perform those activities.

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

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

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

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

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

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

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

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

(ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

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

Direct and significant restrictions in the ability to perform DLA

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA continuously or periodically for extended periods. In reaching this conclusion, the ministry noted that the GP has indicated that the appellant is periodically restricted with some activities but noted that there is no explanation as to the frequency, degree or duration of assistance required. The ministry noted that the specialist indicates that the appellant requires continuous assistance with bathing and periodic assistance with some activities but has not provided additional information relating to the frequency, degree and duration of periodic assistance required. The ministry found that there was not enough evidence to confirm that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods. The ministry concluded that, as the majority of DLA were performed independently or require little help from others, this criterion was not met.

The panel finds that it was reasonable for the ministry to determine that the information provided does not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods. The panel notes that while one activity requires continuous assistance and some other have been assessed as requiring periodic assistance, neither the GP or respirologist have provided information relating to periodicity. The panel finds that, in relation to the areas where some need for periodic assistance is assessed, neither the respirologist or the GP has provided sufficient information in relation to the nature, degree and duration of the assistance required by the appellant to establish that there are significant restrictions for extended periods in the appellant's ability to perform DLA. The panel notes that this information is not consistent with the level of restriction reported by the appellant and his wife at the hearing. However, the panel also notes that the appellant stated that the assessments were accurate at the time they were provided and his ability to function independently has declined since the assessments were completed. The panel also notes that the appellant, his wife, the specialist and the GP emphasize the appellant's inability to work. However, the panel notes that employability or vocational ability is not a criterion for PWD designation nor is it a DLA set out in the regulation. The panel finds that the assessments provided indicate that the appellant is primarily independent with DLA, with some activities requiring periodic assistance. However, the information regarding the nature of periodic required is not sufficient to establish direct and significant restrictions for extended periods as required by the legislation. Given the limitations in the information before the ministry, the panel concludes that the ministry's determination that this criterion has not been met is reasonably supported by the evidence.

Help required

The legislation requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that as it had not been established that appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required from other persons.

The panel notes that the information provided at the hearing indicates that the appellant receives significant assistance from his spouse on a daily basis. However, while the information provided demonstrates that the appellant does receive assistance from other people, the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

Conclusion

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