

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 28 February 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. However, the ministry determined that the appellant had not demonstrated that he has a severe mental or physical impairment; specifically 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 17 August 2017, completed by the appellant's general practitioner (GP) who has seen the appellant 11+ times in the past 12 months and known the appellant for 7 years.
- An Assessor Report (AR) dated 17 August 2017, completed by the appellant's GP.
- A Self Report (SR) dated 19 July 2017, signed by the appellant.

The following documents were Included with the application:

- X-Ray Report (Lumbar Spine) - 15 March 2016
- CT Report (Cervical Spine) - 28 September 2015
- Bone Scan Report - 28 September 2015
- X-Ray Report (Cervical Spine) - 7 August 2012
- Clinic Notes, Pain Specialist – 13 April 2017

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:

- Anxiety
- Depression
- Chronic Pain

No information has been provided regarding the date of onset for these diagnoses.

Severity of mental impairment

MR:

The GP indicates that the appellant suffers from anxiety and depression.

The GP has responded "no" to whether there are difficulties with communication other than lack of fluency in English.

Under Health History, the GP writes that the appellant's pain has contributed to his severe anxiety and depression.

The GP indicates that the appellant had significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation and attention or sustained concentration. The GP writes: *Due to anxiety/depression and he is unable to focus, concentrate, etc. when the pain is overwhelming.*

AR:

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

The GP assesses the appellant's cognitive and emotional functioning as having no impact in the areas of bodily functions, impulse control, motor activity, language, psychotic symptoms and other emotional or mental problems. The GP assesses minimal impacts on daily functioning in the areas of consciousness, insight and judgment, and executive. Moderate impacts on daily functioning are assessed in the areas of memory and other neuropsychological problems. Major impacts are assessed in the areas of emotion, attention/concentration, and motivation. The GP has commented: *Anxiety and depression have been quite debilitating. He ends up being alone and not doing anything. Minimal socializing. This causes him not to be able to focus and concentrate...*

The appellant reports emotional consequences of his pain. He states that he isolates himself at home and, at times, has difficulty with concentration and doing some basic tasks. He reports that he will be seeing a psychologist. He reports that the financial consequences of his pain contribute to feelings of inadequacy and avoiding social situations. He writes that he is frustrated, exhausted, sad and sore. Anxiety and stress are problematic.

Severity of physical impairment

MR:

Under Health History, the GP writes: *this patient has episodes of severe pain that are quite debilitating and leave him bedridden for a number of days at a time. He requires narcotics due to the severe nature of his pain. He was no longer able to do his job because this... He is quite motivated to work but is unable to consistently attend due to his episodic pain. He does also have chronic pain, but it is these 'flares' that are quite problematic.*

For functional skills, the GP indicates that the appellant cannot walk at all (*when in severe pain*), his ability to climb stairs is unknown, no lifting and can remain seated less than 1 hour.

The GP indicates that the appellant uses a cane.

AR:

The GP indicates the appellant's mobility and physical ability as independent, uses assistive device and takes significantly longer for walking indoors (*cane*) and outdoors and climbing stairs. His is independent with standing (*shorter duration*) and requires continuous assistance with lifting and carrying and holding (*no more than 15 lbs.*)

SR:

The appellant states that he has suffered from severe pain in his leg, hip and lower back, which cause difficulty walking and moving around. He has made efforts to treat this pain and has improved but is still uncomfortable. He also suffers from almost constant lower back/upper torso aches and pains. His physical difficulties have affected his life and work. He needs to shift positions approximately every 10 minutes. His sleep, focus, food prep and cleaning have been impacted. As well, his finances have been impacted and he is struggling with 'basics'. He also indicates that he may have had a heart attack and is waiting on tests.

Ability to perform DLA

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with his ability to perform DLA.

AR:

The AR indicates that the appellant is independent in all listed personal care activities and takes significantly longer with dressing grooming, bathing, and transfers in/out of bed and on/off chair.

The AR indicates that the appellant is independent in all listed all basic housekeeping activities, takes significantly longer with all listed activities and requires periodic assistance with basic housekeeping.

The AR indicates that the appellant is independent in all listed shopping activities, takes significantly longer going to and from stores and carrying purchases home, and requires periodic assistance carrying purchases home (*has to do in stages, less than 15 lbs.*)

The AR indicates that the appellant is independent in all listed meals activities and takes significantly longer with food preparation. The GP comments: *if too much pain only eats cereal. Unable to make, etc. twice weekly this month.*

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 and uses an assistive device and takes significantly longer getting in and out of a vehicle. The GP comments: *uses cane for support.*

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 appropriate social decisions, developing and maintain relationships (*avoid relationships*), interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.

The AR indicates that the appellant has marginal functioning in his immediate social network (*has isolated himself – no longer socializing*) and good functioning in his extended social network.

Help required

MR:

The GP indicates that the appellant uses a cane.

AR:

The AR indicates that the appellant receives assistance from family with transport, meals and cleaning.

The AR indicates that the appellant receives assistance from assistive devices: cane, toileting aids and bathing aids. The GP provides the comment: *for 1-2 weeks three times in last year he would require toileting aids/bathing aids.*

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

2. Request for Reconsideration

The appellant's Request for Reconsideration, dated 14 February 2018, included several documents:

- A 6-page typed document, dated 8 February 2018 and entitled "PWD Appeal", from the appellant
- A 3-page typed document, undated and untitled, from the appellant
- A 2-page typed document, dated November 2017 and entitled "Overview of 'limitations' and over-all situation"

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

Notice of Appeal

In the Notice of Appeal dated 13 March 2018, the appellant wrote as reasons for appeal: *I feel that we've established a severe impairment, my daily activities are restricted by this. That I don't need assistance for this is due to my hard work, feel being penalized for this. Wish to explain in person. Thank you.*

Appeal Submissions

Prior to the hearing the appellant submitted the following:

- 3 typed pages dated 28 March 2018, entitled "Additional notes for PWD tribunal meet"
- 1 typed page dated 28 March 2018, entitled "Additional notes (2) for PWD tribunal meet"

At the hearing, the appellant argued that his past should have bearing on the PWD decision. He stated that he is a hard-working individual who began having issues about 2.5 years ago. His employer worked with him for as long as possible to accommodate his issues; however, he became an unreliable worker and there was an 'amicable' parting of ways in 2016. Following this he went on EI. He has had 2 episodes of debilitating back pain that have lasted 6-8 weeks, where he cannot sleep or function. Following each episode, he has slowly recovered. He has been working with a disability support organization and has seen a psychologist. He stated that he does not get help daily, but relies on hot baths, cane and massager unit to get through the day. He argues that these are assistive devices. He reported that he may be able to work for a few hours at a time in the morning but his ability to

do so is unpredictable and he needs a safety net. He stated that he wants and loves to work. He stated that he does everything he can in the mornings because that is when he can do the most and by early to mid-afternoon he is exhausted. He argued that before making its decision the ministry should have spoken directly to his doctor, disability support organization, etc. He feels that there is a disconnect. He has also stated that he recently had eye surgery for glaucoma.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided by the appellant in the appeal submission entitled “Additional notes (2) for PWD tribunal meet” as well as the appellant’s oral submissions regarding glaucoma are not admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because this information is new information that is not in support of information and records that were before the ministry at reconsideration. The balance of the information provided by the appellant at the hearing and the information in the appeal submission entitled “Additional notes for PWD tribunal meet” consist of reiteration/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. The panel notes that the ministry objected to the admission of the glaucoma information on the basis that it was new information that the ministry did not have the opportunity to consider at reconsideration.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three 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 has a severe mental or severe physical impairment;
- 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.

Severity of impairment

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

Severity of physical impairment

In the reconsideration decision, the ministry determined that it was not satisfied that the information established severe impairment. In making this determination, the ministry considered the functional skills assessment by the GP and the physical ability and mobility assessment in the AR. The ministry argued that while the GP has identified some limitations, he has not provided any information as to how much longer the appellant requires to manage those activities. The ministry noted that a cane is used. The ministry noted that the GP has indicated that the appellant experiences significant difficulties during flare-ups 3-4 weeks per year. The ministry concluded that while the information provided reflects a moderate rather than severe impairment.

At the hearing the appellant argued that his impairment is severe. He argued that while his pain may be at a 10 out of 10 for only 3 weeks at a time during episodes, his level of pain is above a 6-7 out of 10 more than 1/3 of each year. He stated that when his pain is at a 6-7, he is OK about half of the day each day and does his best to get things done during that time. He reported currently being at a 2 out of 10. He argued that the ministry should be connecting with his health care professionals to get a better idea of his limitations.

The panel finds that the ministry's determination was reasonable based on the evidence before it. The panel notes that the GP's assessments in the MR and AR reflect an individual who has an episodic impairment but can manage independently most of the time, while taking significantly longer with some activities. As well, the panel notes that the appellant stated at the hearing that he is able to function independently most of the time but requires assistance during episodes. The panel notes that the appellant reports that he is able to manage his daily life and emphasized his inability to work consistently. The panel also notes that the appellant's written and oral submissions also emphasize the appellant's working history and ability 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 information provided reflects an individual suffering from chronic pain who experiences flare-up episodes. However, the panel finds the information as to the frequency and duration of these flare-up episodes is somewhat unclear. The GP indicates that this occurs 3-4 weeks per year but does not indicate whether these weeks are consecutive. Meanwhile, the appellant's information is that he has had two episodes in 12 months and that it has taken him several months to recover each time. The panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

Severity of mental impairment

In the reconsideration decision, the ministry found that the information provided did not establish that the appellant has a severe mental impairment. The ministry noted that the GP's assessment in the MR did not indicate that the appellant has difficulties with communication. The ministry considered that in the MR the GP indicates deficits in the areas of executive, emotional disturbance, memory, motivation and attention or concentration. The ministry also considered that major impacts to cognitive and emotional functioning were assessed in the areas of emotion, attention/concentration and motivation; moderate impacts to memory and other neurophysiological problems; minimal impacts to consciousness, executive and insight and judgment. The ministry noted that there were no impacts assessed in the remaining areas of the assessment. The ministry also noted the assessed independence in all aspects of social functioning and the lack of information regarding a need for support/supervision to maintain the appellant in his community. The ministry concluded that while there are some deficits to the appellant's cognitive and emotional functioning as a result of his condition, most areas are not severely impacted.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes the absence of communication difficulties, safety concerns and a need for support or supervision to maintain the appellant in his community. The panel notes that the GP's assessments relating to decision-making indicate that the appellant is independent in these areas. Alongside the assessments of independence in all decision making and social functioning activities, the panel also notes that both the appellant and his GP have emphasized that back pain is the primary source of the appellant's difficulties. Overall, the panel finds that the ministry's conclusion that the information provided does not establish a severe mental impairment and that this criterion was not met is reasonably supported by the evidence.

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 has not been prescribed medication that restricts his ability to perform DLA. The ministry considered that the GP indicated that the appellant takes significantly longer with some activities but noted that there is no explanation as to how much longer. As well the ministry considered that the GP has indicated that the appellant requires periodic assistance with basic housekeeping and carrying purchases home but has not indicated how often this assistance is required. The ministry noted that the GP indicates that the appellant uses a cane and take significantly longer to get in/out of a vehicle. The ministry found that the absence of information regarding how much longer than typical the appellant requires to manage activities made it difficult to determine whether a significant restriction in overall functioning was made out. The ministry concluded that the information was indicative of a moderate restriction; therefore, 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 all DLA have been assessed as independent; however, some DLA have also been assessed as taking significantly longer and/or requiring periodic assistance. The panel finds that, in relation to the areas where some periodic assistance is assessed, the GP has not 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 finds that, in relation to the areas where the appellant is independent and takes significantly longer, the GP has not provided sufficient information in relation the time required to complete these activities. The panel notes that the appellant has expressed his agreement with the GP's assessment of his abilities in relation to DLA. The panel finds that the assessments provided indicate that the appellant is primarily independent in performing DLA with some activities taking longer. However, the information provided regarding these restrictions is not sufficient to establish direct and significant restrictions to DLA 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. The ministry also stated that a simple assistive device such as a cane does not establish the existence of a severe impairment.

The panel notes that the appellant has argued that while he does not require daily assistance from other people, taking hot baths, using his massager and his cane are assistive devices. While the information provided demonstrates that the appellant does receive some assistance from other people during episodes, as well as his cane and massager, 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.