

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 28 March 2018, which determined that the appellant was not eligible for Persons with Disabilities (PWD) designation because he had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*. The ministry determined that the appellant had demonstrated that he has reached 18 years of age and his impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry further determined that the appellant had not demonstrated that he has a severe mental or physical impairment; 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; nor that 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 8 December 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 more than 2 years. Additional commentary dated 8 March 2018 has been added.
- An Assessor Report (AR) dated 8 December 2017, completed by the appellant's GP.
- A Self Report (SR) dated 7 December 2017 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:

- Epilepsy – onset 1975
- Cerebral Palsy – onset 1975

Severity of Physical Impairment

MR:

Under Health History, the GP writes that the appellant has significant left-sided weakness and contracture of his wrist as well as 3/5 elbow weakness and 3/5 grip strength. The GP writes that the appellant has a left foot drop and walks with a clear limp. The GP writes that the appellant has active epilepsy and, despite compliance with medications, cannot drive, climb a ladder, is unsafe being on an elevated platform or near water due to the risk of injury if he has seizures.

For functional skills, the GP indicates that the appellant can walk 2-4 blocks unaided, climb 5+ steps unaided, lift 2-7kg and remain seated without limitation.

In response to the question about aids or prostheses required, the GP states: *a left ankle/foot brace for his drop foot deformity.*

AR:

The GP describes the appellant's impairment as:

- 1) *Intermittent grand mal seizures*
- 2) *Significant left arm weakness & wrist contracture with also left leg weakness*

The GP assesses the appellant's mobility and physical ability as independent for walking indoors with the use of an assistive device and taking significantly longer (*twice as long*); requiring periodic assistance walking outdoors with the use of an assistive device and taking significantly longer (*twice as long*); requiring periodic assistance climbing stairs with the use of an assistive device and taking significantly longer (*3x as long*); independent for standing; and requiring continuous assistance for lifting and carrying and holding. The GP provides the comment: *using [an] ankle brace to ambulate.*

SR:

The appellant states that he suffers from cerebral palsy that affects the left side of his body, debilitating his upper body and left leg, making it difficult to lift heavy objects as he can only carry heavy objects with one hand. He states that his balance is affected and his ability to walk long distances is limited. He states that he also has epilepsy and lives day to day not knowing when his next seizure will happen.

Severity of Mental Impairment

MR:

The GP has ticked 'no' in response to whether there are difficulties with communication other than lack of fluency in English.

The GP indicates that the appellant has no significant deficits with cognitive and emotional functioning.

AR:

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

The GP has assessed the appellant's cognitive and emotional functioning as moderate impact to consciousness; minimal impacts to bodily functions, attention/concentration, executive, motor activity, and language; and no impact in the remaining areas.

SR:

The appellant does not report a mental impairment.

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 GP indicates that the appellant is independent in all listed personal care activities and takes significantly longer with dressing, grooming, bathing, toileting and feeding self. The GP comments: *due to inability to use his left arm everything takes at least twice as long as a normal person. Risk of drowning if he has a seizure while bathing.*

The GP indicates that the appellant requires periodic assistance and takes significantly longer with all basic housekeeping activities.

The GP indicates that the appellant is independent with the shopping activities of readings prices and labels, making appropriate choices and paying for purchases; he requires continuous assistance going to and from stores and carrying purchase home, which takes significantly longer.

The GP indicates that the appellant is independent with the meals activities of meal planning and safe storage; he requires periodic assistance and takes significantly longer with food preparation and cooking (*due to left arm dysfunction and takes him twice as long to do*).

The GP indicates that the appellant is independent with all pay rent and bills activities and all medications activities.

The GP indicates that the appellant is independent with all transportation activities, taking significantly longer to get in and out of a vehicle (*takes twice as long to do*).

The GP has assessed the appellant as independent in all social functioning areas and comments: *Unpredictable if he has a seizure.*

The GP indicates that the appellant has good functioning in his immediate and extended social networks.

Help required

MR:

The GP indicates that the appellant requires a left ankle brace for his drop foot deformity.

AR:

The GP indicates that the appellant receives assistance from family and from the use of an assistive device (*splint to left leg for drop foot deformity*).

The GP indicates that the appellant requires assistance with transportation/meals preparation and lifting and carrying. The GP states that it is advised that the appellant not be alone and avoid places/situations that could be hazardous to him if he has a seizure.

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

2. Request for Reconsideration

The Request for Reconsideration dated 14 March 2018 is signed by the appellant. Included with the request for reconsideration is an amended MR & AR in which the GP has added to his previous assessment.

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

Notice of Appeal

In the Notice of Appeal dated 4 April 2018, the appellant provides as reasons for appeal: *The reason for my appeal is that I have epilepsy and cerebral palsy that does affect my day to day activity.*

Appeal Submissions

At the hearing, the appellant stated that his disability is hard to describe verbally and in writing as is the impact to his daily living, but both are apparent to those who are able to see him in person. He stated that his impairment affects the left side of his body and the right side of his brain. He reported that DLA and living a 'normal life' are becoming more difficult as he ages, and his speech impediment and memory are worsening. He stated that he can no longer do an 8-hour work week, or a lot of other things he would like to do. He reported that seizures have caused problems for him in the past including hospitalization, burning himself and concussions. The appellant clarified that he has had 3-4 'major' grand mal seizures since December 2017 as well as 'minor' grand mal seizures about once per week and petit mal seizures 2-3 times per week. He stated that he has to live with family, he lives with his mother, and if they go on vacation he has to stay in touch and/or be checked on daily. He stated that his family cannot support him all of the time because they have other obligations.

Appeal Documents

At the appeal the appellant submitted 2 letters:

1. One-page letter from a former supervisor dated 16 April 2018 ("Supervisor's Letter")
2. Two-page letter from the appellant's mother dated 16 April 2018 ("Mother's Letter")

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided in the appellant's Notice of Appeal consists of argument and will be considered on that basis. The panel finds that the appellant's oral evidence at the hearing consisted of information and argument in support of information and records that were before the ministry at reconsideration and is admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act*. The panel finds that the Supervisor's Letter and the Mother's Letter provide information and argument in support of the information and records before the ministry at reconsideration and are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act*. In reaching this conclusion on admissibility, the panel notes that the ministry stated that its position is that the letters are not admissible because neither the appellant's mother or former supervisor are certified or registered professionals and have no bearing on the decision. The panel finds that this argument does not reflect the applicable legislation, set out at section 22(4)(b), which permits the panel to admit oral or written testimony in support of the information and records that were before the minister when the decision being appealed was made. The panel finds that both documents meet this requirement.

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 her 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 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 this criterion had been met. In making this determination, the ministry considered the functional skills assessment by the GP noting that the appellant is able to walk 2-4 blocks unaided, climb 5+ steps unaided, lift 2-7kg. and remain seated without limitation. The ministry also noted that while the GP indicates that continuous assistance is required with lifting and carrying/holding, he also indicates that the appellant can lift up to 15 lbs. As well, the ministry noted that the appellant has been assessed in the AR as requiring periodic assistance with walking outdoors and climbing stairs, but the frequency and duration of assistance required have not been described. In addition, the ministry noted that the MR assessments indicated that the appellant could walk 2-4 blocks and climb 5+ steps unaided. The ministry's conclusion on this criterion was that a severe impairment of the appellant's physical functioning had not been established.

The panel notes that the ministry has stated in a number of places in its reconsideration decision that although the GP describes weakness to the appellant's left side, weakness to his right side is not indicated. The panel finds that, while a holistic analysis of the appellant's impairment requires consideration of both sides of his body, it is not reasonable for the ministry to suggest that weakness must or should be present on both left and right sides in order to establish a severe impairment. The panel also notes that the ministry has stated in the reconsideration decision that taking two to three times longer than typical with mobility and physical ability activities is not considered indicative of a severe impairment. However, the ministry was not able to provide any information regarding how much longer a person must take in order for a severe impairment to be indicated and stated that there is no policy/guidance for decision makers in this regard. Despite these deficiencies, the panel finds that the ministry's determination was reasonable. The panel notes that the assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR do not provide a consistent and coherent picture of the appellant's ability to function independently. The panel finds that despite being completed by the same practitioner the information provided in the two assessments conflicts in a number of areas, including walking outdoors, climbing stairs and lifting. As well, the panel notes that the information provided by the appellant, the GP and in both appeal letters has emphasized 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 information provided reflects an individual with limitations but does not provide sufficient and consistent information establishing a severe impairment. 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 appellant does not have 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 or deficits to cognitive and emotional functioning. The ministry noted that the GP has indicated in the AR that the appellant has satisfactory ability with all areas of communication. As well, the ministry noted that the AR indicates no major impacts to cognitive and emotional function, one moderate impact, five minimal impacts, and no impacts in the remaining eight areas. The ministry noted that the GP has assessed the appellant as independent with all areas of social functioning and having good functioning in immediate and extended networks. The ministry also noted the absence of any description of support/supervision to maintain the appellant in his community and the absence of safety issues with social functioning. The ministry concluded that a severe impairment of mental functioning has not been established.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonably supported by the evidence. The panel notes the absence of any diagnosis that would reflect a mental impairment as well as the absence of any assertion of a mental impairment by the appellant. The panel finds that the GP's assessments of cognitive and emotional functioning in the MR and AR do not reflect a severe mental impairment. The panel also notes the absence of reported communication difficulties, social functioning safety concerns and a need for support or supervision to maintain the appellant in the community. The panel notes that the GP's assessments relating to decision-making indicate that the appellant is independent in these areas. As such, 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, as listed in section 2(1)(a) and (b) of the EAPWDR, in consideration of the opinion of a prescribed professional. While this does not preclude consideration of other evidence, the legislation it is clear that the opinion of a prescribed professional is fundamental. In this instance, the prescribed professional is the appellant's GP.

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. In reaching this conclusion, the ministry noted that the appellant has not been prescribed medication that interferes with his ability to perform DLA. The ministry considered the GP's assessment that the appellant takes twice as long with several activities but concluded that it does not consider taking two to three times as long as typical to perform DLA to be indicative of significant restrictions to DLA. The ministry also noted that employability and ability to work are not taken into consideration for PWD designation. The ministry found that the GP has indicated that the appellant is independent with a majority of listed DLA and, where need for a need periodic assistance is indicated, the GP has not provided the frequency or duration of periodic assistance required. The ministry concluded that for these reasons, and because a severe impairment had not been established, there was not enough evidence to confirm that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods.

The panel finds the ministry's determination that the assessments provided do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods reasonable. However, the panel notes that a finding of significant restrictions to DLA is not contingent upon first finding that a severe impairment was established. The panel notes that the GP's assessment of DLA in the AR indicates that the appellant is independent in many areas but takes longer with some activities. The panel finds that the GP's assessment does not provide sufficient information regarding periodicity in relation to the activities for which periodic assistance is indicated. This results in a lack of clarity with respect to whether periodic assistance is required for extended periods as required by the legislation. For instance, in relation to the activities of food preparation and cooking, for which periodic assistance is indicated, the GP has written "*due to left arm dysfunction and takes twice as long*" in response to the prompt to "Explain/Describe (include a description of the type and amount of assistance required)". The panel notes the presence of safety concerns with some DLA that seem to necessitate supervision, such as bathing, but also notes an absence of information regarding the nature, frequency and duration of assistance required. As well, the panel notes that the GP has not indicated that an assistive device is required for any DLA. The panel notes that while the appellant argued at the hearing that he is having increasing difficulty managing his DLA as he ages, the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. Given the absence of sufficient information regarding direct and significant restrictions to DLA from the GP, 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 panel finds that the information provided clearly demonstrates that the appellant requires an ankle or leg brace for all ambulation due to his drop foot deformity. As well, the information provided indicates that the appellant does receive help and/or supervision for DLA from his mother and other family members. However, as 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, the panel must also find that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA under section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, determining that the appellant is not eligible for PWD designation, was reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.