

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated March 26, 2018, in which the ministry found that the appellant was not eligible for designation as a Person with Disabilities (“PWD”) under section 2 of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry found that the appellant met the age and duration requirements and has established a severe mental impairment, but was not satisfied that:

- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – SUMMARY OF FACTS

The evidence and documentation before the minister at the reconsideration consisted of:

- A letter dated March 26, 2018 in which the ministry advised the appellant he is not eligible for PWD designation.
- Information from the ministry's Record of Decision that indicated the PWD application was received on November 24, 2017 and denied on January 23, 2018. The ministry prepared a reconsideration package on February 14, 2018; the appellant requested an extension of time on February 26, 2018 (the ministry granted the extension); and the ministry reviewed the appellant's Request for Reconsideration "(RFR)" on March 26, 2018.
- An RFR signed by the appellant on February 26, 2018 with attached submission dated February 12, 2018 that summarizes the appellant's argument.
- The *Persons with Disabilities Designation Denial Decision Summary* and accompanying denial letter dated January 23, 2018.
- A letter to the appellant's general practitioner ("Dr. F.") dated January 17, 2018 in which a ministry adjudicator requests clarification of the information in the PWD application with regard to the appellant's social functioning. The ministry indicates it was seeking additional information to address inconsistencies between the appellant's self-report and Dr. F.'s opinion that the appellant was not restricted with DLA. The appellant's current general practitioner ("Dr. A.") replied with a hand-written note, faxed to the ministry on January 19, 2018. Dr. A. attached a *Psychiatrist Consultation* report ("psych. consult report") dictated by a psychiatrist on August 18, 2017.
- A letter dated September 12, 2017 in which the ministry advised the appellant that the PWD application was being returned as incomplete (a prescribed professional had not completed the section 3 assessment report).
- The appellant's PWD application comprised of:
 - his self-report ("SR") dated August 30, 2016 (with an update on August 26, 2017);
 - a Physician Report ("PR") dated October 27, 2016 and completed by Dr. F. who has known the appellant since 2004 and has seen him 2 to 10 times in the past 12 months;
 - an Assessor Report ("AR"), completed by Dr. A. who has known the appellant for 6 months, has seen him 2 to 10 times in the last year, and based her assessment on an office interview with the appellant, file/chart information, and the psych. consult report.

Summary of relevant evidence

Diagnoses

In the PR, Dr. F. indicates the appellant has Major depression (date of onset, 2004) and Anxiety disorder (date of onset, 2011). Since May 2016, the appellant's depression has been severe with generalized anxiety. The conditions are unresponsive to medications to date and the appellant's symptoms include insomnia, low mood, poor motivation, and reclusiveness.

Cognitive and emotional function

- In the PR, Dr. F. indicates the appellant has no difficulties with communication. He has significant deficits in the areas of Memory, Emotional disturbance, Motivation, and Attention/sustained concentration.
- In the AR, Dr. A. indicates the appellant's ability to communicate is good in all areas [comment, "anxiety affects his ability to interact with others"]. The appellant's mental impairments restrict or impact his functioning in the areas of Executive, and Memory (moderate impact) as well as Bodily functions, Emotion, Attention/concentration, Motivation, and Motor activity (major impact).

- In the psych. consult report, the psychiatrist describes the appellant's history of depression and anxiety including recommendations for treatment/ therapy. The psychiatrist observed that the appellant had appropriate speech, a subjectively depressed mood, clear and organized thoughts, appropriate spatial orientation, and good insight. The psychiatrist indicates the appellant is presenting with worsening anxiety.

DLA

In the SR, the appellant states that due to the impact of his severe depression and anxiety combined, he is unable to function in social situations without suffering panic attacks. He reports that he also experiences anxiety and panic attacks in public places, such as stores and doctor's offices. The appellant states that his anxiety prevents him from leaving the house and depression, with its subsequent symptoms of fatigue, prevents him "from even getting out of bed in the first place." The appellant reports that "there are days when I physically cannot get out of bed for more than the most pressing daily activities." He then returns "quickly to bed, exhausted."

In his RFR submission, the appellant states that the DLA of Self-care, Meal preparation, and Basic housework are "heavily affected by fatigue" associated with his depression. In addition, Daily shopping and Use of transportation are affected by his anxiety. In his appeal submission, the appellant reports that "hygiene, eating proper meals, simple housekeeping, and pet care remain increasingly difficult." The appellant states that when he is suffering immobilizing anxiety attacks, DLA such as Daily shopping and Use of public transportation are "painfully prohibitive" and due to the combination of fatigue and lethargy caused by depression and frequent anxiety attacks, he can no longer safely drive or use public transit.

In the PR, Dr. F. indicates the appellant has not been prescribed any medication/treatments that interfere with his ability to perform DLA. Dr. F. check marked "No", the appellant's impairment does not directly restrict his ability to perform DLA. Dr. F. indicates that the following DLA are not restricted: Personal self-care, Meal preparation, Management of medications, Basic housework, Daily shopping, Mobility inside the home, Mobility outside the home, Use of transportation, Management of finances, and Social functioning.

In the AR, Dr. A. indicates that "anxiety - panic attacks, lack of concentration" are the mental impairments that impact the appellant's ability to manage DLA. Dr. A. indicates the appellant is independent with all activities of Personal care, Basic housekeeping, Meals, and Medications. The appellant is independent with all areas of Pay rent and bills with the exception of *Pay rent and bills* for which no check mark is provided [comment: "he is unemployed so unable to pay bills, otherwise he would be independent with this"].

Dr. A. indicates the appellant is independent with one area of Social functioning: *Appropriate social decisions*. The appellant requires periodic support/supervision with two areas: *Able to deal appropriately with unexpected demands* and *Able to secure assistance from others*. The appellant requires continuous support/supervision with two areas: *Able to develop/maintain relationships*; and *Interacts appropriately with others*. There was no explanation/description of the degree and duration of support/supervision required.

Dr. A indicates the appellant has marginal functioning with his immediate social network, and he has very disrupted functioning with his extended social network (Dr. A. circled *major social isolation*). *Additional comments* (including identification of any safety issues) was left blank. Under *Additional Information*, Dr. A. wrote, "Anxiety hampers (his) ability to interact meaningfully with others, seek employment, etc. He is being treated currently with medications and cognitive behaviour therapy but continues to struggle."

In the hand-written note, faxed to the ministry on January 19, 2018, Dr. A. states that the appellant is unimpaired with activities such as dressing, eating, ambulating, toileting, and personal hygiene. Dr. A. wrote, "yes, he struggles socially but this does not constitute 'ADLs'."

In the psych. consult report, the appellant is described as “very isolated”, without much support from his family (although he has a good relationship with his siblings). The psychiatrist observed that the appellant had “adequate self-care.” The psychiatrist describes the appellant’s precarious living situation in the home of a relative; the appellant is not permitted to live there long term due to the rules for visitors. The psychiatrist indicates the appellant is “living in hiding”, unable to leave the house in case “they both get kicked out” (if the neighbours find out he is living with his relative). The psychiatrist notes that this unhealthy living situation is contributing to the appellant’s anxiety.

Need for help

In the PR, Dr. F. indicates the appellant does not require any prostheses or aids for his impairment and does not need any assistance with DLA. In the AR, Dr. A. indicates the appellant is living with family as he is “currently unable to afford own place.” Regarding the support/supervision which would help to maintain the appellant in the community, Dr. A. wrote, “would benefit from psychotherapy, behavioural therapy.” Regarding assistance provided by other people; assistive devices; or an assistance animal, Dr. A. wrote, “N/A.”

In his RFR submission, the appellant states that due to his worsening depression and anxiety he was forced to give up his apartment and move in with a relative as he requires assistance with meals and transportation and he needs to be accompanied in public places. In his appeal submission, the appellant states that he requires both physical and emotional support from his relative: she not only has to drive him, but also accompany him to appointments and grocery shopping. The appellant reports that despite assistance from his relative he rarely leaves the house more than 2-3 times per month.

Additional information

With the consent of both parties, the appeal proceeded as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act* (EAA). Subsequent to the reconsideration decision neither party filed any new evidence requiring an admissibility determination in accordance with section 22(4) of the EAA.

- On April 9, 2018, the Tribunal received the appellant’s Notice of Appeal, followed by his appeal submission received by the Tribunal on April 20, 2018. The panel accepts the content of both documents as argument.
- On May 3, 2018, the Tribunal received an email from the ministry stating that the ministry’s submission on appeal will be the reconsideration summary.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision to deny the appellant PWD designation is reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. In particular, was the ministry reasonable in not being satisfied that the following criteria in section 2 of the EAPWDA were met?

- the appellant's daily living activities ("DLA") are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry based its reconsideration decision on the following legislation:

EAPWDA

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person 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).

EAPWDR

Definitions for Act

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

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

- (i)** prepare own meals;
- (ii)** manage personal finances;
- (iii)** shop for personal needs;
- (iv)** use public or personal transportation facilities;
- (v)** perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi)** move about indoors and outdoors;
- (vii)** perform personal hygiene and self-care;
- (viii)** manage personal medication, and

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

- (i)** make decisions about personal activities, care or finances;
- (ii)** relate to, communicate or interact with others effectively.

Analysis

Restrictions in the ability to perform DLA

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are the general practitioners that filled out the forms and the psychiatrist that dictated the psych. consult report. The term "directly" means there must be a causal link between the severe impairment and the restriction to DLA. The direct restriction must also be significant.

Finally, there is a component related to time or duration - the direct and significant restriction may be either continuous or periodic. If periodic, the restriction must be for extended periods. Inherently, any analysis of periodic restrictions must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a medical practitioner completing these forms has 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 provide additional narrative. DLA, as defined in the legislation, does not include the ability to work.

The appellant submits that the criteria for PWD designation "does not include the symptoms of mental illness" as the medical reports primarily ask about physical functioning. The appellant argues that due to the limited inclusion of items related to mental illness, his doctors' responses addressed the physical nature of his illness and were "not interpreted with mental illness in mind." The appellant explained that Dr. F. left the practice prior to completing the AR and was replaced by Dr. A. who filled out the report a year later, without the appellant being present for consultation. The appellant states that over the course of the year, his anxiety and depression have worsened and there are days when he is so fatigued that he cannot get out of bed to perform his DLA.

The appellant argues that activities such as hygiene, eating proper meals, simple housekeeping, and pet care are all restricted by his condition; he is prohibited from Daily shopping and Use of public transportation when suffering anxiety and panic attacks. The appellant reports that he sleeps for 12-16 hours per day at times while at other times he only sleeps a few hours and his waking hours are fraught with drowsiness and fatigue. The appellant submits that his increased anxiety has reduced him to living as a “shut in” and forced him to move in with his relative for assistance and support. In addition, the emotional stress of his living situation is exacerbating the symptoms of his mental illness.

The ministry was not satisfied that the appellant’s severe mental impairment restricts his ability to perform DLA (in the opinion of his general practitioners). The ministry acknowledged that the legislation does not specifically require the frequency and duration of the applicant’s restrictions to be explained but noted that the ministry finds this information valuable in determining the significance of restrictions.

The ministry argues there is not enough evidence to confirm significant restrictions to DLA, noting that Dr. F. does not indicate or describe any restrictions to DLA in the PR, but instead check marked “No”, the appellant’s impairment does not directly restrict his ability to perform DLA. The ministry argues that the information from Dr. A. is also not sufficient to confirm restrictions to DLA, as Dr. A. does not indicate restrictions for most of the DLA listed in the AR. The ministry argues that an inability to pay bills due to financial limitations is not indicative of restrictions to DLA that are due to a severe mental impairment.

The ministry argues that the information for Social functioning in the PR, AR, psych. consult report, and note from Dr. A. also does not establish significant restrictions to DLA. The ministry argues there is inconsistent information between the PR and AR: Dr. F. indicates the appellant is not restricted with Social functioning while Dr. A. reports restrictions. The ministry argues that the psych. consult report “does not provide specific details concerning the nature of restrictions to daily living activities as outlined in the PWD application.” The ministry notes that the psych. consult report states that the appellant is socially isolated and that he also had “adequate self-care.”

Panel’s decision - Restrictions to DLA

Considering the medical information on restrictions to the DLA, the panel finds that the ministry reasonably concluded the evidence of the general practitioners and psychiatrist was insufficient to establish that the appellant’s DLA are directly and significantly restricted either continuously, or periodically for extended periods as required by the legislation. For the DLA specified in section 2(1)(a) of the EAPWDR, the information in the PR and AR indicates the appellant can independently manage all of these activities.

While the information in the PR and AR identifies impacts to cognitive and emotional functions, such as motivation and attention/concentration (as a result of the appellant’s severe mental impairment), the evidence for specific DLA in both reports indicates that the appellant is able to independently perform activities with a mental or cognitive component. In particular, no restrictions are indicated for Personal Care, Basic housekeeping, Shopping, Meals, Pay rent and bills (despite his financial limitations he is “independent in this”), Medications, and Transportation. The psychiatrist also noted that the appellant “had adequate self-care.”

The appellant argues that he is restricted with personal hygiene, meal preparation, and simple housekeeping. The appellant argues that his anxiety and panic attacks leave him unable to use public transportation, drive safely, or attend appointments and stores unaccompanied by a family member. The appellant argues that the discrepancy in the information in the PR and AR occurred during his transition to Dr. A.'s medical practice. Nevertheless, the ministry's request for additional information/clarification afforded Dr. A. the opportunity to confirm restrictions to DLA but Dr. A.'s note, in reply, indicates the appellant is unimpaired with dressing, eating, ambulating, toileting, and personal hygiene. While the ministry was satisfied the appellant has a severe mental impairment, the panel notes that the restrictions reported in the appellant's submissions are not reflected in the information from a prescribed professional as required by section 2(2)(b) of the EAPWDA. As such, the panel finds the ministry's conclusion to be reasonably supported by the evidence.

Social functioning

The ministry states that it considers social functioning when assessing restrictions to DLA (despite Dr. A.'s note suggesting that impaired social functioning "does not constitute ADLs"). In fact, the legislation lists specific areas of Social functioning under the definition of DLA. Section 2(1)(b) of the EAPWDR states that DLA includes the following activities in relation to a person who has a severe mental impairment: (i) *make decisions about personal activities, care or finances*; and (ii) *relate to, communicate or interact with others effectively*. Excerpts from the legislation are provided with the PWD forms.

In the PR, Dr. F. indicates that Social functioning is not restricted although the appellant is also described as "reclusive." In the AR, Dr. A. indicates a need for supervision/support in 4 out of the 5 areas listed for Social functioning. Specifically, the appellant needs periodic support with *Able to deal appropriately with unexpected demands*, and *Able to secure assistance from others* but no information is provided as to the nature, frequency, or duration of support needed. Without that information, the panel finds it reasonable that the ministry was unable to determine whether Social functioning is periodically restricted for extended periods as set out in section 2(2)(b)(i)(B) of the EAPWDA.

In the AR, it is indicated that the appellant needs continuous support with *Able to develop and maintain relationships*, and *Interacts appropriately with others*. He also has marginal/very disrupted functioning with his social networks. No information is provided to corroborate the restrictions described in the appellant's submissions that portray him as a "shut-in" (unable to go to doctor's appointments and stores on his own due to anxiety and panic attacks). Dr. A. provides comments of a more general nature ("anxiety affects his ability to interact with others" and "hampers (his) ability to interact meaningfully with others") and she circled "major social isolation." The psychiatrist notes that the appellant is very isolated, is without much family support and has an unhealthy living situation. While it is clear that the appellant's precarious living situation is exacerbating his medical condition, the evidence indicates he does not leave the house for fear of being evicted due to housing rules, and not solely because of his anxiety and depression.

In light of the contradictory evidence for Social functioning between the PR and AR and the lack of detailed information in Dr. A.'s note and the psych. consult report regarding direct and significant restrictions in the areas of social functioning that are listed in the Regulation, the panel finds that the ministry reasonably determined there was not enough evidence from a prescribed professional to confirm that Social Functioning is directly and significantly restricted either continuously, or periodically for extended periods. As all other DLA are assessed as not restricted or as independent, the panel finds that the ministry reasonably determined the criteria in section 2(2)(b)(i) of the EAPWDA were not met.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The appellant argues that due to his anxiety, he was forced to give up his own apartment and move in with family for assistance (both physical and emotional support - his relative drives and accompanies him to doctor's appointments and shopping as he can no longer safely drive a car or use public transit). The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry notes that neither the PR nor the AR indicates that the appellant has any aids for his impairments or receives assistance from other people.

In the PR, Dr. F. indicates the appellant does not require any prostheses or aids for his impairment; and he does not need any assistance with DLA. In the AR, Dr. A. indicates the appellant needs support/supervision with most areas of Social functioning and he would benefit from psychological therapies. Regarding assistance provided by other people; assistive devices; or an assistance animal, Dr. A. wrote, "N/A."

Confirmation of direct and significant restrictions to DLA is a precondition of the need for help to perform DLA criterion. As the panel found that the ministry reasonably determined that significant restrictions to DLA were not established by the information provided, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined the appellant was not eligible for PWD designation, is reasonably supported by the evidence and is a reasonable application of the legislation. The panel confirms the decision and the appellant is not successful on appeal.