

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated June 18, 2018, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age and duration requirements, but was not satisfied that:

- the appellant has a severe physical and/or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of 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 information before the ministry at the time of reconsideration included the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) both completed by the appellant's general practitioner (the "GP") and dated March 17, 2018. The GP has known the appellant 2 days and saw the appellant once in hospital in the past 12 months prior to completing the PWD application. The PWD application was completed by conducting a hospital interview with the appellant and file/chart information. The PWD application also included the appellant's Self-Report (SR) dated March 15, 2018.

The evidence also included the appellant's Request for Reconsideration (RFR) dated June 7, 2018. In RFR the appellant, in part, stated the following:

- He struggles daily and must check his sugar levels every 2 hours.
- When sugar levels are low he has hypoglycemia.
- His wife must wake him in the middle of the night several times or he may slip into diabetic coma.
- He suffers from pain, numbness and pressure in the feet and legs and therefore cannot stand.
- He is extremely sleepy and needs rest.
- He needs assistance from his wife daily to manage his diabetes.
- He struggles with severe cataracts in both eyes.
- He cannot read any food labels, print and sugar levels on his diabetes machine or insulin pen. Therefore he needs his wife to assist him with reading his sugar levels 8 times per day. She also assists with writing.
- He has severe dental issues and pain when eating.

Diagnoses

In the MR, the GP diagnosed the appellant with Diabetes Mellitus Type I (onset – longstanding), Diabetic Ketoacidosis (DKA) – not chronic (onset March 2018) and Anxiety/Depression (onset January 2018).

Physical Impairment

In the MR and the AR, the GP indicated the following:

- "Patient is a long standing type I diabetic [and] recently couldn't afford medication. As a result he developed diabetic ketoacidosis [and] admitted to hospital".
- "He would have generalized weakness and lacks motivation [...] is at risk of hypoglycemia".
- "Once chemically stable he would be able to do general tasks (non-manual tasks)".
- The appellant can walk 4+ blocks and climb 5+ steps unaided, can lift an unknown amount of weight and sit without limitation.
- The appellant independently manages all listed tasks under mobility and physical ability; namely walking indoors/outdoors, climbing, standing, lifting and carrying/holding.

In the SR, the appellant indicated that he has type I diabetes (recent DKA).

Mental Impairment

In the MR and AR, the GP indicated the following:

- "He also was found to have moderate anxiety [and] some depression".
- The appellant "lacks motivation".
- There are no difficulties with communication.
- There are significant deficits with cognitive and emotional function in the area of emotional disturbance.
- The appellant has good speaking, reading, writing and hearing.
- There are no major impacts to any listed areas of cognitive and emotional functioning and there are moderate impacts to emotion, attention/concentration and motivation. There are minimal impacts to executive functioning and no impact to the remaining listed items under cognitive and emotional functioning.
- He is independent with all listed tasks of social functioning and has good functioning with immediate and extended social networks.

In the SR, the appellant did not indicate that he has a mental impairment or that his physical impairment has an impact on his mental functioning.

Daily Living Activities

In the MR, the GP indicated the following:

- The appellant is not prescribed medications/treatments that interfere with his ability to perform DLA.
- When asked 'Does the impairment directly restrict the person's [appellant's] ability to perform Daily Living

Activities?' the GP answered 'No'.

In the AR, the GP indicated the following:

- When asked 'what are the applicant's [appellant's] mental or physical impairments that impact his/her ability to manage Daily Living Activities?', the GP answered "none".
- All listed tasks indicated under 'personal care', 'basic housekeeping', 'shopping', 'meal planning', 'pay rent/bills', 'medication', and 'transportation' are performed independently.

In the SR, the appellant stated that diabetes has affected his ability to work with low energy, sweating and difficulty to function for long periods of time.

Help

In the AR, the GP indicated the following:

- The appellant does not require any prostheses or aids for her impairment.
- No equipment or devices are used by the appellant for assistance.
- Assistance is not provided by an assistance animal.
- Help with DLA is provided by family.

In the SR, that appellant stated that he is lucky to have his wife take care of him.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated June 26, 2018, which stated, in part, that:

- The appellant is ill daily and is severely impaired.
- The diabetes significantly restricts his daily activities and he needs assistance daily from his wife to manage his diabetes type I.
- The appellant's condition has gotten worse since being hospitalized and his GP was given wrong information at the time.

At the hearing the appellant reiterated much of what he stated in the RFR and NOA. He also stated, in part, the following:

- 3 months ago he was admitted to hospital due to complication resulting from the mismanagement of his diabetes. He has not had a family or regular physician.
- He cannot afford his long acting insulin medication and is using instant insulin instead which caused his DKA. He should have been using 50 units of his medication daily but due to affordability he used only 22 units.
- His father passed away at age 48 due to complications from Type I diabetes and his mother had her leg amputated from below the knee due to diabetes. A few months ago his mother also passed away due to complication from Type I diabetes.
- The social worker at the hospital advised him to quickly get his PWD application in so he rushed filling out the application.
- He saw 7-8 doctors while in hospital and had the discharge doctor (the GP) complete the PWD application even though the doctor had only seen him a total of 15 minutes over 2 visits. He realizes that this was a mistake.
- He stated that at the time of discharge he did not disclose to the GP his pain in his feet and legs, his dental issues and issues with his eyes. He felt that the doctor could not do anything about the medical condition so did not bother telling him. Also he is not in the habit of disclosing his pain or ailments and also felt bad about his troubles. Therefore he kept this information to himself. He was depressed about his situation and could not climb out of it by himself. He states he thought the doctor was discussing issues relating to his discharge from hospital and did not realize the doctor was interviewing him for the AR.
- He was prescribed medication to help him deal with his feelings but he found that the medication simply numbed his feelings and made him sleepy rather than treating or providing a cure for his feelings. He has since stopped taking the medication.
- He has not been able to walk 4 blocks unaided in years.
- Once being diagnosed with Type I diabetes 4 years ago, he had to re-teach himself to walk once released from hospital. This took 4 weeks to do.
- He can do some yard work but after 10 minutes he will start to shake and sweat and needs to check his sugar levels.
- He experiences low sugar at night time too.
- 4 years ago he had all of his teeth and had \$10 000 worth of work done on his teeth. However, due to diabetes he is losing his teeth and/or they are chipping/breaking away.

- He repeated the information regarding his eyes (cataracts) which was provided in the RFR. He also stated that he is now schedule for surgery on one eye.
- He must attend the food bank and the Salvation Army to have his nutritional needs met as he cannot afford a proper diet. Even with aid from the food bank, he still does not have the nutritional essentials for a diabetic diet.
- There is much financial pressure as well resulting from their unique family situation and caring for his mother.
- He needs a referral to a foot specialist but must first find a family physician, which he is actively working on.
- He suspects he has vascular disease like his mother did.
- No doctor has monitored his diabetes for the past 4 years. This is due to the fact he has not family physician and because he does not seek medical attention until necessary.
- The GP did not interview him for the PWD application but did at discharge.

At the hearing the ministry relied on its reconsideration decision and added that it relies on the information provided by the prescribed professional to make a decision. For this reason, the ministry cannot consider the appellant's testimony at the hearing.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

In this case, the panel found that the appellant's NOA and testimony provided additional detail or disclosed information that was in support of the information addressed in the reconsideration decision. Accordingly, the panel has admitted this new information from the as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*. However, the panel finds that the information about the appellant's cataracts (or eye-related problems), pain in the feet and legs or dental ailments has not been confirmed by the GP or any other prescribed professional. As a result, the panel places little weight on the appellant's reference to his cataracts, pain in the feet and legs or dental ailments.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable when concluding it was not satisfied that

- the appellant has a severe physical and/or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, to perform DLA?

Relevant 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 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.

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

(a) authorized under an enactment to practice 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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

Panel Decision

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively or for a reasonable duration. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Physical Impairment

The appellant's position is that his Type I diabetes is a severe impairment which impacts his daily living.

The ministry's position is that based on the assessments provided by the GP in the PWD application and the SR, a severe impairment of physical functioning has not been established and therefore the legislated criteria has not been met.

In addition to the GP's narrative as indicated above, the ministry noted that the GP indicated that the appellant is able to walk 4+ blocks unaided, climb 5+ stairs, it is unknown how much he can lift and no limitations with remaining seated. The ministry noted that in terms of mobility and physical ability, the GP indicated that the appellant independently managed all listed tasks; namely walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding. The ministry noted that though the GP did not indicate how much the appellant can lift in the MR, in the AR the GP did indicate that the appellant is independent with lifting. The ministry found that it is

not satisfied that the information provided is evidence of a severe impairment.

The GP indicated that “once chemically stable [the appellant] should be able to do general tasks”. The appellant has stated that he was not taking the correct dosage of medication, which would indicate that he mismanaged his care. However the GP is clear that once managed properly or once stable the appellant should function better.

The panel notes that in the RFR the appellant detailed the inability to read and that his wife helps him with writing. However, in the AR, the GP indicated that the appellant has good reading and writing. Moreover, the appellant stated that once he has his eye surgery, which is scheduled for this year, he should be able to see well.

The panel notes that the GP indicated that the PWD application was completed via hospital interview and file/chart information. The panel notes the appellant testified that at the time of discharge (the only interview that was conducted by the GP) he was not forthcoming about all of his medical conditions and that he omitted telling the GP about his pain in the feet and legs, the problems with his eyes and his dental issues. The appellant also testified that he does not have a family physician or see a doctor unless at a serious stage in which case he attends the hospital emergency ward. The panel understands that the appellant’s lack of disclosure about his medical conditions at discharge and to other physicians, such as a family physician or walk-in-clinic physician, left the GP at a disadvantage because the appellant’s medical files and charts were incomplete. However, the legislation is clear that the ministry has to be satisfied of a severe impairment and the ministry was clear that it relies on the information provided by the prescribed professional in order to make this determination. The assessments provided by the GP describe good physical functioning and good mobility and physical ability, and do not describe a severe physical impairment.

Given the assessments of the appellant’s functional ability, and mobility and physical ability in the PWD application and the fact that no additional or supporting information was provided at appeal, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment and the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Mental Impairment

Though the appellant has been diagnosed with anxiety and depression, in his SR, RFR, and NOA or at the hearing he did not argue that his anxiety and depression constitute a severe impairment.

The ministry’s position is that based on the assessments provided by the GP in the PWD application and the SR, a severe impairment of physical functioning has not been established and therefore the legislated criteria has not been met.

In addition to the GP’s narrative as indicated above, the ministry noted that, in the MR, the GP indicated that the appellant has significant deficits in the area of emotional disturbance. However in the AR, the GP indicated only a moderate impact to emotion. The ministry noted that the GP indicated that the appellant has good ability with all listed areas of communication, no major impacts to the listed areas of cognitive and emotional functioning, moderate impacts to emotion, attention/concentration and motivation, minimal impacts to executive functioning and no impacts to the remaining items in this section. In addition the ministry noted that the appellant is independent in all listed areas of social functioning, has good functioning with immediate and extended social networks, the need for support/supervision with social functioning is not described and there is no indication of safety issue with social functioning.

The panel notes that the GP indicated that the appellant lacks motivation. In addition, the panel finds that the assessments provided by the GP describe good mental functioning, and do not describe a severe mental impairment.

Given the assessment of the appellant’s mental functional ability provided by the GP and the fact that no additional or supportive information from the GP was provided at appeal, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe mental impairment and the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant’s ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry’s determination as to whether or not it is satisfied that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. The term “directly” means that there must be a

causal link between the severe impairment and the restriction. 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, it must be for extended periods. Inherently, any analysis of periodicity 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 listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant argued that his diabetes impacts his daily activities.

The ministry argued that the GP does not indicate or describe restrictions to daily living activities throughout the entire PWD application, and therefore the legislated criteria have not been met.

The ministry noted that the GP indicated that the appellant is not prescribed any medications or treatments that interfere with the appellant’s ability to perform DLA. The ministry noted that the GP indicated that the appellant’s impairment does not directly restrict his ability to perform DLA. The ministry noted that all listed tasks indicated under ‘personal care’, ‘basic housekeeping’, ‘shopping’, ‘meal planning’, ‘pay rent/bills’, ‘medication’, ‘transportation’ and ‘social functioning’ are performed independently.

The ministry concluded that there is 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 considered the assessment by the GP in the PWD application of independence with all DLA and that no additional or supporting information was provided from a prescribed professional at appeal to support the appellant’s position. The panel notes that at the hearing the appellant did not specify how his DLA are directly and significantly impacted by his medical conditions. The panel finds that the evidence provided by the GP does not describe or indicate that a severe impairment restricts the appellant’s ability to perform his DLA either continuously or periodically for extended periods.

Given this evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

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’s position is that he requires the help from his wife.

The ministry argues that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established, 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 that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one)

 UNANIMOUS BY MAJORITY

THE PANEL

 CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:*Employment and Assistance Act*Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b) **PART H – SIGNATURES**

PRINT NAME

Neena Keram

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/07/18

PRINT NAME

Kulwant Bal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/07/18

PRINT NAME

Rosalie Turcotte

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/07/18