

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated August 14, 2018, which found that the appellant did not meet three of the five 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 requirement and that the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, 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

With the consent of the parties, the hearing was conducted in writing pursuant to Section 22(3)(b) of the *Employment and Assistance Act*.

Information before the ministry at reconsideration

A PWD application comprised of the appellant's 8 page Self-Report (SR) received by the ministry on January 29, 2018, a Medical Report (MR) and an Assessor Report (AR) both dated January 7, 2018 and completed by the appellant's general practitioner (GP) who has known the appellant since November 2016 and seen him 2-10 times in the past 12 months.

The appellant's Request for Reconsideration (RFR) dated July 19, 2018

Diagnoses

In the MR, the appellant's GP identified the following specific diagnosis giving rise to the appellant's impairment; Musculoskeletal system-other, adding MVA (motor vehicle accident), neck/back pain, and onset unspecified.

In the AR where asked to describe the appellant's mental or physical impairments that impact his ability to manage daily living activities, the GP wrote MVA injuries.

Physical Impairment

In the MR, when asked if the appellant requires any prostheses or aids for his impairment, the GP reported "No". For functional skills, the GP reports that the appellant is able to walk 2 - 4 blocks unaided on a flat surface, climb 5+ steps unaided, lift 5-15 lbs and remain seated less than 1 hour. In terms of health history, the GP indicates that the appellant was injured in an MVA and suffers from neck and back pain, right shoulder pain, hand pain and paresthesia, HA, insomnia, memory deficits, anxiety, tinnitus and difficulty hearing.

In the AR, the GP describes the appellant as independent while walking indoors and requiring continuous assistance from another person or unable for walking outdoors (can't do long distances), climbing stairs (can't do long distances), and standing (can't stand/sit for prolonged periods). For lifting and carrying and holding it was noted only as can't lift heavy loads.

In his Self-Report, the appellant writes that while he has trained and played sports his whole life, he can't walk or stand for more than 10 to 20 minutes, has weariness in his right arm and his hand and fingers are numb. He indicates that he has tried odd jobs and can work through the pain and discomfort.

Mental Impairment

In the MR, the GP indicates the appellant has difficulties with communication and notes the cause as sensory and comments that tinnitus affects the appellant's communication as he can't hear too well.

The GP identifies the following significant deficits with cognitive and emotional function; consciousness, executive, memory, emotional disturbance, motivation, motor activity and attention or sustained concentration.

In the AR, the GP notes the appellant's good ability to communicate in the areas of speaking, reading and writing while noting under hearing that he "Hears a motor running always in the background."

With respect to cognitive and emotional functioning, the GP notes no or minimal impacts for psychotic symptoms, other neuropsychological problems, impulse control, insight and judgement and motivation. A moderate impact is noted for bodily functions, emotion, motor activity and language while a major impact is noted for consciousness attention, executive and memory. No comments are provided.

The appellant is noted to have good functioning with his immediate and extended social networks.

In his Self-Report, the appellant states that from the first day of his head injury which happened more than a year ago, he hears a constant motor running in his head with a background noise like a wa-wa-wa. It's about half as loud as normal volume and he hears it every day, every hour, every minute, and 24/7. The appellant states that his memory is very bad and he forgets constantly from one word to the next. The appellant adds that he finds it hard to write with the ongoing noise in the background.

The appellant indicates that he doesn't sleep properly and when he sleeps it is for only 2 hours at a time he is very edgy and can't concentrate with this constant noise. He never has quiet, is hugely frustrated because he can't understand correctly. In any given sentence, he will miss two words. The appellant states that he is a musician and he can't even play or listen to music properly anymore. This is all very hard on his motivation, self-esteem and self-worth. He indicates that it is definitely not getting better but worse.

Daily Living Activities

In the MR, the GP reports that the appellant has not been prescribed medication that interferes with his ability to perform DLA.

The GP reports that the appellant is independent with all aspects of DLA under:

- Personal care; dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair.
- Meals; meal planning, food preparation, cooking and safe storage of food.
- Pay Rent and Bills; banking, budgeting and pay rent and bills.
- Medications; filling/refilling prescriptions, taking as directed and safe handling and storage.
- Transportation; getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.
- Social Functioning; appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to secure assistance from others while able to deal appropriately with unexpected demands has only the notation, (Gets stressed out easily).

Some DLA restrictions are noted as follows:

- Under Basic Housekeeping, laundry and basic housekeeping are noted to require periodic assistance from another person with a notation, (Appellant has pain doing it).
- Under Shopping, continuous assistance from another person or unable is indicated under going to and from stores (can't do long distances) and carrying purchases home (can't lift heavy loads) while independent in the other aspects of reading prices and labels, making appropriate choices and paying for purchases.

In his self-report, the appellant states that his head and understanding are so bad along with his nerves and the frustration of not being able to start or complete a task properly and safely that he finds it very hard on his motivation, self-esteem and self-worth.

Assistance Required

In the MR under; "Does the applicant require any prostheses or aids for his impairment?" The GP indicates, "No".

The AR indicates that help is provided by friends noting "girlfriend".

Notice of Appeal

In his Notice of Appeal (NOA) dated August 17, 2018, the appellant writes that he disagrees with the reconsideration decision because since his injuries, he has head trauma, a "SYNAPTIC CLEFT" in his brain that filters or processes what he hears and it is not working properly, distorting everything that is heard as a different word and making it impossible at most times to respond correctly or safely.

The ministry stood by their reconsideration decision.

Admissibility of Additional Information

The panel finds that the information provided by the appellant in his NOA is in support of the information and records that were before the ministry at reconsideration, as this information corroborates the information provided by the appellant in his PWD application. The panel therefore admits this information as evidence pursuant to Section 22(4) of the *Employment and Assistance Act*.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reconsideration decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the EAPWDA for designation as a person with disabilities is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

The ministry found that the appellant met the age requirement and that the appellant's impairment is likely to continue for at least two years.

However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The following Sections of the EAPWDA apply to this appeal:

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 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.

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.

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided is evidence of 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.

"Impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively for a reasonable duration. To assess the severity of impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations/restrictions of physical functioning, mental functioning, ability to perform DLA, and help required with DLA.

Severity of Physical Impairment

The appellant's position is that he can't walk or stand for more than 10 to 20 minutes, has weariness in his right arm and his hand and fingers are numb.

The ministry notes that the GP reports that the appellant is able to walk up to 4 blocks and climb 5 or more steps without the assistance of another person, assistive device or assistance animal. He is also reported to lift up to 15 lbs and remain seated for durations less than one hour. In the AR, the GP indicates that the appellant is independent with walking indoors and requires continuous assistance with walking outdoors, climbing stairs and standing. The ministry submits that the narrative provided ("can't do long distances") does not establish that continuous assistance is required for these tasks, especially as the appellant was noted in the MR to be able to walk up to 4 blocks and climb 5 or more steps without assistance. The GP does not indicate whether the appellant is independent or requires assistance with lifting, carry and holding, but notes he cannot lift, carry and hold heavy loads. The minister determines that given the appellant is reported in the MR to be able to lift up to 15 pounds, a severe impairment cannot be established in this regard. While the GP indicates that the appellant can't stand/sit for prolonged periods the ability to remain seated for long periods does not, in and of itself, establish a severe degree of impairment.

The ministry acknowledged that based on the assessments provided by the GP in the appellant's PWD application although the appellant has some limitations with regard to his mobility and physical abilities, a severe impairment of his physical functioning has not been determined.

The legislation requires that the minister be "satisfied" that the person's impairment is severe. The panel therefore finds that the ministry was reasonable in relying on the independent and professional opinion of the GP who has known the appellant since 2016.

The panel notes that for the purposes of determining eligibility for PWD designation, an applicant's employability or ability to work is not taken into consideration. While the panel acknowledges that the appellant has physical limitations as he cannot walk long distances, stand or sit for prolonged periods, and/or lift, carry and hold heavy items; the appellant has indicated that he has tried odd jobs and can work through the pain and discomfort. The panel therefore finds that the appellant's physical limitations as described by both the appellant's GP and the appellant himself are not of a severe nature as required by the legislation. The panel concludes that the ministry was reasonable to determine that the GP's assessment of current physical functioning does not reflect a severe

physical impairment. Therefore, the panel finds that the ministry was reasonable in its determination that the evidence does not establish a finding that the appellant suffers from a severe physical impairment pursuant to Section 2(2) of the EAPWDA.

Severity of Mental Impairment

The appellant's position is that he is disabled because as a result of his head trauma, his brain filters or processes what he hears and is not working properly, distorting everything that is heard as a different word and making it impossible at most times to respond correctly or safely. He hears a constant motor running in his head with a background noise like a wa-wa-wa, every day, every hour, every minute, and 24/7. According to his ear specialist it is very unlikely this condition would fix itself. The appellant states that his memory is very bad and in any given sentence, he will miss two words. This is all very hard on his motivation, self-esteem and self-worth. He argues that it is definitely not getting better but worse.

The ministry notes that the GP refers to the constant "motor running" sound that the appellant hears, his insomnia, that he is unable to focus and that he is fatigued. It is reported that the appellant has some difficulties with communication as a result of sensory issues and the tinnitus affects his communication as he cannot hear well. In the AR, the appellant is reported to have good abilities in all other areas of communication (speaking, reading and writing). In the MR, the GP indicates significant deficits in most of the appellant's cognitive and emotional functions while in the AR, it indicates that the appellant's daily functioning is majorly impacted in the areas of consciousness, attention/concentration, executive and memory. However, the GP provides no further information regarding the appellant's impairment and how it impacts daily cognitive and emotional functioning to establish a severe degree of impairment. Furthermore, the ministry notes that the appellant is reported to have moderate, minimal or no impact to the majority of daily functioning areas; as he is independent in almost all of his social functioning, daily living activities, care and finances.

The ministry acknowledges that it is clear that the appellant's life is impacted as a result of his constant tinnitus. However, the minister has determined that there is insufficient evidence provided to conclude that the appellant has a severe mental impairment.

The panel notes that while the appellant has not been identified with a mental impairment or brain injury by a prescribed professional, he often refers to having a head injury. The appellant also mentions comments from an ear specialist about his tinnitus and hearing problems, yet there is no medical evidence provided by the specialist to support the appellant's statements. The panel recognises however that the appellant's GP has confirmed that the appellant suffers from tinnitus, insomnia and has difficulty hearing nonetheless has not recommended any medication or treatment.

The panel also notes that for DLA that are specific to a mental impairment under Section 2(1)(b) of the EAPWDR, such as making decisions about personal activities, care or finances and relating to, communicating or interacting with others, except for problems with hearing, the reports do not mention any restrictions in terms of decision making and social functioning. Subsequently, the panel does not have a clear understanding from the information provided as to how the appellant's medical conditions would constitute a severe mental impairment that impacts his daily cognitive and emotional functioning given that he is independent in almost all of his daily living activities. The panel therefore finds that the ministry reasonably determined that the assessment provided by the appellant's GP did not establish a severe mental impairment pursuant to Section 2(2) of the EAPWDA. .

Restrictions in the Ability to Perform DLA

The appellant's position is that his head and understanding are so bad along with his nerves that he is frustrated from not being able to start or complete a task properly and safely.

The ministry notes that the appellant's GP reports that he is independent in almost all of his DLA. He is reported to require periodic assistance with basic housekeeping and laundry and requires continuous assistance with going to and from stores and carrying purchases home from shopping. The GP narrates that the appellant has pain doing basic housekeeping, can't go long distances to and from the store, and can't lift heavy loads when carrying purchases home. When these comments are considered in conjunction with functional skills as reported in the MR; walk up to 4 blocks without assistance, lift up to 15 pounds, it is difficult to establish a significant restriction in these areas, either continuously or periodically for extended periods.

In regards to social functioning, the GP reports that the appellant is independent in most areas but that he gets stressed out easily when dealing appropriately with unexpected demands, yet does not indicate that he requires support/supervision in this area as a result.

Based on the information provided by the GP, the ministry is 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 the daily living activities set out in the legislation.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be the result of a severe impairment, a criterion not established in this appeal. The legislation under Section 2(2)(b)(i) of the EAPWDA requires the minister to assess severity considering the opinion of a prescribed professional, in this case the GP as to direct and significant restrictions. This does not mean that other evidence should not be factored in as required to provide explanation of the professional evidence, but the legislative language is clear that a prescribed professional's evidence is fundamental to the ministry's determination whether it is "satisfied." And for the minister to be "satisfied," it is reasonable for the ministry to expect that a prescribed professional provides a clear picture of the extent to which the ability to perform DLA is restricted, as assessed in terms of the nature and duration of help required, in order for the ministry to determine whether the restrictions are "significant."

As the appellant is reported as able to independently manage the majority of tasks of daily living activities, the panel finds it difficult to assess whether the appellant's condition directly and significantly restricts his ability.

While the panel acknowledges that the appellant has pain in his back and numbness in his hands, without more information from a medical professional on the frequency, duration, and nature of help required, the panel finds that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established.

The panel finds that the ministry reasonably determined that there is insufficient evidence from the prescribed professional to show that the appellant's overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods. Therefore, the panel finds that that the requirement pursuant to Section 2(2)(b)(i) of the EAPWDA was not established by the evidence.

Help Required

The appellant's position is that help is provided by friends.

The ministry has determined that as it has not been established that DLA are significantly restricted continuously or periodically for extended periods, it therefore cannot be determined that significant help is required from other persons.

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 a DLA.

Based on the evidence, the panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and that this was a reasonable application of the legislation, therefore confirms the decision. The appellant's appeal, therefore, is not successful.

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

Lynn Twardosky

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/09/27

PRINT NAME

Joan Cote

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/27

PRINT NAME

Charles (Charlie) Schellinck

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/27