

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 August 9, 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 May 25, 2018. The GP has known the appellant for 2 months and saw the appellant 2-10 times in the past 12 months prior to completing the PWD application. The PWD application was completed by conducting an interview with the appellant. The PWD application also included the appellant's Self-Report (SR) dated May 11, 2018.

The evidence included the appellant's Request for Reconsideration (RFR) dated July 31, 2018. In the RFR the appellant, in part, stated the following:

- He had a car accident in June 2017 in which he suffered an injury to his right wrist.
- On July 17, 2018 he was finally able to get a surgery date for a scaphoid 4 corner fusion for his right wrist.
- He has been in a cast for 6 weeks.
- Since the surgery, his everyday life has changed drastically – he cannot tie his shoes, put on socks, prepare food without help, drive, write with a pen, lift anything with his right hand or hold a welding gun. He experiences difficulty with going to the bathroom and taking a shower.

The evidence also included:

- 3 pictures of his right wrist (2 showing incisions and 1 showing the wrist in a cast),
- A letter from the GP (signed and dated May 25, 2018) which stated that the appellant is unable to work at his current job and retraining into a profession that will not require hard physical work on the wrist is recommended.
- A letter from another physician (signed and dated June 15, 2018) which suggests retraining/vocational change.

Diagnoses

In the MR, the GP diagnosed the appellant with right scapholunate separation (onset 2018), essential hypertension (onset 2018), subdural bleeding (onset 2018), polycystic kidneys (onset birth) and methamphetamine addiction (onset 2016).

Physical Impairment

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

- "Suffered a subdural bleeding likely due to a traumatic event" – "he had it drained in March 2018".
- Right wrist injury and "he cannot do physical work like his welding anymore due to pain in the wrist with grasping and holding".
- "He suffers from polycystic kidneys and is waiting for nephrology to see him. He has mild renal failure".
- The appellant can walk 4+ blocks unaided, climb 5 + steps unaided, lift up to 15lbs and remain seated without limitation.
- Independently performs walking indoors, walking outdoors, climbing stairs and standing.
- Takes significantly longer than typical to perform lifting and carrying/holding – with the comment: "pain [in the] right wrist with grasping" and "can't do job as welder".

In the SR, the appellant stated "I am waiting for surgery on my right wrist which is also my dominating (sic) hand so I am unable to work in my industry which is welding.

Mental Impairment

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

- He has been in rehabilitation for 3 months for addictions to methamphetamine.
- Significant deficits with cognitive and emotional function in the area of 'other' – methamphetamine addiction – "has completed 3 months of rehabilitation already".
- All aspects of communication (speaking, reading, writing and hearing) are good.

- In terms of cognitive and emotional functioning there are moderate impacts to impulse control and 'other' (methamphetamine addiction), no impacts to all other listed items in this category.
- All listed items under social functioning are performed independently.
- Good functioning with immediate and extended social networks with the comment: "functioning has improved since attendance of rehab unit".

In the SR, the appellant made no mention of a mental impairment.

Daily Living Activities

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

- The appellant is not prescribed medications/treatments that interfere with his ability to perform DLA.
- "Patient cannot return to job as a welder. He is waiting for surgical repair of his [right] wrist scapholunate separation. He is still in rehab for his methamphetamine addiction".
- "Painful wrist bone – scapholunate dissociation – awaiting surgical repair".
- All listed tasks in the category of 'personal care' are performed independently (namely: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair).
- All listed tasks in the category of 'basic housekeeping' are performed independently (namely: laundry and basic housekeeping).
- In the category of 'shopping', the tasks of 'going to/from stores, reading prices/labels, making appropriate choices and paying for purchases' are performed independently. The task of 'carrying purchases' home requires periodic assistance and the GP commented: "painful wrist, can't lift/grasp".
- In the category of 'meals' the task of meal planning is performed independently. The tasks of 'food preparation, cooking, safe storage of food' require periodic assistance and the GP commented: "can't lift or grasp with [right] hand".
- All listed tasks in the category of 'pay rent/bills' are performed independently (namely: banking, budgeting and pay rent/bills).
- All listed tasks in the category of 'medications' are performed independently (namely: filling/refilling prescriptions, taking as directed and safe handling/storage).
- All listed tasks in the category of 'transportation' are performed independently (namely: getting in/out of a vehicle, using public transit and using transit schedules/arranging transportation).

In the SR, the appellant left blank the section pertaining to his ability to care for himself.

Help

In the AR, the GP indicated the following about the appellant:

- Requires prostheses or aids for his impairment – with the comment: "he needs surgical repair to his wrist. He is waiting to see [a] hand surgeon".
- The GP left blank the section regarding equipment or devices used by the appellant for assistance.
- The GP left blank the section regarding assistance provided by an assistance animal.
- The GP left blank the section regarding assistance provided by other people

In the SR, the appellant did not indicate that he requires assistance with daily functioning.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated June 26, 2018, which stated, in part, that he needs a kidney transplant, brain surgery and had surgery on his wrist with the doctor indicating that he needs to retrain in regards to his career. This should allow him to qualify for PWD and if it does not then there may be a problem with the system.

Evidence Submitted Prior to the Hearing

- Letter from the appellant, which in part stated the following:
 - “I’ve been in a car accident in which I suffered a bad wrist injury in June 2017 ending up in surgery 1 year after accident with 2 different doctors 1 surgeon telling me that it’s best to retrain my career”.
 - “After surgery I will require at least 2 years of recovery with hopefully but probably not even 80% use from my wrist ever again”.
 - “I barely survived a brain aneurysm and emergency brain surgery in March 2018 and am recovering from that mentally disturbing my thoughts”.
 - “I have polycystic kidneys with exploding cysts inside of me that cause me to pee blood eventually leading me to a transplant”.
- Letter from the appellant’s GP, signed and dated August 24, 2018, which in part stated that the appellant suffers from a “severe [right] scapholunate dislocation with ORIF July 2018 and repair with a prolonged rehabilitation process, can only lift 5 lbs for 6-12 months. Will take prolonged recovery and expect 80% recovery hopefully. He suffered a subdural bleed and drainage March 2018, fully recovered but depression ongoing. He also has polycystic kidneys with mild renal failure, awaiting nephrologist treatment”.

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, the letter from the appellant and the letter from the GP dated August 24, 2018 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 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*.

PART F – REASONS FOR PANEL DECISION

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. 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 he qualifies for PWD because he has several physical impairments; namely the injury to his hand, post-surgery recovery, brain aneurysm which led to emergency brain surgery and polycystic kidneys with exploding cysts which will eventually lead to a kidney transplant.

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 stated previously, the ministry noted that the GP indicated that the appellant is able to walk 4+ blocks unaided, climb 5+ stairs, can lift up to 15lbs and there are no limitations with remaining seated. The ministry noted that in terms of mobility and physical ability as outlined in the AR, the GP indicated that the appellant independently managed walking indoors and outdoors, climbing stairs, standing, and takes significantly longer with lifting, and carrying/holding. The ministry noted the GP did not indicate how much longer the appellant takes with lifting and carrying/holding. The ministry also noted that, at the time of reconsideration, information regarding the appellant's surgery, recovery, and prognosis and functioning post-surgery was not provided. The ministry found that it is not satisfied that the information provided is evidence of a severe impairment.

The panel notes that, in the RFR and additional information, the appellant stated that his post-surgery recovery would last 2 years and he may regain 80% function of his wrist. In the letter of the GP dated August 24, 2018, the GP echoed that the appellant may regain 80% function of his wrist, he will only be able to lift 5 lbs for 6-12 months and that recovery will be "prolonged". The panel notes that the ministry was not privy to this information. The panel finds that the GP's letter dated August 24, 2018 does not specify how long post-surgery recovery is expected and clearly stated that the limitation to lifting is restricted to up to a 12 month period. Furthermore, the panel notes that in the PWD application, the GP repeatedly indicated that function was currently limited in the right hand only due to pain when lifting and grasping but that 80% return of function is expected hopefully. The panel also notes that in the AR (a pre-surgery assessment), the GP indicated that the appellant has 'good' ability to communicate, which included the ability to write; a task that requires the ability to grasp. The appellant has indicated that his right hand is his dominant hand and therefore it is likely that the appellant uses his right hand to write. The GP has not provided information on the appellant's post-surgery ability to write.

The panel also notes that the GP indicated that the PWD application was completed in an office interview. Therefore it is reasonable to conclude that the appellant had at least some input regarding the information provided by the GP. 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 additional or supporting information that was provide 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

The appellant argued that due to the limitations of his hand (wrist) and the prognosis of his kidneys he feels depressed and his brain surgery has led to disturbing thoughts.

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 mental functioning has not been established and therefore the legislated criteria has not been met.

In addition to the GP's narrative as indicated previously, the ministry noted that, in the MR, the GP indicated that the appellant has significant deficits in the area of 'other' – methamphetamine addiction. In the AR, the GP indicated only a moderate impact due to the methamphetamine addiction and a moderate impact in the area of impulse control and no impact in all other listed items under cognitive and emotional functioning. The ministry noted that the GP indicated that the appellant has good ability with all listed areas of communication (speaking, reading, hearing and writing). 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 GP further commented that since rehabilitation, the appellant's functioning in this area has improved.

The panel notes that the appellant stated that he feels depressed due to his situation and has disturbing thoughts; however he has not been diagnosed with depression or another mental impairment other than addiction. The GP has not provided information on how the appellant's methamphetamine addiction has impacted the appellant's overall mental state or functioning. The panel also notes that the appellant is in rehabilitation and the GP has not provided information on how sobriety may impact the appellant's mental state or functioning. The panel further notes, that in his May 25, 2018 and August 24, 2018 letters, the GP did not speak to the appellant's mental state or functioning.

Given the assessment of the appellant's mental functional ability provided by the GP does not indicate a severe mental impairment 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. 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 since his surgery his life has changed drastically and he is unable to do many normal functions of life (tie shoes, put on socks, prepare food, drive, lift anything with his right hand, write, and showering and toileting are difficult).

The ministry argued that the appellant is independent in almost all listed DLA and therefore it is not satisfied that he has an impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform the DLA set out in the legislation.

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 all listed tasks are performed independently except, food preparation, cooking, safe storage of food', and 'carrying purchases' home requires periodic assistance. However, the GP has not indicated the frequency, duration and degree of assistance required and therefore it is difficult to determine if periodic assistance is required for extended periods.

The panel considered the assessment by the GP in the PWD application of independence with almost all of the DLA and that no additional or supporting information was provided from a prescribed professional at appeal to support the appellant's position. 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 the 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)

2018/09/24

PRINT NAME

Susan Johnston

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/24

PRINT NAME

Robert Kelly

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/24