

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “ministry”) reconsideration decision of September 4, 2018, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner 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 those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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 following:

- The appellant's PWD application form consisting of the appellant's self-report form dated May 2, 2018; a physician's report ("PR") completed by a general practitioner at the drug treatment facility where the appellant is currently residing (the "physician") on May 2, 2018; and an assessor's report ("AR") also completed by the physician on May 9, 2018.
- The ministry's Denial Decision Summary dated June 22, 2018.
- A Request for Reconsideration form dated August 22, 2018, including a hand-written statement from the appellant indicating that his issue is substance use disorder; he has never been able to stay sober more than 30 days on his own and therefore his severity of impairment is high; and his doctor did not fully understand how to fill out the paper work.
- A letter from the physician dated August 7, 2018 in which the physician noted the appellant brought the ministry's denial letter to his attention and wishes to have it reconsidered, and that the appellant would like the ministry to note that given his past history the appellant is likely not to benefit from his time at a treatment centre and is likely to relapse. The physician wrote that he believes the appellant meets all the criteria for approval of PWD.

In his notice of appeal, dated September 13, 2018, the appellant wrote, "I don't think you have all the info right. I have been working more closely with my DR and my history was not properly explained."

At the hearing, the appellant again stated that he felt his history was not accurately portrayed in the application and that the physician did not spend a lot of time with him. He said he has been using drugs every day for the last 16 years (other than three years worth of time when he was either incarcerated or in treatment centres). When he uses, he cannot take care of himself, he does not shower or eat normally, and he goes for 4 days at a time without sleep. When he sleeps, he wakes up in opioid withdrawal, getting the shakes, vomiting, diarrhoea, and is paranoid. The withdrawal feels so bad he stays in a foetal position until he uses and then gets up to go out and buy more drugs. He can't control his emotions. Every feeling, good or bad, gives him the impulse to use. When he is using drugs, he uses every day so he is continually impaired. He said that treatment has never worked for him in the past. Even now, while he is clean, he obsesses about using, thinking about it 4-5 hours per day. He says he knows that when he gets out of treatment he will use drugs again. In response to questions, the appellant said he's been in treatment, clean, for 9 ½ months and has about 2 months left in the treatment facility. He says there is no plan for him once he leaves treatment. He is currently anxious, but can take care of himself right now. However, he feels like he is getting worse—that he wants to use. He also explained that his drug use is both a physical impairment (he gets "dope sick" with withdrawal and can't sleep) and a mental impairment (he can't get the feeling of needing to use out of his head).

At the hearing, the ministry stated that it can only assess what is on paper and that the ministry did not have enough information from a medical practitioner to support the PWD application. The ministry noted that the doctor focussed on the drug use, but did not explain the other medical consequences and conditions such as anxiety, lack of sleep, paranoia, etc., leaving the ministry without enough information to be satisfied that the conditions for PWD were met.

As per section 22(4) of the *Employment and Assistance Act*, the panel admitted the appellant's new oral evidence about his current anxiety and current impulse to use as being information in support of information that was in his PWD application before the ministry at reconsideration.

The panel assessed the medical evidence that was before the ministry at reconsideration as follows:

Diagnoses

In the PR the physician diagnosed the appellant with substance abuse disorder (onset 2000). He notes the appellant has used hard and soft drugs on a regular basis since age 14, has been incarcerated for 2 ½ years on drug related charges and has attended treatment in the past with poor results. The physician anticipates the appellant will require lifelong treatment for addiction, but also said that treatment may help to reduce his impairment.

Physical Impairment

In the PR the physician did not answer the questions related to functional skills concerning walking, climbing, lifting, or seating. In the AR the physician indicated that the appellant is independent in all areas of mobility and physical ability (walking, climbing, standing, lifting, carrying), but made the comment that these are “affected when using”.

Mental Impairment

In the PR the physician did not answer the question about whether there are any difficulties with communication. He did, however, note significant deficits in all areas of cognitive and emotional function with the note that “All of the preceding are adversely affected when using drugs,” and said that the appellant is restricted in social functioning (with no indication of whether this restriction is periodic or continuous) and periodically restricted in all other DLA.

In the AR the physician reported a good ability to communicate but “has deficit when using.” The physician noted major impacts in consciousness, emotion, and impulse control, and moderate impact in insight and judgment, attention/concentration, executive, memory, motivation, motor activity, language, psychotic symptoms, other neurological problems (not identified), and other emotional or mental problems (not identified). There are no comments or explanations provided to explain how these impacts affect the DLA. In the AR, the physician also noted the appellant needs periodic support/supervision with social functioning (“Affected by drug use”) and that the appellant has very disrupted functioning in both his immediate and extended social networks. The physician wrote that the appellant needs community support for his additional problems, but did not note any safety issues.

DLA

In the PR the physician left blank the question about whether the appellant has been prescribed any medication or treatments that interfere with his ability to perform DLA.

In the PR, the physician indicated the appellant had a periodic restriction in all areas of DLA (except for social functioning where he did not indicate whether the restriction was periodic or continuous), adding the comment that these areas are affected “while using drugs” and that the appellant functions reasonably well when clean.

In the AR the physician reported that the appellant independently manages all tasks related to DLA with the exception of social functioning, but said that all these areas are “impacted in a major degree when using.” As well, in respect of personal care, basic housekeeping, and shopping, the physician wrote that, “many of the areas are affected when not using.” With respect to social functioning, the physician reported the appellant needs periodic support or supervision as these are “affected by drug use.”

The physician provides no indication of how often the appellant uses drugs or how long the associated impairments last.

Help

In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment. He does not require an assistance animal.

The physician described that the appellant receives assistance from "Detox, Hospital, AA, Counselling (private)" and is currently in a one-year treatment program. He stated the appellant "needs ongoing professional counselling, addiction, social and medical services after current treatment."

PART F – REASONS FOR PANEL DECISION

The issue on this 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 in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

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 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.

EAPWDR section 2(1):

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.

Severe Impairment

A diagnosis of a serious medical condition such as substance abuse disorder does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the PR and AR form define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this definition is not binding on the panel, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

Severe Physical Impairment

The appellant's position is that he suffers a severe physical impairment as a result of his substance abuse. He cannot sleep when he uses and he gets "dope sick" or suffers physical withdrawal symptoms such as diarrhoea or vomiting. When he uses, these symptoms are a daily occurrence.

The ministry's position, as set out in the reconsideration decision, is that the physician does not describe the nature of any impacts to mobility or physical ability during periods of drug use, but notes that the appellant is independent with all listed areas of mobility and physical ability, and therefore the evidence did not establish a severe impairment of physical functioning.

Panel Decision:

While the appellant described the physical symptoms that he experiences when using drugs (i.e., sleeplessness, vomiting, diarrhoea), the physician did not describe any physical impairments related to mobility or physical abilities. Indeed, he declined to answer the functional skills section on the PR. In the AR, while the physician notes that mobility and physical ability is affected when using drugs, he lists the appellant as being independent in all areas. Accordingly, the ministry's determination of no severe impairment of physical functioning is reasonably supported by the evidence.

Severe Mental Impairment

The appellant's position is that he suffers from anxiety, and paranoia when using drugs, and an intense obsession about using drugs when he is clean, such that he cannot get the impulse to use out of his head. He says the impulse is such that he knows he will use again as soon as he is out of treatment.

The ministry's position is that there is insufficient evidence from a medical practitioner to establish a severe mental impairment. The ministry noted that while the physician states there are deficits with all listed areas of cognitive and emotional functioning and that these are adversely affected during periods of drug use, he does not describe the frequency of drug use, or whether any of these deficits operate during periods without drug use. Further, the appellant is currently in treatment, which the physician states may help reduce the appellant's impairment. Thus, the ministry concluded it is difficult to establish that the appellant will continue to experience deficits following treatment. While the physician states that the appellant will need support/supervision in the community due to his addiction problems, he does not describe the frequency of support required to assist with the appellant's social functioning. Finally, while the physician's letter of August 7, 2018 states the appellant's view (rather than a medical opinion) that the appellant is likely to relapse, the ministry noted the appellant is currently in treatment and may not be experiencing severe impacts to cognitive function.

Panel Decision:

The physician describes moderate and major impacts to cognitive and emotional functioning when the appellant is using drugs. But without any information from the physician on the frequency of drug use and/or information about whether any impacts occur during periods without drug use, it is difficult to establish a severe impairment. As well, the appellant is currently clean and is in treatment, where he has been for 9 ½ months. While the appellant expects to relapse as soon as his treatment ends, the physician states that the degree of his impairment may improve with treatment. In sum, the evidence shows that the appellant has had moderate and major impacts (of unknown duration or frequency) in the past when using drugs, but is currently in treatment and not using drugs. Without either a medical opinion to establish that the appellant is expected to relapse and suffer severe cognitive and emotional impairments, or medical evidence to establish severe mental impairments when the appellant is not using drugs, the panel finds the ministry's determination that there was insufficient evidence to establish a severe metal impairment is reasonably supported by the evidence.

Significant Restrictions to DLA

The appellant's position is that his impairment significantly restricts his ability to manage his DLA. He states that he functions normally when not using drugs, but that he cannot take care of himself at all when using.

The ministry's position is that there is not enough evidence to show that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods.

Panel Decision

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. 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. In circumstances where the evidence indicates that DLA are directly restricted, it is appropriate for the ministry to require evidence as to whether the restriction is continuous or periodic and – if periodic – of how frequently the restriction arises and how long it lasts.

In the AR, DLA are broken down into discrete tasks. The physician's evidence is that the appellant is independent in all DLA (except for social functioning) but is "impacted in a major degree when using". The physician does not explain what the impacts are to the DLA when the appellant is using drugs and he does not indicate the need for any assistance. With respect to social functioning the physician states that the appellant needs periodic support with the note "affected by drug use". It is not clear whether the appellant only needs this support during the periods when he is using drugs, (and hence the comment "affected by drug use") or whether he needs periodic

assistance to help him deal with his addiction regardless of whether he is using. The physician provides no description of the degree and duration of support/supervision required. In this context, where the medical assessor has marked nearly all of the DLA "independent" and where details are missing in respect of the periodic support required for one area of DLA, it was reasonable for the ministry to conclude there is not enough evidence to show that the appellant has a severe impairment that *significantly* restricts his ability to perform DLA continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he cannot stay clean and sober on his own and that he cannot function normally when using drugs.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that *significant* help is required from other persons.

Panel Decision

The appellant does not require any prostheses or aids or an assistance animal. The physician noted that the appellant requires "community support for his addition problems" in the form of "Detox, Hospital, AA, Counselling (private)" and is currently in a one-year treatment program with about 2 months left. The appellant will need ongoing professional counselling, addiction, social and medical services after current treatment.

A finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, the panel finds the evidence falls short of satisfying that precondition.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, and for the reasons provided above, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant is not successful in his 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

Kathy Grant

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

October 4, 2018

PRINT NAME

Jan Cotie

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

October 4, 2018

PRINT NAME

Charlie Schellinck

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

October 4 2018