

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated March 12, 2019, in which the ministry found that the appellant is not eligible for designation as a Person with Disabilities ("PWD") under section 2 of the *Employment and Assistance for Persons with Disabilities Act* ("EAPWDA"). The ministry found that the appellant meets the age and duration requirements, but was not satisfied that:

- the appellant has a severe mental or physical impairment;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities ("DLA") either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry also found that the appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation*. As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

PART D – RELEVANT LEGISLATION

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

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

PART E – SUMMARY OF FACTS

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

1. Information from the ministry's record of decision indicating that the PWD application was received by the ministry on January 2, 2019 and denied on February 8, 2019. On March 1, 2019, the ministry received the appellant's Request for Reconsideration ("RFR") and completed the review of the RFR on March 12, 2019.

2. The RFR, signed by the appellant's family physician ("Dr. L.") on February 25, 2019, with two submissions included:

- A hand-written submission from Dr. L. describing the appellant's physical limitations and need for assistance due to his chronic health conditions:
 - the appellant is unable to carry his young children or supervise them in outdoor activities;
 - the appellant's spouse acts as his caregiver;
 - the appellant is unable to work or contribute financially to his family;
 - the appellant has "significant back pain" that limits bending and carrying;
 - the appellant requires "extraordinary time" to complete tasks because he needs to rest frequently. He also cannot complete most tasks at home;
 - the appellant has a diagnosis of depression that prevents him from learning the language and culture of the workforce outside the home;
 - the appellant is not employable due to his physical impairment and he cannot do basic tasks such as carrying groceries, doing laundry, housework, or cleaning.
- A hand-written submission from the appellant's spouse, providing argument for the reconsideration and stating that the appellant is in pain most of the time despite taking a lot of medicine, and his health is declining day by day.

3. A letter from a social worker dated March 5, 2019, providing argument in support of the PWD application. The social worker states that the appellant's spouse takes on most of the family's childcare and household management responsibilities to compensate for the appellant's inability to contribute due to his chronic physical and mental health conditions.

4. The ministry's Decision Summary with attached letter, dated February 8, 2019.

5. The appellant's PWD application comprised of:

- the applicant information (self-report - "SR") dated December 19, 2018 and completed by the social worker;
- a Medical report ("MR") dated December 21, 2018, completed by Dr. L. who has known the appellant for 1 year, and has seen him 2 -10 times in the past 12 months; and
- an Assessor Report ("AR") dated December 12, 2018, also completed by Dr. L. who indicates he has known the appellant for 10 months. Dr. L. bases the assessment on an office interview with the appellant, file/chart information from a medical clinic (records for 2017), and information from the appellant's spouse.

Summary of relevant evidence from the application:

Diagnoses

In the MR, the appellant is diagnosed with diabetes (onset 2014), chronic back strain (onset 2002), steatohepatitis (onset June 2017) and depression (onset 2018). Under *Health History*, Dr. L. provides a description of the appellant's conditions:

- the appellant's back pain resulted from a work-related injury. The appellant is bothered by morning stiffness and takes pain medication twice a day. The appellant has tried physiotherapy which did not resolve his pain completely.

- The appellant saw a specialist who did a liver biopsy in 2018 and prescribed a low carbohydrate diet.
- The appellant has poor control of his blood sugar and takes diabetes medication.
- There is “evidence of a mood disorder”, depression.

The social worker reports in the SR that the appellant’s most significant disability is chronic back pain. The appellant experiences “constant pain” but tries to limit his reliance on pain medication due to side effects, including a negative impact on his liver and significant fatigue. The appellant began to experience depression when he was unable to work due to a back injury.

Functional skills

Self-report

The social worker reports that upon moving to a new community, the appellant’s depression worsened as he was unable to find work because of a language barrier and back pain. The social worker reports the following functional restrictions:

- The appellant is unable to lift items that weigh more than 5 kg.
- The appellant experiences a slower response time due to drowsiness caused by his medication. He is unable to fully engage with his children and this contributes to his stress and depression.
- The appellant has “limited movement” which is causing his muscles to become smaller and stiff.

Medical Report

Under section D, *Functional Skills*, Dr. L. indicates the appellant can walk 4 or more blocks unaided on a flat surface and climb 5 or more steps unaided. The appellant has limitations with lifting (under 2 kg) and with remaining seated (less than 1 hour). The appellant has no difficulties with communication other than a lack of fluency in English (“non-native speaker”). Under *Additional Comments*, Dr. L. confirms that the appellant has difficulty with understanding and communicating in English.

Dr. L. indicates yes, the appellant has significant deficits with cognitive and emotional function. Deficits are evident in 5 of the 12 areas listed: *Executive, Language, Emotional disturbance, Motivation, and Impulse control*. Dr. L. states that the appellant has “significant depression” since moving to a new community.

Assessor Report

Under section B-2, *Ability to Communicate*, Dr. L. indicates the appellant’s ability to speak is poor and due to his limited education (elementary school), he is unable to read or write in his native language or in English. The appellant’s ability to hear is satisfactory.

Under section B-3, *Mobility and Physical Ability*, Dr. L. marks the appellant as independent with 4 of the 6 listed skills: *Walking indoors, Walking Outdoors, Climbing stairs, and Standing*. Dr. L. indicates the appellant takes significantly longer than typical with *Lifting and Carrying/holding*. No explanation or comments are provided.

For section B-4, *Cognitive and Emotional Functioning*, Dr. L. indicates *to what degree the applicant’s mental impairment or brain injury restricts or impacts his/her functioning*:

- No impact is indicated for 2 of the 15 areas listed on the form: *Bodily functions and Consciousness*.
- A minimal impact is indicated for 4 areas: *Motor activity, Psychotic symptoms, Other neuropsychological problems, and Other emotional or mental problems*.
- A moderate impact is indicated for 7 areas: *Emotion, Impulse control, Insight and judgment, Attention/concentration, Executive, Memory, and Motivation*.
- A major impact is indicated for 1 area: *Language*.
- Under *Additional Comments*, Dr. L. indicates the appellant is depressed over trying to learn English, and he “cannot follow directions, constantly on phone, easily distracted, no motivation, poor executive function, relies on family to do things for him.”

Daily Living Activities

Self-Report

The social worker reports that the appellant is unable to carry groceries or lift household items that weigh more than 5 kg. The appellant is unable to lift his young children or bathe them due to back pain. The appellant's medication causes drowsiness, resulting in a "slower response time" and an inability to fully engage with his children which contributes to his stress and depression. Due to his back injury and pain, the appellant is unable to secure ongoing work which also contributes to his depression and stress. The appellant must always have access to his pain medication and therefore plans his day anticipating what activities he will be doing in case he requires his medication. The appellant needs help with dressing ("putting pants on and sometimes putting on shoes") and he sometimes requires help with bathing ("washing his legs and feet and drying them").

Medical Report

Dr. L. indicates Yes, the appellant has been prescribed medications or treatments that interfere with his ability to perform DLA. The appellant's medication causes drowsiness, and physiotherapy treatments have not improved his long term back issue.

Assessor Report

Dr. L. writes that the appellant's ability to manage DLA is impacted by "back pain and back problems" as well as a learning disability. In Section C of the AR, Dr. L. indicates restrictions with all DLA, except *Medications* which has no reported restrictions. Dr. L. indicates the following restrictions with DLA:

- *Personal Care*: The appellant requires continuous assistance with *Dressing* (comment, "needs help reaching his socks/feet/shoes/pants"). The appellant is independent with all other areas: *Grooming*, *Bathing*, *Toileting*, *Feeding self*, *Regulating diet*, *Transfers in/out of bed*, and *Transfers on/off chair*.
- *Basic Housekeeping*: The appellant requires periodic assistance with *Basic Housekeeping* and is independent with *Laundry*.
- *Shopping*: The appellant requires periodic assistance with *Making appropriate choices*. The appellant requires continuous assistance with *Reading prices and labels* (comment, "English labels difficult to read"), and with *Carrying purchases home* (comment, "difficulty lifting items that are heavy").
- Under *Additional comments*, Dr. L. writes that the appellant experiences pain with bending and lifting, "especially with heavier shopping items."
- *Meals*: The appellant requires periodic assistance with *Cooking* and with *Safe storage of food*. The appellant is independent with *Meal planning* and *Food preparation*.
- *Pay Rent and Bills*: The appellant takes significantly longer in all of the listed areas: *Banking*, *Budgeting*, and *Pay rent and bills*.
- *Transportation*: The appellant requires periodic assistance with *Getting in and out of a vehicle* (comment, "pain with shifting"). The appellant is independent with *Using public transit* and with *Using transit schedules and arranging transportation*.
- Under *Additional Comments*, no further information is provided.

For *Social Functioning*, Dr. L. checkmarks that the appellant requires continuous support/supervision with all of the areas listed: *Appropriate social decisions* (comment, "poor English skills, needs wife for interpretation, tends to be withdrawn"), *Able to develop and maintain relationships*, *Interacts appropriately with others*, *Able to deal appropriately with unexpected demands*, and *Able to secure assistance from others*.

Dr. L. indicates that the appellant has marginal functioning with his social networks. Under *Additional Information*, Dr. L. states that the appellant has been treated for back pain without any improvement, and "severe back strain" precludes him from performing physical work involving lifting and bending. The appellant needs assistance with dressing.

Need for help

In the MR, Dr. L. checks *No*, the appellant does not require any prostheses or aids for his impairment. In the AR, section D - *Assistance provided for applicant*, Dr. L. indicates that support/supervision is required to help maintain the appellant in the community (comments, "needs help with translating English." The appellant also has problems communicating in his native language).

Dr. L. checks that help with DLA is provided by family. No information is recorded for *Assistance provided through the use of assistive devices*. Dr. L. check marks that the appellant does not have an assistance animal.

Additional information

The appellant filed a Notice of Appeal with a hand-written statement which the panel accepts as argument. Subsequent to the reconsideration decision, the appellant provided two submissions with various documents (mainly medical records) requiring an admissibility determination in accordance with section 22(4) of the *Employment and Assistance Act*.

Appendix A (33 pages), received by the Tribunal on April 4, 2019

The documents submitted as Appendix A that are relevant to the reconsideration decision include:

- An email from the appellant's spouse dated April 3, 2019, indicating that Dr. L. has also confirmed "leg problems." The appellant is suffering from leg pain and his legs sometimes swell for no reason. Dr. L. has provided reports from another doctor and hospital records that explain the appellant's back pain and leg problems.
- A letter from a liver specialist dated February 1, 2018, stating that the appellant is receiving follow-up care for non-alcoholic fatty liver disease and the best way to address the condition is through dietary modification and regular exercise.
- A letter from an internal medicine resident student dated January 29, 2018. The letter states that the appellant has chronic back pain secondary to a trauma that occurred 12 years ago. The appellant is taking medication for his diabetes but has not been following his diabetic diet and does not exercise regularly. There is some loss of sensation in the appellant's toes, but otherwise normal sensation in the rest of his foot.

The appellant does not have a full understanding of the extent of his diabetes and is being referred to an education program with a translator for his native language. The appellant can benefit from changing his diet and engaging in regular exercise ("30 minutes 5 days a week"). The appellant reports that his back pain does not preclude him from walking and regular walking is therefore encouraged.

- 3 pages of laboratory test results for kidney function and breathing (oximetry) dated in September and October 2017.
- 17 pages of clinical notes from a diabetes education centre and two medical clinics, date range from January 13, 2016 to July 31, 2017, with attached laboratory test results and medication review information. The various clinicians that entered the notes recommend exercise and provide diet tips for the appellant's diabetes and liver conditions. The clinicians prescribe physiotherapy for the appellant's back pain to limit the risks associated with medication. The appellant reports that his medication "is the only thing that takes away his pain." Information from these clinical notes, regarding the appellant's functional abilities and associated symptoms is summarized as follows:
 - May 30, 2017: objective observations by a nurse practitioner indicate the appellant is "walking independently, normal gait, sit to stand with ease."
 - March 16, 2017: a physician reports that the appellant's back pain "remains unchanged from last visit." The appellant has no pain after taking medication but the pain returns as the medication wears off. The appellant reports difficulties with walking, standing up straight, rolling over in bed, and performing activities of daily living ("ADL") if he doesn't take his pain medication.

The appellant experiences "throbbing right lower back pain radiating through hip and down leg." He routinely takes medication due to "constant pain." Objective observations include "slow, steady gait, hunched slightly forward. Changing position from standing to sitting without difficulty... Needed minimal assistance to sit back up from lying flat."

- January 3, 2017: a nurse indicates the appellant was complaining of "persistent back pain... no change in the quality or type of pain." The appellant is diagnosed with muscle spasms and he experienced some improvement with physiotherapy sessions which are now completed. The appellant is not doing home exercises "because it hurts". The appellant reports "no change in back pain" and "no issues with medications."
- August 29, 2016: a physician notes mechanical lower back pain "with psychological components". The appellant is out of shape and has significant family stressors. The physician prescribes regular exercise, weight loss, and continuing physiotherapy and medication.
- July 19, 2016: a physician notes the appellant's ongoing back issues and states that the appellant's back/leg symptoms are "not progressive". The appellant is receiving physiotherapy and has been referred for a CT scan of his back. Objective observations include a normal gait when walking. The appellant presents with anxiety about physical symptoms over the course of many appointments. The appellant requires a mental health assessment at some point.
- April 22, 2016: a physician notes chronic low back pain radiating down the appellant's legs, the left leg in particular. An x-ray showed some signs of osteoarthritis but "no red flags." The appellant still has a lot of pain despite physiotherapy and medication and he feels that physiotherapy is not really helping. The appellant functions better when he takes his medication.

The physician discussed pain management and indicates that a "magic fix" is unlikely to make the appellant totally pain free. Objective observations include "shuffling gait, moving slowly", very tight lumbar muscles, normal reflexes, and subjective decreased sensation in the right foot versus the left.

- March 29, 2016: A nurse notes the appellant's throbbing lower back pain that radiates bilaterally to his feet. The appellant has no impaired sensation in his fingers or toes. Objective observations include "shuffling gait", and "able to stand and sit unassisted."
 - February 19, 2016: A physician notes ongoing back pain that is usually well controlled with medication. The appellant was counselled on medication management.
 - February 5, 2016: A physician notes back pain that radiates to both of the appellant's legs.
- 2 radiology reports (March 2016 and November 2016) describing technical findings for the appellant's lumbar spine, thoracic spine, and sacroiliac joints. The thoracic spine is normally aligned with "minimal" multi-level degenerative changes noted. "Mild degenerative changes" are noted for a right joint. The joints are otherwise maintained.
 - A letter from the appellant's liver specialist dated June 15, 2017, confirming findings consistent with non-alcoholic fatty liver disease. The appellant is referred for a liver biopsy.

Admissibility of Appendix A evidence

The panel finds that the Appendix A submission provides additional detail and background information on the medical conditions and functional abilities that are the subject of the reconsideration decision. Even though the documents themselves were not provided at the reconsideration, the appellant's physician, Dr. L. bases the PWD medical reports on the information from the various medical professionals. The appellant was routinely seen by these professionals before he became Dr. L.'s patient within the past year.

While the diagnosis of leg conditions is new information, the appellant's self-reports refer to back pain that limits his leg function and the documents in Appendix A which pre-date the MR and AR, refer to radiating leg pain as well as assessments of foot and toe motion. The ministry did not object to the Appendix A documents and the panel admits them under section 22(4) of the *Employment and Assistance Act* as evidence in support of the information and records that were before the minister when the decision being appealed was made.

Documents submitted at the hearing (77 pages)

[Panel note: the 25 pages that are duplicates of documents received with Appendix A, are not summarized below]

The documents submitted at the hearing that are relevant to the reconsideration decision include:

- An Emergency Department consultation report dated March 16, 2019 for treatment of cellulitis in the appellant's left foot. The appellant's past medical history includes diabetes and gout.
- An Emergency room ("ER") record dated October 15, 2018. The appellant presented with a lower extremity injury and the final diagnosis is gout.
- A radiology report for the appellant's bilateral knee exam dated October 15, 2018. The report includes some technical observations and states that no fractures or degenerative changes are seen.
- An Emergency Department consultation report dated October 15, 2018 with attached laboratory test results. The appellant presented at the ER with left knee pain and no history of injury. The ER physician states that the appellant likely has Osgood-Schlatter disease with an element of gout of the patellar tendon. Medications were prescribed and the appellant was advised to follow up with his family doctor regarding his "multiple other joint complaints."
- An ER record dated September 4, 2018, indicating the appellant had a "mis-step" while "running in the park." The appellant presents with pain and a throbbing sensation in his ankle. The appellant is observed with a limp and has difficulty positioning his ankle but is "able to weight bear." The final diagnosis is "ankle pain" and the attached *Radiology Diagnostic Report* of the right ankle indicates spurring but no fracture.
- An ER record dated September 9, 2017, indicating the appellant presented for voluntary blood tests. The attached laboratory results indicate the appellant tested negative for Hepatitis B, Hepatitis C, and HIV.
- 22 pages of clinical notes from a medical clinic, date range from January 13, 2016 to July 6, 2017, with attached laboratory test results and medication review information. Information from these clinical notes, regarding the appellant's functional abilities and associated symptoms is summarized as follows:
 - June 22, 2017: a nurse practitioner indicates back pain. The appellant is not going to physiotherapy and he required clarification on which medication to take for "breakthrough" pain.
 - May 25, 2017: the nurse practitioner reports that the appellant's back pain "remains unchanged." The appellant states that he manages with his medications. The appellant is not taking Tylenol or going to physiotherapy and he is not doing stretches or exercises at home because he finds them painful. The appellant is walking "usually daily" and he goes swimming irregularly. Objective observations include walking independently and moving from a sit to stand position "with ease."
 - February 10, 2017: a physician indicates that the appellant's wife prepares all of his meals and he follows a healthy diet of home-cooked meals. Side effects from the diabetes medication are improving.
 - February 7, 2017: the physician notes ongoing back pain, "likely mechanical, no other features." The appellant's pain is managed with medications and he is interested in more physiotherapy.
 - August 22, 2016: a physician notes chronic back pain and assesses "atypical back pain radiating from thoracic spine to legs." A motor exam indicates the appellant's tandem gait is normal and all muscle groups in his arms and legs are normal. The physician indicates "some pain amplification behaviour" and refers the appellant for further imaging exams.
 - March 29, 2016: a nurse practitioner notes back pain that has worsened in the last few days. The appellant ran out of his pain medication and is not finding physiotherapy very helpful. The appellant reports "radiating pain down legs, like electricity". A CT scan has been ordered.
 - March 11, 2016: a physician notes the appellant's history of 10 years of low back pain. The pain starts in the mid-back and radiates down both legs, almost to the heels. The appellant experiences a pins-and-needles sensation in his ankles sometimes. The appellant has "no motor difficulties." An x-ray of the lumbar spine shows some "mild arthritis." The appellant can raise his legs bilaterally and has normal reflexes. The appellant's diabetes is well-controlled. The physician states, "query disc herniation."
 - February 23, 2016: a physician notes chronic back pain which the appellant experiences daily.
 - January 13, 2016: a nurse reports that the appellant understands the diabetic food guidelines. The appellant demonstrated knowledge of complex carbohydrate and protein intake as well as reducing fats and sugars. No concerns were reported on this date.

- A consultation report from a rheumatologist dated November 23, 2016, indicating the appellant was seen for an assessment of his chronic back pain. The appellant developed "severe back pain" and stiffness subsequent to carrying heavy objects at work 12 years ago.

The appellant reports that his pain is aggravated "by carrying heavy groceries and by leaning forward." The appellant has "occasional numbness" in both legs but no weakness. The appellant reports that his back pain is better when he leans forward and after exercise. The appellant experiences morning stiffness for 10 to 20 minutes. The appellant has been taking pain medication since January 2016 and states that he cannot function properly without taking his analgesics.

The appellant has attended 60 sessions of physiotherapy which have reduced his pain by 40%. The appellant's lumbar spine CT scan in July 2016 was normal. There is no evidence of degenerative disc disease or spinal stenosis. Upon examination, the appellant has no tender or swollen joints. The appellant has some muscle and rib cage tenderness.

The diagnosis is non-specific mechanical back pain. The appellant is advised to take Tylenol and use the prescription pain medication only when necessary. The appellant is advised to do core strengthening exercises and hip abductor exercises and to go to physiotherapy. The appellant is referred for spine and joint x-rays to rule out any unlikely inflammatory back issues.

- A letter from the appellant's liver specialist dated May 29, 2017, confirming findings of fatty infiltration of the liver which persists in the most recent imaging in May 2017. At this time, findings are most in keeping with non-alcoholic steatohepatitis. The appellant is referred for additional baseline investigations and advised to restrict the carbohydrate load in his diet which is the main concern, as well as to modify his sedentary lifestyle.
- A radiology report dated July 28, 2016, indicating normal kidney, bladder, and prostate appearance as well as "mild" diffuse fatty infiltration of the liver.
- An *Initial Assessment Report* for a sleep clinic study (including overnight oximetry) dated September 19, 2017. Results are not significant for sleep disordered breathing or nocturnal hypoxemia.
- Laboratory test results for diabetes monitoring dated January 5, 2018.

Admissibility of evidence submitted at the hearing

The panel finds that the appellant's submission provides additional detail and background information on the medical conditions and functional abilities that are the subject of the reconsideration decision. As well, the submission includes recent medical records that provide an update on the appellant's pre-existing conditions as well as a definitive diagnosis (gout and cellulitis) for his associated leg problems. The ministry did not object to the documents submitted at the hearing and the panel admits them under section 22(4) of the *Employment and Assistance Act* as evidence in support of the information and records that were before the minister when the decision being appealed was made.

Oral testimony

The appellant attended the hearing with his spouse who presented argument on the appellant's behalf. An interpreter for the appellant's native language also attended the hearing and translated the appellant's additional comments. The panel accepts the testimony as argument in support of the appellant's position at the reconsideration.

The ministry relied on the reconsideration decision and did not submit any new evidence.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Was the ministry reasonable in finding that the following eligibility criteria in section 2 of the EAPWDA were not met?

- the appellant has a severe mental or physical impairment;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry based the reconsideration decision on the following legislation:

EAPWDA

2 (1) In this section:

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

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

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

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

EAPWDR

Definitions for Act

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self-care;

(viii) manage personal medication, and

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

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

Analysis

Severe mental or physical impairment

To be eligible for the PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. "Severe" is not defined in the legislation but the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental or physical functioning.

Mental impairment

To assess the severity of a mental impairment, the ministry must consider the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions; restrictions with DLA requiring mental/social functioning; and whether significant help is required to manage DLA.

Arguments

The ministry argues that the information provided does not demonstrate a severe mental impairment because Dr. L, in the AR, indicates that the majority of cognitive and emotional functions are only moderately, minimally, or not impacted by the appellant's condition. The ministry notes that only one major impact (in the area of *Language*) is reported. The ministry acknowledges that the appellant has some cognitive deficits and a major impact for *Language*, but argues that his cognitive deficits have little effect on his daily functioning as the appellant is independent with most areas of DLA according to Dr. L.'s assessments.

The appellant explains that his daily struggles with pain and English as a second language, and not being able to work as a contributing member of society, leave him feeling dependent on his family. The appellant worries that he "does not have a life" due to pain and the side effects of his medications. The appellant argues that his pride is suffering which definitely affects his mental health. The appellant's spouse states that the appellant cannot engage effectively with his family because he is "always in deep thought" due to his declining health and because of the time and effort it takes to manage the medications and address his constant pain.

Evidence for mental impairment

The submissions from Dr. L. and the social worker indicate the appellant's depression stems from his inability to learn English and contribute to his family through employment. As noted in the reconsideration decision, an applicant's employability or ability to work is not taken into consideration in determining eligibility for PWD designation. The panel notes that the ability to work is not included in the criteria for PWD designation under the legislation.

The main evidence in support of a mental impairment is the information on the appellant's language and communication deficits. The panel finds that the ministry reasonably determined that a severe impairment of mental functioning is not established on the evidence provided for communication and language. In the MR, Dr. L. reports that the appellant has no difficulties with communication other than a lack of fluency in English. In the AR the appellant's ability to communicate is poor and he is unable to read or write in either his native language or English due to his low educational attainment rather than a mental impairment.

At the same time, a learning disability is reported in the AR and the appellant has significant deficits with executive function ("cannot follow directions"), attention ("easily distracted"), and other areas of cognitive and emotional functioning. Dr. L. provides no additional detail about the appellant's learning disability. While many areas of cognitive and emotional functioning are impacted by the appellant's impairments, most of the impacts (indicated in the AR) are minimal or moderate as noted by the ministry.

In addition to the information in the PWD application and RFR, the panel has carefully considered the submissions on appeal. While the clinical notes and reports from various medical practitioners confirm the appellant's language barrier, most of the information concerns the appellant's physical impairments. In the clinical notes from July and

August 2016 included with the Appendix A submission, the appellant's back pain is reported to have "psychological components" and the physician states that the appellant requires a mental health assessment due to anxiety about physical symptoms over the course of many appointments. Unfortunately, there is no mental health assessment in the record or any cognitive assessment to describe the extent of the appellant's learning disability.

Panel's decision - mental impairment

Based on the analysis set out above, the panel finds that the ministry reasonably determined the information provided does not demonstrate a severe mental impairment. The impacts for cognitive and emotional functioning are mostly in the moderate and minimal range despite the appellant's mood disorder/depression. While the appellant is reported to have significant deficits with language and executive function including difficulties with learning English, there is insufficient information about his learning disability to establish a severe cognitive impairment.

Physical impairment

To assess whether the applicant has a severe physical impairment, the ministry considers the degree of restrictions to physical functioning, DLA involving movement, and whether the applicant requires significant help or any assistive devices to manage DLA.

Arguments

The ministry argues the appellant does not have a severe physical impairment because he is able perform most physical functions independently according to the information in the MR and AR. The ministry acknowledges that the appellant experiences limitations with bending and carrying due to back pain but argues that the information provided by Dr. L. and the appellant as well, is evidence of a moderate rather than severe impairment.

The appellant argues that he has a severe physical impairment because he has significant back pain every day as well as gout in his foot or an infection in the bone. These conditions are in addition to his diabetes and liver problems. The appellant argues that his physical functioning depends on taking medication, up to six pills per day to control the pain even though the prescribed dose is two pills.

The appellant disagrees with Dr. L.'s functional assessments; he especially disagrees that he can walk four or more blocks. The appellant argues that he is unable to walk without taking his medication and the reason he does not use a walker or other assistive device is because it would "switch" the angle of his back and make the pain worse. The appellant indicates that the only information he agrees with is his ability to remain seated for less than an hour. The appellant was asked at the hearing if he had spoken to Dr. L. about his concerns with the accuracy of the assessments. The appellant indicated that he had, but Dr. L. replied that he "does not know a lot about (the appellant)."

The appellant submits that sleep is difficult due to his back pain and he wakes up with swollen legs and feet in the morning. He is constantly at doctor's appointments or at the lab for various medical tests. The appellant argues that his impairment is severe because he frequently needs to go to the hospital for pain relief when he cannot get an appointment with his doctor right away. The appellant argues that the additional medical records, submitted on appeal, confirm his restrictions because "they all say he is suffering from pain on different dates, at different times." The appellant argues that his condition is getting worse over time.

Evidence for physical impairment

The evidence in the MR is that the appellant is able to walk 5 or more blocks and climb 5 or more steps unaided, indicating the least degree of restriction on the rating scale. The appellant has limitations with *Lifting* and with *Remaining seated* but he can lift under 2 kg., and remain seated for less than an hour according to Dr. L.'s information. In the SR, the social worker indicates less of a restriction with lifting as the appellant is able to lift items that weigh less than 5 kg. In the AR, the appellant is independent with *Walking*, *Climbing stairs*, and *Standing* but he takes significantly longer than typical with *Lifting* and *Carrying/holding*.

The social worker states that the appellant's most significant disability is his chronic back pain and the panel has carefully considered the additional submissions on appeal to determine whether they indicate a severe impairment as argued by the appellant. In the clinical notes from 2017, the appellant was observed to be "walking independently" with a "normal...slow steady gait." The appellant was able to move from a sitting to standing position "with ease" despite reporting difficulties with walking, standing, and other physical functions when he does not take his pain medication. In 2016, the appellant was observed to have a "shuffling gait" and he was able to sit and stand unassisted. A normal gait and normal muscle movements are also reported in 2016.

Many of the clinicians prescribe exercise but the appellant reports that he does not do specific exercises because they are "too painful." However, the additional evidence supports Dr. L.'s opinion that the appellant does not have significant restrictions with walking. In 2017, the appellant reports walking "usually daily." As recently as 2018, the appellant indicates that back pain does not preclude him from walking. The medical resident encourages regular walking as well as frequent exercise ("30 minutes 5 days a week"). In addition, a recent ER report from 2018 states that the appellant was "running in the park" when he had a "mis-step" and injured his ankle.

The appellant argues that his condition is getting worse but most of the clinical notes submitted on appeal indicate that the appellant's back pain is mechanical in nature and unchanged over time. The appellant's ongoing back and issues are described as "not progressive." The appellant's CT scan was normal and he does not have degenerative disc disease. The results of Imaging tests (spine and joints) in 2016 and 2017 indicate "minimal" or "mild" degenerative changes, and "mild arthritis."

Panel's decision - physical impairment

Considering the information in its entirety, the panel finds that the ministry reasonably determined the information provided does not confirm a severe impairment of physical functioning. The panel finds that the ministry reasonably determined that the information supports a moderate rather than severe physical impairment because the appellant can perform all of the physical functions listed in the PWD reports. Despite the appellant's reports of "constant pain", the MR and AR and additional medical records submitted on appeal indicate that his pain is managed by medications for the most part. The appellant is encouraged to pursue exercise as well as further physiotherapy to help reduce his reliance on pain medications.

The appellant presented with foot problems in 2018 and 2019 including a recent cellulitis infection and gout, but knee and ankle imaging results indicate no fractures or degenerative changes in the knee. Ankle spurring but no leg fracture was noted. The appellant was observed limping but is able to weight bear and the symptoms and the observations in the ER records do not indicate any further functional limitations.

The evidence indicates the appellant's main limitations are with lifting and remaining seated, but he is able to lift up to 2 kg according to Dr. L. and up to 5 kg. as noted in the self-report. The appellant agrees that he is able to remain seated for up to an hour. The panel finds that the ministry reasonably concluded that a severe mental or physical impairment under section 2(2) of the EAPWDA is not established on the evidence.

Restrictions in the ability to perform daily living activities

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are Dr. L. and the social worker who provide information on DLA in the PWD application and RFR. As well, the additional submissions on appeal from various medical practitioners provide some information on specific areas of DLA, in particular, *Regulating diet* and *Medications (Taking as directed)*.

The term "directly" means there must be a causal link between the severe impairment and the restriction to DLA. The direct restriction must also be significant. Finally, there is a component related to time or duration: the direct and significant restriction may be either continuous or periodic. If periodic, the restriction must be for extended periods. Inherently, an analysis of periodic restrictions must also include how frequently the activity is restricted. All other things being equal, a restriction that 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 on the duration and frequency of the restriction in order to be satisfied that this criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, a practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the applicant's impairments either continuously or periodically for extended periods, and to provide additional narrative. DLA, as defined in the legislation, does not include the ability to work.

Arguments

The ministry argues that the information in the AR does not confirm that DLA are significantly restricted because Dr. L. indicates the appellant can independently perform the majority of DLA listed in the report. The ministry argues that where periodic help is reportedly required, there is no description to explain the nature or frequency of assistance to confirm that the appellant needs help for extended periods of time. Further, where the appellant is reported to need continuous assistance with activities such as *Carrying purchases home* and *Dressing*, the ministry argues that it is unclear why that level of assistance is needed given the appellant's functional skills and abilities.

The ministry argues that the appellant's limited literacy skills rather than a severe mental impairment is the cause of some of the restrictions that are reported. The ministry argues that the mainly moderate and minimal impacts in cognitive and emotional functioning as well as language problems that are due to a lack of fluency in English do not support a significant impairment with the *Social Functioning* DLA.

The appellant argues that he cannot carry groceries or household items that weigh more than 5 kg., or bathe his young children due to back pain. The appellant submits that the drowsiness that is a side effect of his medication causes a "slower response time" and an inability to fully engage with his family. The appellant argues that he needs help with dressing and washing his legs and feet "sometimes" due to his pain and stiff muscles.

At the hearing, the appellant argued that he "cannot do shopping because it involves carrying things" and he would fall down if he tried to clean the floor. When asked how often these restrictions occur in a month, the appellant indicated "70% of the time." The appellant submits that he needs help with dressing "all the time" and although he can eat independently he cannot prepare a whole meal. The appellant argues that he would not be able to take care of himself if he had to live independently, without the support and assistance from his family.

Evidence from prescribed professionals

In the MR, the appellant is prescribed medications that interfere with his ability to perform DLA because they cause drowsiness. In the AR, the appellant's back pain/ back problems and his learning disability are the impairments that impact his ability to manage DLA.

In the AR, the appellant is independent with all areas of *Personal Care* except *Dressing* for which he requires continuous assistance. In the additional submissions on appeal, the appellant is reported to have some difficulties with *Regulating diet* to manage his diabetes and liver conditions. At the same time, the appellant demonstrated an understanding of his dietary needs and he was also referred to *Diabetes Education* for support.

The appellant argues that *Basic housekeeping* is significantly restricted but Dr. L. indicates the appellant is independent with Laundry (despite limitations with *Lifting*) and he only requires periodic assistance with *Basic housekeeping*. In the RFR submission, Dr. L. states that *Laundry* is restricted because the appellant "cannot carry laundry around the house", and *Basic housekeeping* is also restricted because the appellant "is not able to do housework or cleaning." While it appears that Dr. L. has changed his assessment for *Basic Housekeeping* from periodic assistance to continuous assistance required, there is no explanation for the change in the information. Periodic assistance with *Basic housekeeping* is indicated in the AR and as noted by the ministry, the nature and frequency of the periodic assistance is not indicated. The ministry was therefore unable to confirm that the appellant's periodic restrictions with housework are for extended periods of time as required by the legislation.

In the AR, the appellant is independent or requires periodic assistance with most areas of *Shopping* but he requires continuous assistance with *Reading prices and labels*, due to his lack of English language skills as opposed to a severe mental impairment. The appellant requires continuous assistance with carrying "items that are heavy" but no restrictions are reported for lighter weight items.

The appellant states that he cannot prepare a whole meal without assistance from his family, but Dr. L. indicates the appellant is independent, or requires periodic assistance only with all areas of *Meals*. Again, no information on the nature or frequency of periodic assistance is provided to establish that the appellant's periodic restrictions are for extended periods as required by the legislation.

Dr. L. indicates the appellant takes significantly longer than typical with all aspects of *Pay Rent and Bills* but there is no information on how much longer the activities take or whether the restriction is due to the side effects of the appellant's medication, his learning disability, or his lack of English language ability. On the other hand, Dr. L. assesses the appellant as independent with all aspects of *Medications* despite the appellant's evidence that he does not always take the medication as directed. The clinical notes submitted on appeal also indicate the appellant required some extra counselling on medication management, particularly with regard to his medication for "breakthrough pain."

The appellant is able to manage all areas of transportation but requires periodic assistance with *Getting in and out of a vehicle* due to "pain with sitting." Dr. L. does not provide any information on how often the appellant requires assistance. The ministry was therefore unable to confirm that the appellant has periodic restrictions for extended periods as required by the legislation.

Dr. L. indicates the appellant's most significant restriction is with *Social Functioning*. The appellant requires continuous support/supervision in all areas of this DLA. Dr. L. reports that the appellant tends to be withdrawn due to his "poor English skills." Marginal functioning with his social networks is also attributed to the appellant not knowing English but the appellant also has communication problems in his native language. As noted by the ministry, there is no information that explains to what degree the appellant's social impairments are caused by his lack of fluency in English versus his learning disability or diagnosis of depression.

Panel's decision - restrictions to Daily Living Activities

Considering the information as a whole, the panel finds that the ministry reasonably determined there is insufficient information from prescribed professionals to establish that DLA are significantly restricted either continuously, or periodically for extended periods as required by the legislation. The appellant is independent with most DLA or requires periodic assistance only, or takes significantly longer than typical. Where the need for periodic assistance is indicated, or taking longer to do an activity is reported, there is insufficient detail to confirm that those DLA are periodically restricted for extended periods.

The ministry submits that the appellant's functional skills and abilities for both his physical and mental functioning do not support the extent of the restrictions indicated for some activities. Based on the information from prescribed professionals, for physical and mental functioning and DLA, the panel finds that the ministry reasonably determined the criteria in subsection 2(2)(b)(i) of the EAPWDA are not met.

Help to perform daily living activities

Subsection 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 ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

The information in the MR and AR indicate the appellant does not use aids for his impairment, or assistive devices or an assistance animal to perform DLA. The appellant receives help and support from his spouse and family.

Panel's decision - help with Daily Living Activities

Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. As the panel found that the ministry reasonably determined that significant restrictions to DLA were not established by the information provided, the panel also finds that the ministry reasonably concluded that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA are not met.

Conclusion

The panel finds that the ministry's reconsideration decision that found the appellant ineligible for PWD designation was reasonably supported by the evidence. The legislation requires all of the criteria to be met. Based on the functional skills and DLA assessments by prescribed professionals, and considering the evidence in its entirety, the panel finds that the ministry's reconsideration is reasonable as only two of the legislative requirements were met. The panel confirms the ministry's 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

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019-04-09

PRINT NAME

Carlos Garcia

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-04-09

PRINT NAME

Rabinder (Rob) Nijjar

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-04-09