

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 March 21, 2019 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 (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years. However, the ministry was not satisfied 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, in the opinion of a prescribed professional, 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 (EAPWD), section 2

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

PART E – SUMMARY OF FACTS

Information before the ministry at reconsideration

- A PWD application comprised of the appellant's self-report (SR 1) dated November 28, 2018, as well as a Physician Report (PR) and Assessor Report (AR), both dated December 10, 2018, which were completed by a general practitioner (GP) who has seen the appellant since 1998 and seen the appellant 11 or more times in the past 12 months.
- In his Request for Reconsideration the appellant provided another self-report (SR 2) dated March 12, 2019.

Information submitted on appeal

In his Notice of Appeal dated March 29, 2019 the appellant wrote: "I do [at the hearing the appellant clarified he meant to write "I don't"] think medical report is accurate of physical abilities. Doctors report reflected condition of six months ago as condition is worsening. Would like to submit another up to date medical report that would reflect present medical condition."

At the hearing the appellant stated he does not agree with the diagnosis of "chronic anxiety". His anxiety stems from pain and the fear of losing his lifestyle. He owns and lives in a trailer and does not want to downgrade because of lack of funds due to the fact that he is no longer able to work. The appellant reported further that he found out recently that he has a bulge in his aorta which is a life-threatening condition. He stopped taking Tylenol because it is not working for him. He had reactions to pain medications in the past and does not take them anymore. He takes medications for his takes heart condition and high blood pressure. When he walks more than 50 metres he becomes dizzy. He is fatigued, has no energy and had to give up his walking. He was not aware that he could have submitted additional medical information at reconsideration. He wanted to fill out a new application with new medical information but did not have the form to give to the doctor. As a result the doctor could not write a new report.

The ministry presented the reconsideration decision and added a few comments for clarification.

Summary of relevant evidence

Diagnoses

The GP diagnoses anxiety (ongoing), fibromyalgia - chronic pain (onset June 2010), and chronic fatigue (onset June 2010)

In the AR the GP indicates that the appellant's mental or physical impairments that impact his ability to manage DLA are anxiety and fatigue.

Physical Impairment

In the PR and the AR, the GP provides the following information.

- "Struggles with chronic broad based myofascial pain - worsening past 3 months. Post operative non cardiogenic anterior chest pain wall pain since CABG June 2010."
- The appellant can walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, and can remain seated for 1-2 hours. Limitations in lifting are unknown.
- Walking indoors and outdoors, climbing stairs, standing, and lifting and carrying/holding are managed independently.

The appellant reports that the PR showed his condition as it was several months ago. His doctor was not aware how much his condition worsened with his foot problems and said he would write another medical report. The appellant states he cannot stand for more than 10 minutes, cannot walk more than 50 meters without suffering from foot and back pain, is falling over because of dizzy spells. He cannot lift more than 10-15 lbs because he is weak. He suffers from severe ankle pain and his toes go numb. He is walking with difficulty which intensifies his pain. His foot problem is worsening and he is starting to get the same feelings in his hands. He cannot sleep for more than 1-2 hours and takes many hours to get back to sleep. He has to change his leg elevation to ease his foot and ankle pain and has to get up to settle the pain before he can return to bed. He rarely leaves his home as discomfort and pain make mobility difficult. In the last 4 months he has not climbed any stairs except the 2 stairs into his home. Several weeks ago he had a back problem. He suffers from chronic chest pain which has been worsening since his by-pass surgery 8 years ago. Walking used to help relieve chest pain but now his chest bothers him all the time. He feels unwell and suffers from fatigue, dizziness, growing weakness, and muscle loss.

Mental Impairment

In the PR and AR, the GP reports the following:

- There is a significant deficit with cognitive and emotional functioning in 1 out of the 11 listed areas: emotional disturbance. The GP comments: "Chronic anxiety".
- Major impacts on daily functioning are reported for emotion (the GP highlights anxiety and depression) and "other emotional or mental problems". A moderate impact is reported for motivation. Minimal impacts are reported for impulse control, insight and judgement, attention/concentration, and memory. There is no impact on daily functioning for the remaining 7 aspects of cognitive and emotional functioning.
- There are no difficulties with communication.
- Social functioning is not restricted and is managed independently.
- The GP wrote "no comment" to the request to describe the appellant's functioning with his immediate and extended social networks.
- The GP crossed out the response area for describing the support/supervision required to help maintain the appellant in the community and to identify safety issues.

DLA

In the PR and AR, the GP reports the following:

- The appellant has struggled to keep working in his own business. He requires frequent breaks and naps due to his chronic fatigue.
- The appellant has been prescribed medications that interfere with his ability to perform DLA. The GP comments "habitual use". "The patient is unable to contemplate coming off medications."
- All listed tasks of all DLA - personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation - are managed independently with no identified limitations.
- Making decisions about personal activities, care or finances is managed independently.
- No limitations or restrictions are reported in the areas of relating to, communicating or interacting with others efficiently.

The appellant reports that he is not able to do many activities since his by-pass surgery. Weakness and being unwell make it difficult to do anything. Until late summer 2018 he was able to do light work (with discomfort). Until 6 weeks ago he would take light walks on trails most days but now he has difficulties walking.

Need for Help

In the PR, the GP indicates that the appellant does not require any prostheses or aids for his impairment. In the AR the GP crossed out the sections of "assistance provided by other people" and "assistance provided through assistive devices." The appellant does not have an assistance animal.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. In particular, was the ministry reasonable in determining that

- A severe physical or mental impairment was not established;
- the appellant's daily living activities (DLA) are not, 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 does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal 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 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).

- 2 (1) For the purposes of the Act and this regulation, "daily living activities",
- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
- (i) prepare own meals;
 - (ii) manage personal finances;
 - (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "prescribed professional" means a person who is
- (a) authorized under an enactment to practise the profession of
- (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
- (b) acting in the course of the person's employment as a school psychologist by
- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
- if qualifications in psychology are a condition of such employment.

Severe Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the ministry, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure of functioning causing restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, 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 argues that his impairment is severe; his condition has worsened considerably during the past several months but his doctor was not aware of this and provided inaccurate information.

The ministry's position is that the functional skill limitations described by his medical practitioner do not describe a severe degree of physical impairment and therefore the ministry is not satisfied that the information provided is evidence of a severe physical impairment. The ministry arrived at this conclusion by considering evidence provided by the appellant and his GP and based its determination on the following information: In terms of physical functioning, the GP indicated that the appellant is able to walk 4+ blocks unaided, climb 5+ steps unaided, his ability to lift is unknown, and he is able to remain seated 1 to 2 hours. In assessing the appellant's mobility and physical ability his medical practitioner indicates he is independently able to manage all activities including walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding. Further, the GP indicates that the appellant does not require the use of any prostheses or aids to manage his physical functioning.

The ministry noted that for the purpose of determining eligibility for the PWD designation an appellant's employability or vocational ability is not taken into consideration.

Panel Decision

The appellant's GP diagnoses fibromyalgia - chronic pain and chronic fatigue which result in the appellant being limited to remain seated for 1-2 hours. The GP also reports that the appellant is independent in all listed all areas of mobility and physical ability (walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding). The panel notes that while the appellant reports he cannot stand for more than 10 minutes, cannot walk more than 50 meters, is falling over, and cannot lift more than 10-15 lbs, these limitations are not supported by the GP's information. The panel concludes that the ministry was reasonable to determine that a severe physical impairment has not been established given the level of independent physical functioning assessed by the GP.

Severe Mental Impairment

The ministry's position is that in terms of mental status the GP reports a deficit to cognitive and emotional functioning in the area of emotional disturbance, noting "chronic anxiety". In assessing the impact of cognitive and emotional functioning on daily living the GP indicates that the appellant has a major impact in the area of emotion, highlighting anxiety and depression. The GP also indicates the appellant has a major impact in the area of other emotional or mental problems, however, he does not provide additional

information to explain what other emotional or mental problems the appellant experiences that have a major impact on his daily living. Additionally, the GP indicates the appellant has a moderate impact in the area of motivation and minimal to no impact in all other areas of cognitive and emotional functioning.

With regards to communication, the GP indicates he has no difficulties and his ability to communicate is good in all areas. The ministry found that the information provided in the appellant's application does not demonstrate that as a result of cognitive and emotional deficits he is significantly impacted in his cognitive and emotional functioning; as a result, a severe mental impairment has not been established.

Panel Decision

The GP diagnosed the appellant with anxiety which results in a significant deficit with emotional disturbance (chronic anxiety). While the GP indicates a major impact on emotion (anxiety, depression) and on unspecified emotional and mental problems, as well as a moderate impact on motivation, the remaining 11 areas of impact on daily functioning are reported as "minimal" or "no impact". Furthermore, there are no difficulties with communication or decision making, and social functioning is not restricted but managed independently. The panel finds that the ministry reasonably concluded that the information from the appellant and his GP does not establish a severe mental impairment.

Restrictions in the ability to perform DLA

The appellant argues that his ability to perform DLA is significantly restricted as he is not able to do many activities since his by-pass surgery 8 years ago. Weakness and the general feeling of being unwell make it difficult to do anything. The appellant 's GP reports that the appellant has struggled to keep working as best he can at his own business. The panel notes that for the purpose of determining eligibility for the PWD designation an appellant's ability to work is not taken into consideration.

The ministry noted that it relies on the medical opinion and expertise from the appellant's medical practitioner and other prescribed professionals to determine that his impairment *significantly* restricts his ability to perform DLA either continuously or periodically for extended periods. In assessing the appellant's ability to manage his DLA, the GP reports that the appellant is independently able to manage all activities of daily living, including personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation. With regards to social functioning, the GP indicates that the appellant is independently able to manage all activities of social functioning. In assessing the appellant's relationship with others the GP does not provide any information, noting "No comment". The appellant's medical practitioner does not identify any support or supervision required to help maintain him in the community.

Based on the assessments provided in the appellant's PWD application, the ministry found there is not enough evidence to confirm a severe mental or physical impairment significantly restricts his ability to perform his DLA *continuously or periodically for extended periods*. As the majority of the DLA are performed independently and the appellant does not require the help from others or the use of an assistive device, the information from his prescribed professional does not establish that impairment *significantly restricts* DLA either continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b)(i) of the EAPWDA is that the ministry be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either

continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In the appellant's case, the prescribed professional is his GP who reports that the appellant is independently managing all DLA related to a physical and/or mental impairment; no limitations or restrictions are reported in the areas of relating to, communicating or interacting with others efficiently. As a result the panel finds that the ministry reasonably determined that the information does not establish that the appellant is directly and significantly restricted in his ability to perform DLA continuously or periodically for extended periods.

Help to perform DLA

The ministry's position is that it has not been established that DLA are significantly restricted; therefore it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDR requires that, as a result of being directly and significantly restricted to perform DLA either continuously or periodically for extended periods, a person requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

As the ministry reasonably established that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, 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 therefore confirms the decision. The appellant is not successful on appeal.

PARTG-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) **PARTH-SIGNATURES**

PRINTNAME

Inge Morrissey

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/04/24

PRINTNAME

Donald Stedeford

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/04/24

PRINTNAME

Barbara Thompson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/04/24