

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated April 20, 2020, which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that the impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

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

PART D – RELEVANT LEGISLATION

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

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

PART E – SUMMARY OF FACTS

Evidence before the Ministry at Reconsideration

The evidence before the ministry at the time of the reconsideration decision included:

- the appellant's PWD Application comprised of the appellant's self report ("SR") dated February 1, 2020, a medical report ("MR") dated February 1, 2020 and an assessor report ("AR") dated February 2, 2020, both completed by the appellant's family physician ("the GP"), who has known the appellant for 7 ½ years and who has seen the appellant between 2 - 10 times in the past 12 months;
- the appellant's request for reconsideration submitted April 4, 2020.

PWD Application Summary

Diagnosis

In the MR the GP noted that the patient suffers from:

- bilateral shoulder rotator cuff tears
- chronic back pain
- chronic obstructive pulmonary disorder (COPD)
- hypertension
- osteoarthritis (OA) in left knee
- depression

Physical Impairment

In the SR the appellant reported that:

- he sustained a workplace injury in 2009-10 which caused injury to shoulders, left knee and ankle and lower vertebrae;
- sometimes the spasms in his back are so severe he feels like he is having a heart attack;
- he can no longer participate in activities such as biking, swimming, hiking, and camping. If case of overexertion he suffers pain for several days;
- he cannot lift his arms to shoulder height, making bathing, dressing, shopping and daily tasks very difficult and time-consuming;
- he can't vacuum or wash floors. This work is done by his son.

In the MR the GP reported that the appellant:

- can walk less than 1 block unaided (*needs to stop due to severe knee pain*), can climb 2-5 steps unaided (*takes more than 3 times longer*), can lift 7-16 kg and has no limitation in remaining seated;
- has a long-standing history of weakening, slowing down most activities;
- takes medications that interfere with ability to perform DLA (*can cause drowsiness*);
- does not require aids or prostheses for the impairment;
- has multiple pain issues (*to shoulder, back and knees*);
- did construction work in the past but is no longer able to do the job as injuries to shoulder and pain are getting worse. Not educated enough to hold other jobs.

In the AR the GP reported that the appellant:

- takes significantly longer than typical while walking indoors, outdoors, climbing stairs, standing (*3 times longer*) and carrying/holding (*takes carts but cannot carry*)

Mental Impairment

In the SR the appellant wrote that the long-term impact of workplace injuries has resulted in heavy depression over the past few years.

In the MR the GP noted that the appellant experiences the following significant deficits to cognitive and emotional functioning: consciousness, memory, emotional disturbance and attention/sustained concentration (*multiple psychosocial issues affect mental health*).

In the AR the GP noted that the appellant suffers the following impacts to cognitive and emotional functioning:

- major impact in the area of emotion (eg., depression/anxiety);
- moderate impacts in bodily functions, impulse control, attention/concentration and executive processes;
- minimal impacts in consciousness, memory and motivation;
- no impact in language, psychotic symptoms or other neuropsychological problems.

Daily Living Activities (DLA)

In the AR the GP indicated that the appellant:

- is independent in:
 - all areas of personal care except dressing and getting in/out of bed which take significantly longer than typical;
 - shopping (reading prices, making appropriate choices, paying for purchases);
 - all aspects of meal planning, paying bills, taking medications;
 - all areas of social functioning;
- takes significantly longer than typical (3 times longer) with dressing, getting in and out of bed, laundry, basic housekeeping going to do and from stores, carrying purchases home (*son helps, needs to take car*), getting in and out of a vehicle (*difficulty in walking*);
- has marginal functioning with immediate and extended social networks.

Assistance Required

In the AR the GP noted that the appellant receives help from family to perform DLA.

Information Received after Reconsideration

1. Appellant's Submission

Prior to the hearing the appellant submitted a 3-page typewritten document signed by the GP on July 8, 2020. This document will be referred to as the Appellant's Submission (AS). The AS was prepared by the appellant's advocate in consultation with the appellant. It consisted of 22 statements relating to the appellant's mobility, functional ability, ability to perform DLA and assistance required. All but 1 of these statements was checked off in ink, presumably by the GP. Immediately above the GP's signature a typed comment states:

"It is my medical opinion that the appellant has severe restrictions that will last for more than 2 years. I have checked the applicable boxes where I confirm that he is directly and significantly restricted in his ability to perform DLA and requires significant help to perform the activities, noted above."

The AS contained the following new or revised information confirmed by the GP:

- in addition to the diagnoses set out in the MR the appellant suffers from anxiety;
- as a result of his impairments the appellant's ability to perform DLA is directly and significantly restricted continuously, and he requires assistance;
- the appellant is continuously restricted in the areas of:
 - basic mobility (*because of severe chronic back pain, left knee OA and bilateral shoulder pain. Needs a knee brace most of the time. Must stop and rest after 1 block*);
 - sitting (*5-10 minutes due to chronic back pain. Then he must either move around or lay down with a pillow between his knees*);
 - standing (*5 minutes or less. Must lean on objects for support*);
 - climbing stairs (*avoids stairs whenever possible. Must go slowly and always uses the handrail. Will often use a cane*);
 - lifting and carrying (*limited to lifting about 10 lbs and can carry only for about 15 steps*);
 - bending (*very painful. Restricts putting on socks, shoes, pants*);
 - fatigue (*tired throughout the day. Has SOB (shortness of breath) restricting his ability to accomplish tasks. Uses sleep medication, but is often unable to get a restful sleep due to pain and anxiety*);
 - personal care (*severe bilateral shoulder pain, has limited range of motion, restricts ability to put on socks shoes and pants. Fatigued, depressed with low motivation. Takes 3 times longer to do personal self-care*);
 - meal preparation, cooking (*pain, low energy from lack of sleep and COPD, poor concentration and*

restricted ability to stand. Can only prepare very quick and simple meals and requires help with this);

- *basic housework (SOB and pain. Requires help – his son or a friend helps with this. Would benefit from having someone come to clean weekly);*
 - *laundry (puts it off due to pain, fatigue. Requires another person's help to carry it);*
 - *daily shopping (shoulder and knee pain. Can't reach above shoulders so requires help from friend or store clerk. Uses shopping cart to lean on);*
- the appellant is also restricted in the following areas:
 - *emotional control (becomes easily agitated and angry);*
 - *motivation (lacks motivation due to depression and fatigue, constant daily emotional battle);*
 - *memory (very poor short term);*
 - *attention/concentration (restricted by pain, anxiety and pain medication, which causes drowsiness);*
 - *banking (unable to stand in lineups. Resorts to online banking);*
 - *transportation (requires transportation to access the community – often unable to take the bus when it is crowded or if he has to wait a long time at a bus stop);*
 - *assistive devices (uses a cane – can walk with a cane up to 2 blocks, stopping to rest after 1 block. For greater distances the appellant requires a walker and knee braces);*

Prior to considering the AS the panel obtained the following background information from the appellant and advocate:

- the appellant's advocate sent the draft AS to the GP, who read it and underlined certain sections to indicate her agreement;
- the GP called the appellant and they reviewed the AS together;
- the GP personally ticked the boxes with which she agreed, signed the AS and returned it to the appellant.

Oral Evidence

The appellant offered oral evidence before the ministry representative joined the teleconference hearing. He claimed that he did not understand how to fill out the PWD application forms when he brought them to the GP in early February 2020 and was not forthcoming with the GP, in part because he wished to retain his dignity.

Admissibility of Additional Information

The ministry representative did not object to the admissibility of the AS and reported that the additional evidence contained in the AS satisfies the ministry that the appellant now meets all criteria for designation as a PWD under EAPWDA Section 2 (2).

The panel considered the AS and the appellant's oral evidence and determined that all of it should be admitted under EAA Section 22(4) because it is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reasonably determined that the appellant was ineligible for designation as a PWD. The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, Section 2. Specifically, the ministry determined that the information provided did not establish that:

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

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.

EAPWDR:

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.

Introduction to Panel Decision

As noted in Part E of this appeal decision the ministry representative stated that the additional information contained in the AS satisfies the ministry that the appellant meets the legislative criteria for designation as a PWD. However because the hearing was already in progress a consent dismissal of the appeal could not be entered by the parties. The panel must still consider the reasonableness of the ministry's decision as required by EAA Section 24.

To be eligible for designation as a PWD an applicant must meet the 5 legislative criteria set out in EAPWDA Section 2 (2). The ministry found that the appellant had met the first 2 criteria, namely that he is at least 18 years of age and the impairment is likely to continue for 2 or more years.

At reconsideration the ministry found that the remaining 3 criteria were not met, namely that:

3. the appellant has a severe (A) physical or (B) mental impairment;
4. in the opinion of a prescribed the severe impairment directly and significantly restricts ability to perform DLA either continuously or periodically for extended periods, and
5. as a result of those restrictions the person requires help in the form of an assistive device, the significant help of another person or the services of an assistive animal.

This appeal decision will address Criteria 3, 4 and 5.

3 A. Severe Physical Impairment

The appellant argues that he suffers from several medical conditions that create a severe physical impairment: bilateral shoulder rotator cuff tears, chronic back pain, COPD, hypertension and OA in the left knee.

The ministry's position at reconsideration was that the information does not establish that appellant suffers from a severe physical impairment.

Panel Decision

The information set out in the SR, MR, AR and AS indicates that the appellant's functional ability (to walk, stand, lift and remain seated) and mobility are severely restricted as a result of his multiple physical impairments. He is continually restricted in his ability to perform most DLA and requires assistive devices and the help of other persons.

The panel therefore finds that the Ministry's determination at reconsideration, namely that the appellant does not suffer from a severe physical impairment, is not supported by the evidence.

3 B. Severe Mental Impairment

The appellant argues that he suffers from a severe mental impairment arising from depression and anxiety.

The ministry's position at reconsideration was that the information provided at reconsideration did not establish a severe mental impairment.

Panel Decision

The information provided by the GP indicates that as a result of his mental impairments and chronic pain the appellant is impacted in the areas of consciousness, emotional control, motivation, memory and

attention/concentration. The GP commented that multiple psychosocial issues affect the appellant's mental health. The only major impact to cognitive and emotional functioning is in the area of emotions. The evidence does not indicate that the appellant is being treated by a psychiatrist or other mental health specialist.

The panel therefore finds that the ministry reasonably determined that the information provided by the appellant and the GP does not establish that the appellant suffers from a severe mental impairment.

4. Restrictions in Ability to Perform DLA

The appellant argues that ability to perform DLA is significantly restricted as a result of severe physical impairment.

The ministry's position at reconsideration was that the information provided by the prescribed professional does not establish that the appellant is directly and significantly restricted in his ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

EAPWDR Section 2(2) (b) requires that the minister 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.

The information provided by the GP in the AR and AS establishes that as a result of severe physical impairment the appellant is directly and significantly restricted in his ability to perform DLA continuously in multiple areas: basic mobility, sitting, standing, climbing stairs, lifting/carrying, bending, ability to attend to personal care and hygiene, meal preparation, cooking, laundry, basic housework and shopping. The appellant is also restricted in his ability to attend at a bank and to use public transportation.

The panel finds that the ministry's determination at reconsideration, namely that the information provided fails to establish that the appellant suffers from a severe impairment that in the opinion of a prescribed professional directly and significantly restricts DLA continuously or periodically for extended periods, is not reasonably supported by the evidence.

5. Assistance in Performing DLA

The appellant argues that he requires assistive devices (cane, knee brace, walker) and the significant help of other persons to perform DLA.

The ministry's position at reconsideration was that because the information did not establish that the appellant's ability to perform DLA was directly and significantly restricted it could not be determined that the appellant requires an assistive device or the significant help of another person to perform DLA.

Panel Decision

In the AS the GP noted that the appellant needs the assistance of his son or a friend for basic housework, laundry, shopping and carrying purchases home. The GP also noted that the appellant uses a cane when walking for a distance of up to 2 blocks, but must use a walker and knee braces for greater distances.

The panel finds that the ministry's determination at reconsideration that the appellant does not require the use of an assistive device and the significant assistance of another in performing DLA is not reasonably supported by the evidence.

CONCLUSION

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's determination that PWD criteria 3A, 4 and 5 were not met is not reasonably supported by the evidence, and rescinds the decision. The appellant is successful on appeal.

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PARTG-ORDER

THE PANEL DECISION IS: 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

PRINT NAME

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/Jul/16

PRINT NAME

Chris McEwan

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/Jul/16

PRINT NAME

Inge Morrissey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/Jul/16