



**Social
Benefits
Tribunal**

APPELLANT

Appellant's Representative

Michelle Farb

RESPONDENT

Respondent's Representative

Director, Ontario Disability Support Program
Lori Burns

PRESIDING MEMBER

Denise Dudley

Hearing Date

October 31, 2012

SBT File No.

1203-03051

Citation

2012 ONSBT 773

DECISION

ISSUE

[1] The Appellant disagrees with the Director's February 14, 2012 decision that he is not a person with a disability, as defined in section 4 of the *Ontario Disability Support Program Act, 1997 (ODSPA)*. The Director determined that the impairments were not substantial and also that there were no substantial restrictions in one or more of the activities of daily living listed in section 4(1) of the *Act*.

DECISION

[2] The Tribunal is satisfied that the Appellant is a person with a disability within the meaning of section 4(1) of the *Act*.

REASONS

Applicable Law

[3] In order to be considered a "person with a disability" for the purposes of the *ODSPA*, an Appellant must meet the requirements of section 4(1) of the *Act*.

4. (1) A person is a person with a disability for the purposes of this Part if,
- (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
 - (b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
 - (c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

[4] Section 23(10) of the *Act* states that the onus is on an Appellant to satisfy the Tribunal that the decision of the Director was wrong.

Verification of Impairments, Duration and Restrictions

[5] The 53 year-old Appellant's application for income support as a "person with a disability" relies on the following conditions: type II diabetes; panic disorder; depression; peripheral neuropathy and diabetic retinopathy. These conditions have resulted in the following verified impairments: fatigue; unpredictable fear; poor sleep; some cognitive difficulties; numbness in hands and feet and reduced vision. The Tribunal is satisfied that the Appellant's impairments are continuous or recurrent and expected to last one year or more because a person of a prescribed qualification provided verification of this on the health status report.

[6] The *Act* also requires that the restrictions in a person's activities of daily living have been verified by a person with appropriate qualifications. In that regard the Tribunal is satisfied that the Appellant has the following verified restrictions: must have organized lifestyle; difficulty with social situation; difficulties with motivation and persistence; reduced self worth; unsteady and clumsy and requires refraction.

Substantial Impairments and Restrictions

[7] In addition to the requirement for proper verification, in order to be found to be a "person with a disability" under subsection 4(1) of the *Act*, an Appellant must satisfy the Tribunal that he or she had a physical or mental impairment that met the threshold of substantial, and that the direct and cumulative effect of the impairment resulted in a

substantial restriction in his or her ability to attend to personal care, function in the community, or function in a workplace, at the time of the Director's decision. The legislation requires the Appellant to meet both of these thresholds of "substantial" in order to be determined to be a "person with a disability."

Substantial Impairments

[8] With respect to the definition of "person with a disability" guidance has been provided by the Ontario Court of Appeal in *Gray v. Director, Ontario Disability Support Program* (2002), 59 O.R. (3d) 364 (C.A.). In this case the Court dealt with the important issue of the appropriate determination of substantial impairment within the meaning of s. 4(1) of the *Act*.

[9] The Court held that "compared with its predecessor and with similar federal legislation, it would appear that the current definition of 'person with a disability' in the *ODSPA* was intended to encompass a broader segment of society and to provide assistance to persons with *significant* but not *severe* long-term functional barriers".

[10] The Court also held that when interpreting the word "substantial" in s.4(1)(a) of the *Act* "the word should be given a flexible meaning related to the varying circumstances of each individual case in a manner consistent with the purposes of the *Act*."

[11] The Court of Appeal in *Crane v. Ontario (Disability Support Program)*(2006), 278 D.L.R. (4th) 374, stated that s.4(1) presents three separate tests that require separate analysis and answers. The onus is on the Appellant to establish all three factors. However, the Court went on to say that in some cases, not all, there can be an overlap of evidence relevant to the factors in paragraphs (a) and (b) of s.4(1). This is because although the concept of impairment is anchored in medicine, the determination of whether an impairment is substantial will require consideration of the whole person, including a person's ability to function in the domains of personal care, community and workplace.

[12] The Tribunal is satisfied that at the time of the Director's decision the Appellant's impairments were substantial because of the totality of the evidence.

[13] The Appellant lives with his 86 year old mother. He has no children. He was employed as a cleaner for 8-9 years. For the past 27 years he has worked as a cab driver

and he continues to do this part-time. He works 3-4 days per week for about 6 -10 hours per day.

[14] The Appellant was diagnosed with diabetes in 1990. This condition causes him poor eyesight, pain in his hands and feet, fatigue, depression, poor energy and high sugar levels. He has fallen asleep in his cab and missed calls. He sees a specialist every three weeks. He is prescribed 2 insulins, which require 6 needles per day; novarpid, levemix and metformin.

[15] The Appellant experiences extreme pain in his hands and feet due to his diabetes. This neuropathy began about three years ago. The pain is constant, with pins and needles, but every 30-40 seconds he will experience a very sharp pain. He is prescribed Lyrica which he stated does reduce his pins and needles by about 50%, but he has to rely on samples from his doctor because he cannot afford it. The Appellant admitted that he sometimes takes less of his medication in order to make it last longer.

[16] He also has retinopathy which causes his eyes to go blurry, dry out and he has floaters in his eyes. He finds driving long distances is a strain on his eyes, and this will result in a headache. He tries to close and rest his eyes periodically throughout the day.

[17] The Appellant stated that he gets panicky; very nervous and jittery. This began about two years ago and he is unsure as to what triggers his panic attacks. When he is out in public he feels the need to flee. He experiences 3-4 panic attacks per day. He is easily confused and has poor memory.

[18] In a typical day the Appellant wakes to go to work at 5 a.m., he goes to work and waits for a call. If a call requires heavy lifting or going a long distance he has to refuse the fare. He goes home at 3:30 p.m. and sits in the backyard with his dog. He can no longer take his dog for walks because the pain in his feet limits his mobility. He does manage his house hold chores but minimally, at his own pace and with regular breaks. He manages his grocery shopping by getting a little each day while he is out to avoid heavy bags. The Appellant admitted that it is almost unsafe for him to drive, but he has no choice to support himself. He lives in a bungalow and his neighbour manages the lawn and snow removal for him.

[19] The family doctor has been treating the Appellant for 30+ years and sees him on a regular basis. The Tribunal finds this would be indicative of the doctor knowing the Appellant well and therefore has given considerable weight to the doctor's opinion. Overall, the family doctor stated that the Appellant's diabetes is not well controlled. His neuropathy is well documented and remains significant enough, despite treatment. He suffers from depression and sees him on a regular basis for this. On the Intellectual and Emotional Wellness scale he rated all but three areas with minimal to moderate symptoms. The Tribunal finds that the family doctor does describe the Appellant's impairments to be substantial. Additionally, the Appellant is also seen by an internist regularly due to his poorly controlled sugar levels.

[20] The Tribunal finds that the Appellant's impairments are substantial because he is in constant pain, which causes him difficulty using his hands, with standing and his mobility, despite treatment. His poorly controlled diabetes has resulted in him being depressed and experiencing anxiety.

Substantial Restrictions

[21] The remaining issue for the Tribunal is whether these substantial impairments, individually or cumulatively, result in substantial restrictions in one or more activities of daily living - that is the ability to function in the community, the workplace or attend to personal care.

[22] In *Director, Ontario Disability Support Program v. Gallier*, [2000]101 A.C.W.S. (3d) 642 the Court ruled that in considering whether an Appellant is substantially restricted in activities of daily living the Tribunal is "entitled to consider the applicant in the context of her own situation...The test is not whether any person with these impairments and restrictions met the criteria, but whether this person met the criteria."

[23] For the following reasons the Tribunal is persuaded that the Appellant's ability to function in the workplace is substantially restricted by the Appellant's substantial impairments. Although the Appellant continues working for a significant amount of time, it is clear that he should not be. His uncontrolled sugar levels, fatigue, poor vision, poor concentration and painful hands are a safety concern for driving and could be a danger to

others on the road. His poor use of his hands, limited mobility and poor concentration would be significant barriers to any employment.

[24] Section 5(1) of Ontario Regulation 222/98 under the *Act*, provides there shall be a review date for a determination that a person is a person with a disability unless the decision maker is “satisfied that the person’s impairment is not likely to improve.” The Tribunal is satisfied that it is not appropriate to set a date because his prognosis is poor. His conditions are expected to deteriorate and/or remain the same.

ORDER

[25] The appeal is granted. The decision of the Respondent Director is rescinded. The Tribunal orders that if otherwise eligible, income support shall be paid to the Appellant in accordance with section 17 of O. Reg. 222/98 made pursuant to the *Act*.

[26] The Tribunal directs that there be no review of the determination that the Appellant is a person with a disability because the Tribunal is satisfied that the Appellant's impairment is not likely to improve.

Signed by
Denise Dudley

Date issued
December 18, 2012