



**Social
Benefits
Tribunal**

APPELLANT
Appellant's Representative

Ali Mohammad Salal
Purva Vaidya

RESPONDENT
Respondent's Representative

Director, Ontario Disability Support
Program
Yeside Aguele

PRESIDING MEMBER

Michal Juhas

Hearing Date
SBT File No.

13 September 2023
2302-00915

DECISION

ISSUE

[1] The Appellant disagrees with the Director's 12 November 2022 decision that the Appellant is not a person with a disability, as defined in section 4 of the *Ontario Disability Support Program Act, 1997* (the *Act*). 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 subsection 4(1) of the *Act*.

DECISION

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

PRELIMINARY ISSUES

[3] The Appellant filed the appeal outside of the 30-day period required by the legislation. The Form 1 Appeal application was submitted on 15 February 2023, which was 1 day after the 14 February 2023 deadline to appeal the internal review decision from 10 January 2023. The Appellant's Representative submitted that the legal clinic attempted to submit the appeal on time but there were unexpected delays due to transmission issues. The Appellant's Representative also stated that there were some delays associated with the preparation of the appeal due to Appellant's language barrier and a need to arrange for an interpreter. The Tribunal has jurisdiction to hear the appeal, since it was filed less than one year after the internal review decision. The Tribunal considered the Appellant's reason for late filing and is satisfied that it is appropriate to extend the time for filing the appeal as per subsection 23 (2) of the *Act*. The Respondent did not raise an objection to the late appeal application during the hearing. As a result, the Tribunal decided to proceed with the hearing as scheduled.

REASONS

Applicable Law

[4] In order to be considered a "person with a disability" for the purposes of the *ODSPA*, an Appellant must meet the requirements of subsection 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.

[5] Subsection 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

[6] The *Act* requires that a person with prescribed qualifications verify the impairment and its likely duration and the restriction in the Appellant's activities of daily living.

[7] Based on the Health Status Report (HSR) completed by the Appellant's family physician who has the prescribed qualifications, the Tribunal is satisfied that the following impairment and restrictions were properly verified as continuous or recurrent and expected to last one year or more, at the date of the Director's decision:

Condition	Impairment	Restriction
Lumbar Degenerative Disc Disease (DDD)	<ul style="list-style-type: none">• Chronic low back pain	<ul style="list-style-type: none">• Difficulty standing for more than thirty minutes• Difficulty walking for more than thirty minutes• Difficulty sitting for more than thirty minutes• Difficulty lifting relevant weight• Difficulty pushing/pulling relevant weight

Substantial Impairments and Restrictions

[8] 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

[9] 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*.

[10] 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".

[11] 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*."

[12] 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 clauses (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.

[13] The Tribunal's findings of facts are based on the medical evidence and the Appellant's testimony at the hearing. Substantiality is a flexible concept determined on the totality of the evidence, which may include, in addition to testimony, medications, treatment plan, hospitalizations, specialist reports, diagnostic and imaging reports, use of assistive devices, activity limitations, narratives and severity scoring found in the Intellectual and Emotional Wellness Scale (IEWES) and the Activities of Daily Living Index (ADLI) in the HSR. Social and individual background, such as work history, education, living arrangements, and community and family circumstances, may also be relevant to understanding how an individual experiences an impairment, although it is always the medical impairment itself that must cause a substantial restriction in an activity of daily living. No one factor is determinative or required to reach a finding of substantiality, as the Tribunal's responsibility

is to assess the evidence, weigh all of it in balance, and consider the Appellant in their own personal context.

[14] The Tribunal finds it to be more likely than not that at the time of the Director's decision the Appellant's impairment related to Lumbar Degenerative Disc Disease was substantial based on the Appellant's testimony, the medical evidence set out in the Disability Determination Package (DDP) and the supplemental medical evidence submitted on behalf of the Appellant.

[15] By way of background, the Appellant was 47 years old at the date of the Director's decision. He lived in a townhouse with his wife and three of his youngest children. His highest level of education was grade 6 completed in his country of origin. The Appellant enrolled in English as a Second Language (ESL) courses after arriving in Canada and reached level 2 or 3. His most recent work and his only work in Canada was working for approximately 20 days as a painter and construction labourer in 2018. He also worked as a painter and plumber in different countries before moving to Canada. The work as a painter before moving to Canada was very physical and required the Appellant to carry 60kg boxes of paint up stairs for approximately 10 hours per day and 4-5 days per week. The Appellant also testified to having a large variety of different jobs since he was 12 years old in his country of origin. The Appellant had a driver's licence and access to a vehicle at the time of the Director's decision. The Appellant testified that he did not know how to use a computer, but he also testified that he was attending online ESL classes for two hours per day two days per week at the time of the Director's decisions.

[16] The Appellant's testimony was persuasive of substantial impairment.

[17] With respect to impairments relating to Lumbar Degenerative Disc Disease at the time of the Director's decision, the Appellant testified that he experienced chronic pain in his lower back. He described that the pain would sometimes radiate to his left leg, which would then stiffen up and be difficult to move (as documented in 2020 encounter notes, November 2021 biopsychosocial assessment, and August 2022 neurosurgeon letter). The Appellant testified that his level of pain in the lower back was at 8 on a scale from 1 to 10 from lowest to highest at the time of the Director's decision. He stated that the pain would be

exacerbated by physical activity such as walking or being in one position for too long when sitting or standing. The Appellant stated that he was not able to sleep in a bed due to the back pain and would sleep on the floor at the time of the Director's decision. He also testified that he would experience difficulty getting up in the morning approximately two times per week due to his back pain.

[18] The treatment identified in the DDP, additional documentation and the Appellant's testimony is persuasive of substantial impairment. The Appellant was prescribed Naproxen and Baclofen for his pain at the time of the Director's decision. He was also previously trialed on Cymbalta with not much response. The Appellant testified that at the time of the Director's decision the pain medication helped to relieve some of the pain approximately for 2-3 hours but stated that the pain would return. He also stated that his doctor wanted to increase his dosage, but he would experience dizziness side-effects. He also stated that he would sometimes not take his medication due to the dizziness side-effects. The Appellant also testified that he was using a back belt and a cane at the time of the Director's decision. The Appellant was also attending weekly physiotherapy sessions for his back at the time of the Director's decision. He was also recommended injections for his back pain and was referred to a pain clinic approximately two years ago, but he did not follow-up after the initial assessment. The Appellant was also referred to a neurosurgeon in August 2022 about potential surgical treatment of his degenerative disc disease. The Tribunal finds that the level of treatment is persuasive of substantial impairment at around the time of the Director's decision.

[19] The supplementary medical evidence documents are persuasive of substantial impairment and add credibility to the Appellant's testimony. The Tribunal recognizes that much of the medical documentation in evidence pre-dates the time of the Director's decision and finds that these are not reflective of the Appellant's status at the time in question. Documentation that is relevant to the time in question includes an August 2022 letter from a locum neurosurgeon which documents that the Appellant's "pain over the lower back radiating to the left leg..." which was supported by a previous "MRI report which... revealed that he has degenerative changes at L5-S1 associated with a grade 1 anterior listhesis or narrowing of left neural foramina narrowing" and recommended that the Appellant should

see the regular neurosurgeon about potential surgical treatment. The more historical supplemental medical documentation describes previous treatment efforts (including lack of response to physiotherapy) as well as the Appellant's lower back pain impairments and the worsening of the back pain after walking, bending, or sitting or standing for a long time. While the Tribunal ascribes little weight to the evidence that is not relevant to the time of the Director's decision, its value is in providing credibility to the Appellant's testimony because it is indicative of the efforts at treatment and supports the Appellant's historical account.

[20] Based on the Appellant's high levels of daily pain, and the efforts at treatment, as established through the sworn testimony of the Appellant that was generally consistent with the documentary medical evidence, the Tribunal finds it to be more likely than not that the Appellant did experience a substantial impairment at the time of the Director's decision.

Substantial Restrictions

[21] The remaining issue for the Tribunal is whether this substantial impairment results 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 was substantially restricted by the Appellant's substantial impairments at the time of the Director's decision.

[24] The Appellant's testimony was persuasive of substantial restriction. The Appellant testified that at the time of the Director's decision he was not able to walk, sit, or stand for more than 30 minutes due to his back pain. He also described that he was no longer able to carry as much weight as before and as much as he would be expected to carry as a construction labourer. He described that if he pushed himself, he could carry a maximum of

25 kg but that even lifting of grocery bags would affect his back pain at the time of the Director's decision. The Appellant testified that he was not able to do most of the chores around the home although he would try to help his family with running errands with a car, sweeping, or tidying up.

[25] The physician's narrative is supportive of a finding of substantial restriction. For example, the physician who completed the application noted on the HSR that the Appellant experienced "difficulty standing, walking, or sitting [for over] 30 minutes, difficulty lifting relevant weight or pushing/pulling relevant weight". A November 2021 biopsychosocial assessment completed by a registered social worker also describes that the Appellant's "impairments affect his ability to perform most of the daily activities independently" and that "the direct and accumulative (*sic*) effects of the impairment on the client's ability to function in the community and in a workplace, result in a substantial restriction to these activities of daily living... therefore, the impairment and its likely duration and restriction seem to me as a Social Worker (MSW and RSW) to meet the criteria of a "person with a disability" under the *Ontario Disability Support Program Act*". The biopsychosocial assessment was completed almost a year before the time of the Director's decision. It was not considered by the Tribunal in its determination of the Appellant's level of restriction at the time of the Director's decision since it was not proximate to the time in question. The biopsychosocial assessment report was still helpful in providing credibility to the Appellant's testimony about the long-standing nature of the Appellant's restrictions.

[26] The Activities of Daily Living Index (ADLI) is partially supportive of substantial restriction. The ADLI does not endorse any severe restrictions but includes 6 moderate restriction ratings (in the areas of dressing, housekeeping, laundry, sustained physical activity, mobility, and stair climbing) and 6 mild restriction ratings (in the areas of bathing, shopping, sitting, standing, transportation, and attending medical appointments). The Tribunal finds that these ratings appear only partially consistent with the family physician's own narrative in the HSR, which appear to describe more severe restrictions in several restrictions, such as standing or sitting. The Appellant's testimony also appeared to suggest more severe restrictions than described on the ADLI. When asked by the Respondent's Representative about the discrepancy, the Appellant testified that his restrictions in standing

and sitting were severe at the time of the Director's decision and that he did not know why his family physician endorsed only mild restriction in these activities. Due to the inconsistencies with the other evidence, the Tribunal put less weight on the ADLI in its consideration of the Appellant's level of restriction at the time of the Director's decision. Nonetheless, when considering all six of the moderate restrictions together, the Tribunal still finds that the ADLI was generally supportive of a substantial level of restriction at the time of the Director's decision.

[27] The Tribunal finds that the Appellant would not have been able to engage in employment of either a physical or sedentary nature without experiencing substantial restrictions at the time of the Director's decision. The Appellant's daily physical pain made this unreasonable for him. The Appellant's language barrier, limited education, limited experience using a computer, and previous work experience only in physically demanding positions would likely make finding an employment position where the Appellant would be able to function very difficult at the time of the Director's decision.

[28] Based on the detailed testimony of the Appellant that was generally consistent with the documentary evidence, the Tribunal finds it to be more likely than not that the Appellant did experience a substantial restriction to his ability to function in a workplace at the time of the Director's decision.

[29] Subsection 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 appropriate to set a date because the Appellant's age and desire to seek further treatment offer hope that his impairments will no longer reach the level of substantial. The Appellant did not yet trial recommended pain injections and could also be a candidate for a potential surgical treatment.

ORDER

[30] 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*.

SBT File Number - 2302-00915

[31] A review date under subsection 5(1) of O.Reg. 222/98 under the *ODSPA* is set for 1 year from the date of this Order.



Signed by Michal Juhas

**Date issued
September 28th, 2023**