

PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision dated January 10, 2012 which denied persons with disabilities designation, holding 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 for designation as a person with disabilities (PWD).

The Ministry found that the Appellant met the age requirement and that her impairment is likely to continue for at least 2 years. However, the Ministry was not satisfied that the evidence establishes that the Appellant has a severe physical or mental impairment, nor that her daily living activities (DLAs) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that she needs help from another person or an assistive device. The DLAs are set out in the Employment and Assistance for Persons with Disabilities Regulation, section 2.

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 before the ministry at the time of the Reconsideration Decision included:

A self report, in which the Appellant describes the following:

- She has severe and chronic pain in her neck, shoulder, shoulder blade and the small of her back.
- The pain has spread to her right arm and she hears a high-pitched ringing in her ears.
- She has suffered from chronic exhaustion for 25 years.

In terms of its effect on her, she states:

- Her condition has made employment impossible.
- She feels foggy and cloudy in her brain, making it difficult to think clearly.
- She takes pain killers regularly, has no social life and must spend much of time her bed.
- To avoid pain she must prop her head and arm up with pillows.
- If she does a bit of house work she must lay down and rest.
- She uses her left arm to do any work

A Physician's Report (PR) was completed by Dr F, GP, who has attended the Appellant for 5 years. He diagnosed her with neuropathic pain in her neck and make the following observations:

- Her pain made movement, lifting and repetitive use difficult
- The condition was likely to last for two or more years.
- The Appellant does not require any aids for her impairment

In terms of functional skills, Dr F found that the Appellant could:

- Walk 2-4 blocks unaided
- Climb 5+ steps
- Lift 5-15 lbs, and
- The Appellant had no difficulty with communication nor had any cognitive or emotional deficits
- Dr F noted continuous restrictions in the DLAs of Basic Housework, Daily Shopping and Use of transportation, but no restrictions with Personal Self-Care, Meal Preparation, Management of Medications, Mobility in and outside the home or Management of Finances.
- Regarding the degree of restriction, Dr F commented that the Appellant had pain with lifting and repetitive use.

The Assessor's Report (AR) was written by SO, an Occupational Therapist (OT). SO noted the following about the Appellant:

- She lives with a roommate, who helps with chores
- Her ability to communicate is satisfactory to good, however pain increases if she writes too much and she experiences ringing in her ears.
- She is independent with her:
 - Mobility and physical ability, (although limited by pain for lifting and carrying and holding)
 - Personal care, (although she is slower if her back pain flares)
 - Basic housekeeping (a little at a time.)
 - Shopping (although she requires periodic assistance from her roommate to carry heavier items)
 - Meals
 - Paying rent and bills

- Medications
 - Transportation (owns a car but could manage public transit if needed), and
 - Social functioning
- In terms of cognitive and emotional functioning, the OT found the following has a moderate impact on the Appellant's daily functioning:
 - Emotion
 - Attention/Concentration, and
 - Motivation
 - Her memory has a major impact on her daily functioning. The Appellant reported to the OT that these mental impairments resulted from her pain and the medication she takes, however she does not require support for social functioning.
 - Assistance is provided by a roommate, who brings in wood, mows lawns and carries heavy items.
 - In a report dated October 4, 2011, Dr J, a radiologist, noted "degenerative type uptake in the right upper and lower cervical facets best localized to the C3-4 and C6-7 levels. Activity is otherwise normal."

Evidence received at the Hearing

- The Appellant discussed her shoulder and right arm pain and that she must spend much of her time in bed. Her pain is constant. The only way to relieve it is to prop her torso and arms up with pillows.
- To use her arms she must keep her elbows pinned at her sides.
- When she was tested by the OT she used her left arm and had her elbows pinned at her side.
- The Appellant says that her pain has now spread to her left arm, making it extremely difficult to perform any tasks.

In the PR, Dr F opined that the Appellant was continuously restricted with basic housework, daily shopping and use of transportation and further commented regarding the degree of restriction that the Appellant experiences pain with lifting and repetitive use. The OT found her independent with housework although she could only do it a little at a time. The OT also found her independent with 4 of 5 areas of shopping, noting that she needs periodic help lifting heavier items. She was also independent with transportation as she owns a car but could manage public transit if needed.

The Panel has considered the OT's report together with the report of Dr F. Where Dr. F. assessed continuous DLA restrictions in the above-mentioned areas, the physician also clarified, with respect to the degree of restriction, that the Appellant experiences pain with lifting and repetitive use, and the OT provided a commentary about where specifically the Appellant was restricted.

PART F – Reasons for Panel Decision

The issue before the Panel is whether the Ministry's reconsideration decision dated January 10, 2012 to deny persons with disabilities designation was reasonably supported by the evidence, or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

Pursuant to section 2 of the EAPWDA, the Ministry found that the Appellant met the age requirement and that her impairment is likely to continue for at least 2 years. However, the Ministry found that the evidence did not establish that the Appellant was suffering from a severe physical impairment or a severe mental impairment, nor that her daily living activities (DLAs) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that she needs help from another person or an assistive device. The DLAs are set out in the Employment and Assistance for Persons with Disabilities Regulation, section 2.

The criteria for being designated as a person with disabilities (PWD) are set out in section 2 of the EAPWDA. The Minister may designate a person as a PWD when the following requirements are met:

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 has a severe mental or physical impairment that

- 2 (a) in the opinion of a medical 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.

Section 2(1)(a) of the EAPWDR defines DLAs for a person who has a severe physical or mental impairment as:

- preparing own meals,
- managing personal finances,
- shopping for personal needs,
- using public or personal transportation facilities,
- performing housework to keep one's residence in acceptable sanitary condition,
- moving about indoors and outdoors,
- performing personal hygiene and self care, and
- managing personal medication.

Section 2(1)(b) adds two additional activities for a person with a severe mental impairment:

- making decisions about personal activities, care or finances, and
- relating to, communicating, or interacting with others effectively.

An "assistive device" is defined in the EAPWDA as "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."

In her appeal documents and oral submissions, the Appellant argues that she suffers from pain in her neck,

shoulders and right arm. At the hearing she stated that her left arm was starting to hurt, limiting her even more. The Appellant maintains that this pain makes it difficult for her to carry out DLAs without assistance as she is often confined to her bed and can only operate normally for short periods before the pain becomes too much for her to bear and she is forced to stop.

The Ministry restated the position it took in its reconsideration decision, namely that the Appellant is over 18 years old and that her impairment is likely to last for at least two years. The Ministry maintains, however, that the available evidence does not show that the Appellant's physical impairment is 'severe' nor that she has a mental impairment. Nor did the Ministry accept that the evidence demonstrates that the Appellant's impairment directly and significantly restricts her ability to perform DLA's either continuously or for extended periods and that she requires help from another person or assistive device as a result of these restrictions.

The Appellant reports that she suffers from pain in her neck, shoulders and right arm. At the hearing she stated that her left arm was starting to hurt, limiting her even more.

The Panel finds the Ministry's conclusion with respect to severity of the Appellant's impairments reasonable. Regarding a severe physical impairment, apart from her difficulties with lifting heavier items and the length of time she can perform tasks, the Panel finds that the evidence demonstrates that the Appellant is independent with her DLAs and functional in most physical aspects. The physician indicated the Appellant can walk 2 to 4 blocks unaided, climb 5 or more steps unaided and lift 5 to 15 lbs., and that she does not require an aid for her impairment. The OT reported that the Appellant is independent in all areas of mobility and physical ability. Although the Appellant stated that her left arm is now hurting and it makes it very difficult to perform any tasks, the Panel finds that the available evidence in the physician and assessor reports does not reflect these further impacts.

Regarding a severe mental impairment the Panel finds that the evidence of a medical practitioner does not confirm a diagnosis of a mental disorder. The physician reports that the Appellant has no difficulties with communication. The physician also indicates that there are no significant deficits with cognitive and emotional function. In the assessor report, the OT has completed the section applicable to an applicant with an identified mental impairment which details impacts to daily cognitive and emotional functioning, but has noted that the Appellant self-reports the impacts as a result of chronic pain and medication. The OT has noted "N/A" and has not completed the section which details impacts to social functioning, which applies for an applicant with an identified mental impairment. Therefore, the Panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

The DLAs set out in the Regulations are as follows:

Section 2(1)(a)

- prepare own meals
- manage personal finances
- shop for personal needs
- use public or personal transportation
- perform housework to maintain the person's place of residence in acceptable sanitary condition
- move about indoors and outdoors
- perform personal hygiene and self care
- manage personal medication

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

- Make decisions about personal activities, care or finances
- Relate to, communicate or interact with others effectively

The Ministry argues that the information before it did not demonstrate a severe mental or physical impairment which directly and significantly restricted the Appellant's ability to perform DLAs either continuously or periodically for extended periods.

The Appellant argues that her condition makes it extremely difficult to function properly, particularly as the pain is spreading to her left arm. The Appellant reported to the Panel that she had to use her left arm to accomplish tasks for the OT. The Panel notes that in the evidence before the Ministry, the Appellant's left arm was not reported as problematic.

The Panel has authority to make a determination as to whether the Ministry's reconsideration decision was reasonable based on the evidence before the Ministry at the time it made the decision. In this case, the Ministry had before it two reports: the first was completed by the Appellant's physician and indicates that the Appellant is restricted in 3 out of 10 of the listed DLAs. These are Basic Housework, Daily Shopping and Use of Transportation.

The second was completed by an Occupational Therapist and is more detailed in its assessment of the Appellant's ability to carry out DLAs. This report indicates that the Appellant is Independent in 27 out of 28 detailed tasks of DLAs. The exception is listed under Shopping as Carrying purchases home, requiring periodic assistance from another person. This finding is consistent with the Appellant's position that she has periodic difficulty in lifting objects.

The legislation requires that the opinion of a prescribed professional confirms that the Appellant's ability to perform DLA is directly and significantly restricted either continuously or periodically for extended periods.

With this in mind and examining the evidence in totality, the Panel finds that the Ministry was reasonable in its conclusions with respect to DLA restrictions. The Panel considered the evidence of both the physician and the OT with respect to the Appellant's DLA restrictions. The physician indicated that the Appellant is continuously restricted in the areas of basic housework, daily shopping and use of transportation, with the clarification regarding the degree of restriction that the Appellant experiences pain with lifting and repetitive use. The OT's findings were more detailed and nuanced than the Appellant's GP's. The Appellant is assessed as independent in her ability to perform DLAs with the exception of lifting heavy items when shopping and having to take frequent breaks when performing housework. The Appellant also stated that she must take breaks when she does housework. Although the physician indicated the Appellant is restricted on a continuous basis with use of transportation, the OT reports that the Appellant is able to independently manage all tasks, including getting in and out of a vehicle, using public transit and arranging transportation with the note that the Appellant has her own car but could manage public transit, if needed.

Looking at the evidence of the physician together with that of the OT, the Panel finds that a prescribed professional has confirmed that the Appellant is periodically restricted with basic housework and with 1 out of 5 tasks of daily shopping (carrying purchases home). Although the Appellant states that she now experiences pain in her left arm which makes it difficult or impossible to perform most tasks of DLA, the Panel finds that the evidence of the prescribed professional does not confirm the Appellant's evidence, as required by the legislation. Therefore, the Panel finds that the ministry's determination that the evidence of a prescribed professional does not establish a direct and significant restriction on the Appellant's ability to perform DLA either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA, was reasonable.

Following from this, the Panel finds that the Ministry was reasonable in finding that, as she was not significantly restricted with her ability to perform DLAs, it could not be determined that significant help is required from other

persons.

Accordingly the Panel finds that the reconsideration decision to deny the Appellant persons with disabilities designation was reasonably supported by the evidence and the decision is confirmed.