

PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision dated February 21, 2012, 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 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 appellant has a severe physical or mental impairment or 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. The Ministry also found that as the Appellant is not significantly restricted in her ability to perform DLAs, it could not be determined that she requires the significant help from another person, although the Ministry noted that a cane was used as well as bathing aids and supportive cushions.

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 Ministry was not in attendance at the hearing. After confirming that the Ministry was properly notified, the hearing proceeded pursuant to Section 86(b) of the Employment and Assistance Regulation.

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

- The physician's report (PR), completed by the Appellant's GP, Dr J. Dr J has seen the Appellant since 1994. During the last year he has seen the Appellant 2-10 times.
- Dr J diagnosed:
 - Diabetes, since 1986
 - Diabetic Neuropathy, since 1998
 - Spinal Anesthetic Complications, since Feb 2011
 - Right Shoulder Dysfunction, since Feb 2011
 - Repeated pilonidal sinus and perianal abscesses, since 2004

Dr J opined that her conditions would be "lifelong."

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

- Climb 2-5 stairs unaided
- Lift 5-15 lbs
- Remain seated for less than 1 hour
- Communicate without difficulties.

In the February 14, 2012 letter Dr J agreed that the Appellant was:

- Only able to stand for 15 minutes at a time unaided, with the comment "Has to lean on a wall."
- Can only lift a maximum of 5 pounds at a time with her right arm.
- Able to sit for less than one hour.
- Unable to climb any stairs at all without the use of a handrail or her cane.
- Only able to walk up to ½ a block unaided, commenting, "Uses a cane."

No cognitive or emotional function deficits were identified by Dr. J.

Acting as the Assessor, Dr J noted the following about the Appellant:

- She lives with family, friend or a caregiver
- She has "pain and dysfunction sitting walking standing + with right hand grip."
- Her ability to communicate in all aspects is good.
- In terms of her mobility and physical ability, she was found to be:
 - independent with walking indoors
 - taking significantly longer than typical with:
 - Walking outdoors, climbing stairs and lifting.
 - Dr J noted: "walks 5 blocks + has to rest due to pain or weakness. Legs [unreadable] unstable going down stairs; difficultly getting out of chairs; gets out slowly; cannot lift or grip with right hand."

- Requiring periodic assistance from another person with standing
- As a general comment, Dr J noted "Problems increase when pilonidal sinus active and cannot sit at all and mobility decreases; son ... carries groceries and helps with housework."
- Regarding personal care, Dr J reported that the Appellant:
 - Is independent with dressing, grooming, toileting, feeding self and regulating diet
 - Takes significantly longer than typical with:
 - Grooming, bathing: "very difficult with getting in and out of baths."
 - and transfers in/out of bed: "takes a long time due to pain and weakness."
 - Requires periodic assistance from another person with transfers on/off of chair: "slowly."
- With basic housekeeping, Dr J reports the Appellant requiring periodic assistance from another person for laundry: "son does this cannot get clothes out of the dryer." Basic housekeeping takes significantly longer than typical.
- With regards to shopping, the Appellant:
 - Is independent with:
 - Reading prices and labels
 - Making appropriate choices, and
 - Paying for purchases
 - Takes significantly longer than typical with:
 - Going to and from store: "she walks too slowly, her son ... goes for her frequently."
 - Carrying purchases home: "son carries groceries."
- Regarding meals, Dr J reports the Appellant is:
 - Independent with:
 - Safe storage of food
 - Requires periodic assistance from another person with:
 - Meal planning
 - Food preparation, and
 - Cooking
 - Dr J noted: "uses expensive convenience food; cannot stand long enough to cook; as sitting is painful often doesn't eat meals."
- Dr J found her independent with all aspects of paying rent and bills and medications.
- With respect to transportation, Dr J found she takes significantly longer than typical with all aspects:
 - Getting in and out of vehicle
 - Using public transit
 - Using transit schedules and arranging transportation, noting "needs help, cannot travel if pilonidal sinus is active."
- Dr J found her independent with all aspects of social functioning.
- Dr. J also notes in the Assessor Report that the Appellant requires assistance from family and friends who "do major household tasks + cleaning," and that no assistance is available to clean her bathtub.
- To compensate for her impairment, the Appellant routinely uses a cane, bathing aids and supportive cushions.

- Under additional information, Dr J reported:
 - “Her rectal ulcers have become more frequent. She cannot sit for more than ½ hour at a time. Due to lack of money eats poorly + does not buy the recommended insulins. The poor diabetic control is damaging her nerves, muscles + eyes.”
- In the February 14, 2011 letter Dr J agreed the Appellant is in need of continuous assistance or unable to perform the following daily living activities on her own:
 - Getting in/out vehicle
 - Banking (son goes with her)
 - Cooking
 - Food preparation (son or friend to do for her, due to limitations)
 - Carrying purchases home
 - Going to and from stores
 - Laundry
 - Housekeeping
- He disagreed that she needed help with budgeting.
- In the same February 14, 2011 letter Dr J agreed that the Appellant needed an assistive device (cane, bath/shower bar, support cushions) to perform the following:
 - Transfers on/off chairs
 - Going to/from store
 - Walking indoors
 - Walking outdoors
 - Banking
 - Climbing stairs
 - Bathing/Showering
 - Sitting

At the hearing the Appellant stated the following:

- She has been dealing with her problems for a long time
- She is a diabetic and has had removals of her buttocks cheek
- She takes cortisone shots
- She worked security at the Olympics but her buttocks broke and bled
- They have been splitting open for 2 ½ years
- When this happens she cannot sit or stand
- It feels like a knife is stuck in her rear
- She can't bend over
- Has to use a cane to walk
- Three of her vertebrae have been pushed into two lower disks
- Dressing takes longer as she must lean against something
- When she bends over her back locks
- She needs to bathe frequently to prevent infections but can't bend down for a bath
- Friends must help wash floors or clean as she can't
- She can't take food from the oven without her back locking up although stovetop cooking is ok
- Showers are hard as she can't wash her hair

- She can't carry groceries
- She must lean against a wall for stovetop cooking or dishes
- She only takes half of her insulin as she can't afford it
- Vehicles are difficult with the bending required to get in and out
- She can't sit on the bus for longer than ½ an hour
- When her condition flares up it incapacitates her for about a week and she cannot stand
- she cannot walk more than a block without pain
- she has seen a specialist for her back and shoulder and a specialist for her rear problems
- her rear end problem calmed down in June, split in July and August, calmed down in October, split again in November, went to the hospital in December to have it lanced and it split again in January so the doctor has said she needs surgery again (booked for April)
- during the week that it flares it is so painful that she has a stick that she bites on to avoid grinding and cracking her teeth.

In her notice of appeal, the Appellant states that her rectal ulcer problem does not give notice when it will open up. When the pain comes she "cannot sit, walk and ha[s] problems laying down." Surgery is planned for her in April 2012 to take the pressure away although her physician has informed her that there is no cure for her problem. She previously had surgery but the problem relapsed. She is unable to work because she misses too many days when her ulcer splits open.

Since January 2012 the pain has felt like she is sitting on a sharp rock and she cannot sit for more than ½ an hour. She needs a cane because of the pain in her "back, right leg and butt." She must take three baths per day to prevent infections and cannot travel for more than ½ an hour in a car or bus. She previously took cortisone injections but they no longer work. She takes pain medications. She has difficulty keeping her home clean "as the pull on the butt cheek makes it feel like it is ripping open, then it feels like a sharp knife being shoved into the opening."

Under section 22(4)(b) of the Act, the Panel admitted the new evidence as it is in support of information and records which were before the Ministry at the time of its decision. The Ministry did not submit a challenge to the Appellant's introduction nor the content of this evidence.

PART F – Reasons for Panel Decision

This is a review of the Ministry's reconsideration decision dated February 21, 2012, 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 for designation as a person with disabilities (PWD). The Panel must determine whether this decision is reasonably supported by the evidence, or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

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 appellant has a severe physical or mental impairment or 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. The Ministry also found that as the Appellant is not significantly restricted from DLAs, it could not be determined that she requires the significant help or supervision of another person and that no assistive devices are required.

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. Pursuant to section 2(2) the applicant must have reached the age of 18 and the Minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLAs) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions, in the opinion of the prescribed professional, the person must require help to perform DLAs. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or 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."

There is no dispute that the Appellant is over 18 years old nor that her impairment is likely to last for at least two years.

The Act requires the physical or mental impairment to be severe. Evidence of severity can be drawn from the Appellant's ability to perform DLAs as well as medical evidence of the impairment itself.

The Ministry did not find the Appellant's impairment was severe, arguing that Dr J

"reports independent function with mobility and physical abilities with periodic help to stand (difficulty getting out of chairs – slowly). Walking outdoors is limited to 5 blocks before the need to rest, and some activities take longer (how much longer is not described). You are able to climb 2-5 stairs, to lift 5-15 lbs. and to sit for less than an hour. A cane is used to ambulate inside and outside the house. The functional skill limitations are more in keeping with a moderate impairment. The minister is not satisfied that the information provided is evidence of a severe physical impairment."

The Panel does not find the Ministry's assessment of severity reasonable. While the Ministry accurately reports the functional limitations in the physician's report (PR), Dr J's notes in the assessor's report (AR) state "problems increase when pilonidal sinus is active and cannot sit at all + mobility decreased." As well, he stated that she "cannot travel if pilonidal sinus is active," and that "her rectal ulcers have become more frequent. She cannot sit for more than ½ hour at a time. Due to lack of money eats poorly + does not buy the recommended insulins. The poor diabetic control is damaging her nerves, muscles + eyes."

There is information regarding severity in the doctor's additional report as well, for example she can only stand for 15 minutes at a time unaided (has to lean on a wall), she can only lift 5 lbs. at a time (with her right arm), that she cannot climb any stairs without her cane, and she is only able to walk up to 1/2 block unaided (uses a cane), and she uses her cane everyday both inside and outside her home.

This points to the fact that when the Appellant has an episode where her skin splits and bleeds she is basically incapacitated for a week at a time, according to her evidence. Episodes occurred in June, July, October, November, December and January, with splitting occurring in July, August, November of 2011 and January 2012. Based on this level of incapacity while the flare-ups occur, which are becoming more frequent the Panel finds that the Ministry was not reasonable in finding that no severe physical impairment existed. However, the Ministry was reasonable in concluding that no severe mental impairment exists as none was diagnosed. Dr. J reported no significant deficits with cognitive and emotional functioning and that the appellant is independent with all aspects of social functioning.

The next test is whether, in the opinion of a prescribed professional, the impairment(s) directly and significantly restrict DLAs continuously or periodically for extended periods.

The DLAs set out in the Regulations are as follows:

Section 2(1)(a)

- (i) prepare own meals
- (ii) manage personal finances
- (iii) shop for personal needs
- (iv) use public or personal transportation
- (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

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

The Ministry noted the restrictions on the DLAs as reported by Dr J but then concluded:

"As you are able to walk up to 5 blocks, to lift 5 lbs. with your right arm and have no lifting limitation with your left arm, to stand for 15 minutes and to sit for about an hour before needing to stretch, the functional skill limitations do not support the degree of restriction to daily living activities described in the application."

The Panel does not find the Ministry reasonable in negating the evidence in the AR based on the limitations set out in the PR. The discrepancies between the 2 reports are clarified by the February 14, 2012 report from the doctor seen together with the appellant's testimony. Examining the evidence in totality, it establishes that:

With respect to the DLA "prepare own meals" Dr J, acting as the Assessor, found the Appellant:

- Independent with:
 - Safe storage of food
- Requires periodic assistance from another person with:
 - Meal planning
 - Food preparation, and
 - Cooking
 - Dr J noted: "uses expensive convenience food; cannot stand long enough to cook; as sitting is painful often doesn't eat meals." The doctor's February 14, 2012 report assesses the appellant as requiring continuous assistance with cooking and food preparation (son or friend do for her, due to limitations).

This level of assistance required from another person with four elements of this DLA and the fact that the Appellant simply buys "expensive convenience food" rather than cook is evidence of an inability to prepare her own meals. As well she requires assistance from "son or friend."

The Panel finds the Ministry was not reasonable in its finding. A significant restriction is evident. The Panel accepts the evidence that the length of the flare-ups is a week and that periodic assistance is required for meal planning (AR), continuous assistance for food preparation and cooking (Dr J's February 14, 2012 letter), and independent with safe storage (AR).

Regarding the DLA "manage personal finances," Dr J found the Appellant independent with respect to banking, budgeting and paying rent and bills. The Appellant stated she cannot afford certain things but that is not an aspect of this DLA, which is the capacity to manage her finances. The doctor's additional report assesses the appellant as requiring continuous assistance with banking "son goes with her" and the appellant's testimony was that while she can do the transaction, she cannot stand in a line-up and she uses a cane for banking. Nonetheless she is able to perform the majority of these tasks so the Ministry was reasonable.

With regards to "shopping for personal needs," the Appellant:

- Is independent with:
 - Reading prices and labels
 - Making appropriate choices, and
 - Paying for purchases
- Takes significantly longer than typical with:
 - Going to and from store: "she walks too slowly, her son ... goes for her frequently."
 - Carrying purchases home: "son carries groceries."

While she is independent with three of the elements of this DLA, they are those not requiring physical activity: reading prices and labels, making appropriate choices and paying for purchases. Being able to go to the store

and carry purchases home is an essential aspect of this DLA and the Ministry was not reasonable in finding no restriction. While Dr J ticked the box denoting "takes significantly longer than typical" for carrying purchases home, his note "son carries groceries" indicates that she is unable to perform this task. The evidence shows her physical limitations with shopping are a direct and significant restriction to perform this DLA continuously. Dr J's February 14, 2012 letter corroborates this evidence.

With respect to "use public or personal transportation facilities," Dr J found she takes significantly longer than typical with all aspects:

- o Getting in and out of vehicle
- o Using public transit
- o Using transit schedules and arranging transportation, noting "needs help, cannot travel if pilonidal sinus is active."

This evidence points to a periodic restriction for an extended period, particularly during a flare-up of her pilonidal sinus. Dr J indicates she "cannot travel if pilonidal sinus is active." Which is consistent with her evidence and that even during periods where there is no flare-up she states:

- Vehicles are difficult with the bending required to get in and out
- She can't sit on the bus for longer than ½ an hour
- Dr J reported in his February 14, 2012 letter that she needs continuous assistance with getting in and out of a vehicle

The Panel finds the Ministry was unreasonable in finding no restriction. A periodic restriction for extended periods, particularly during a flare-up, is demonstrated with this DLA.

With the DLA of "perform housework to maintain the person's place of residence in an acceptable sanitary condition," Dr J found the Appellant requiring periodic assistance from another person for laundry: "son does this cannot get clothes out of the dryer" and basic housekeeping takes significantly longer than typical. He further stated she requires continuous assistance required for laundry/housekeeping in his February 14, 2012 letter, which is consistent with the comments in the AR that her son does this for her. The Appellant reported: "Friends must help wash floors or clean as she can't."

In addition to the general pain caused by the pilonidal sinus, the Appellant reported extreme difficulty bending over because of her back pain and particularly during a flare-up of the sinus. The panel finds her inability to perform household tasks because of this limitation constitutes a direct and significant restriction to perform this DLA continuously.

Regarding the DLA "move about indoors and outdoors," she was found to be:

- o independent with walking indoors
- o taking significantly longer than typical with:
 - Walking outdoors, climbing stairs and lifting.
 - Dr J noted: "walks 5 blocks + has to rest due to pain or weakness. Legs [unreadable] unstable going down stairs; difficultly getting out of chairs; gets out slowly; cannot lift or grip with right hand."
- o Requiring periodic assistance from another person with standing
- o As a general comment, Dr J noted "Problems increase when pilonidal sinus active and cannot sit at all and mobility decreases; son ... carries groceries and helps with housework."

In his February 14, 2012 letter Dr J notes that she requires a cane for walking indoors and outdoors, that she is only able to walk up to ½ a block with a cane, and can stand for only 15 minutes.

The Panel finds that the Ministry was unreasonable in finding no restriction. The combination of taking significantly longer than typical with walking outdoors, climbing stairs, lifting and requiring periodic assistance with standing constitutes a direct and significant restriction to perform this DLA either continuously or periodically for extended periods. Referencing Dr J's other comments on the increased frequency of the episodes and the Appellant's evidence that she is incapacitated for a week at a time when her pilonidal sinus is active is consistent with this finding.

Regarding the DLA "perform personal hygiene and self care," Dr J reported that the Appellant:

- Was independent with dressing, grooming, toileting, feeding self and regulating diet
- Takes significantly longer than typical with:
 - Grooming, bathing: "very difficult with getting in and out of baths."
 - and transfers in/out of bed: "takes a long time due to pain and weakness."
- Requires periodic assistance from another person with transfers on/off of chair: "slowly."

The Appellant reported:

- Dressing takes longer as she must lean against something
- She needs to bathe frequently to prevent infections but can't bend down for a bath
- Showers are hard as she can't wash her hair

The Panel finds that the Ministry was reasonable in determining the Appellant independent with this DLA. She is independent for many of the aspects of personal care and, while has difficulty with grooming, bathing, getting in and out of bed and chairs, she is still able to perform these tasks.

With respect to the DLA "manage personal medication," the Panel finds the Ministry was reasonable in finding no restrictions. Dr J found her independent with this. Apart from her inability to afford her insulin, she is able to fill prescriptions, take it as directed and store it safely.

In summary, the evidence shows the following DLAs are restricted:

- prepare own meals
- 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

The panel finds that the Ministry was not reasonable when it found that the Appellant is, in the opinion of a prescribed professional, not directly and significantly restricted in the Appellant's ability to perform DLAs, either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA with respect to the above DLAs.

The final test is contained in section 2(2)(b)(ii) of the Act, which states that as a result of those restrictions, in the opinion of the prescribed professional, the person must require help to perform DLAs. Section 2(3)(b) of the EAPWDA expands upon this section, stating that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

The evidence from the physician in the AR and the Appellant indicates that significant help is required from the Appellant's son and her friends with those DLAs for which she is restricted. Specifically, she requires significant help from friends and her son with housekeeping and her son with groceries and also requires the

use of assistive devices, especially a cane, as set out in Dr J's February 14, 2012 letter.

Accordingly the Panel finds that the reconsideration decision was not reasonably supported by the evidence and the decision is rescinded and is overturned in favour of the Appellant.