

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated March 6, 2012 which held that the appellant did not meet 4 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. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years and, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform daily living activities (DLA) either continuously or periodically for extended periods and, as a result of those restrictions, the appellant requires help 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

The evidence before the ministry at reconsideration was a PWD application comprised of a Self-report (SR), a Physician Report (PR), and an Assessor Report (AR), a February 9, 2012 letter from the appellant's general practitioner who completed both the PR and AR ("the physician's letter"), and a 3-page advocate prepared questionnaire completed by the same general practitioner ("the questionnaire").

In the SR, the appellant reports that due to pain in both of her feet and lower back degeneration, her whole alignment is off and she is not comfortable sitting, standing, lying or walking for any length of time. She can only climb one step at a time and avoids stairs if at all possible. She is up 3 to 4 times a night due to back and foot spasms and believes blocked leg veins may be part of her problem. She is able to dress herself but needs help putting on stockings. She cannot take baths, only showers, and cannot scrub her feet or cut her toenails. Moving from sitting to standing takes a lot longer and requires getting balanced.

In the PR, completed on November 15, 2011 by the appellant's general practitioner of 10 years, the appellant is diagnosed with musculoskeletal – trauma to right and left ankle date of onset November 2010, arthritis date of onset April 2011, and depression date of onset April 2011. In describing the appellant's health history, the physician reports that the appellant cannot climb stairs normally or get comfortable sitting/standing. Due to pain in her back and both feet the appellant is up 3 to 4 times at night, is unable to sleep on her right side and has insomnia. The appellant's height and weight are reported as 5'7" and 285 lbs. The appellant has not been prescribed medication and/or treatment that interferes with her ability to perform DLA and does not require aids or prosthetics. When asked "Is the impairment likely to continue for two years or more from today", the physician circles the "yes" box and writes "UNKNOWN" beside the box and where asked to explain writes "Unknown – has ligamentous tears x 4 in Rt ankle due to her injury. Healing not predictable. Has a specialist appointment pending." With respect to functional skills, the appellant can walk less than 1 block unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs, and can remain seated less than 1 hour. The appellant has no difficulties with communication. A significant deficit with cognitive and emotional function for emotional disturbance is reported ("feels emotionally labile due to her insomnia, and dealing with her pain"); no deficits are reported for the remaining 10 identified areas. With respect to DLA, the appellant is restricted in her ability to perform personal self care, basic housework, daily shopping, mobility outside the home, use of transportation, and social functioning (needs to stay home, rest as needed). The restrictions for housework, shopping and mobility outside are identified as periodic; the restrictions with personal self care, transportation, and social functioning are not identified as either periodic or continuous. Descriptive narrative respecting the degree of restriction is that the appellant is unable to bear weight comfortably on either foot and cannot bend/sit/stand for long. Assistance needed with DLA is described as the appellant's daughter doing vacuuming and laundry and the appellant's aunt running errands.

In the AR, also completed by the appellant's general practitioner, the appellant is reported to have a good ability to communicate. With respect to mobility and physical ability, the appellant independently manages walking indoors, takes significantly longer walking outdoors, climbing stairs, and standing (difficult standing for over 20 min) and requires periodic assistance for lifting (can't lift over 10 lbs due to pain) and carrying/holding. No major impact on daily functioning is reported for any aspect of cognitive and emotional functioning with a moderate impact reported for emotion; either minimal or no impact is reported for the remaining 13 listed aspects. Respecting the DLA personal care, grooming, bathing, toileting, feeding self, and regulating diet are managed independently; dressing is reported to take significantly longer and require periodic assistance while transfers to and from bed and chair take significantly longer. Additional narrative is that the appellant cannot bend to put on her socks or to wash/scrub her feet. Basic housekeeping and laundry require periodic assistance. With respect to shopping, the assessor did not tick any of the answer boxes respecting the tasks of going to and from stores or carrying purchases home but wrote that the appellant leans on a buggy in shops and to carry her purchases and reports the appellant as independently managing reading prices and labels,

making appropriate choices, and paying for purchases. The appellant is reported to independently manage all aspects of meals, paying rent and bills, and medications. Respecting transportation, the appellant is unable to use public transit or transit schedules and takes significantly longer getting in and out of a vehicle. The section of the AR respecting the DLA social functioning has not been completed. Assistance is provided by family and help is required for foot care and housekeeping. The appellant requires a cane, raised toilet seat, and bath stool. The assessor adds that the appellant has to soak her feet twice daily to cool down the pain in her ankles and feet and takes ibuprofen BID.

A questionnaire ("the questionnaire") prepared by the appellant's advocate asks the appellant's general practitioner to agree or disagree with each written statement on the form and gives an opportunity to provide comments after each statement. The physician indicates that he agrees that the appellant's "conditions" are likely to continue for two years or more, that the appellant is only able to walk less than one block before having to stop for a rest, is unable to climb any stairs without use of a handrail, is able to sit for less than 1 hour before having to move around, is only able to lift 5 lbs at a time, and only able to stand for 10-15 minutes at a time. The physician provides no written comments respecting any of the above statements. Respecting cognitive and emotional functioning, the physician agrees that bodily functions (sleep), emotions (depression), and motivation have a major impact on her daily functioning and writes "she is depressed, and in constant pain." The physician neither agrees nor disagrees with the statement that motor activity (agitation) has a major impact on daily functioning. Respecting DLA, the physician indicates that she agrees that the appellant requires continuous assistance or is unable to perform all listed activities – dressing (socks, shoes), grooming (cutting toenails), bathing (can't scrub feet), toileting (wiping herself), laundry, basic housekeeping, going to and from stores, carrying purchases home, food preparation, cooking (relies on prepared/packaged food as can't stand to prepare meals), using public transit, social functioning. Additionally, the physician writes "Due to constant fatigue/insomnia and low mood/motivation."

The physician's February 9, 2012 letter states that the appellant will be seeing a named vascular surgeon prior to [another named physician] doing anything regarding her right ankle. The appellant "cannot stand for more than twenty minutes at a time due to pain in her legs. The duration of her illness is not known until both specialists have assessed her."

At the hearing, the appellant submitted 3 additional letters: an undated letter from a friend; an undated letter from her daughter; and, a March 28, 2012 consultation letter from the above-referenced vascular surgeon to the appellant's general practitioner.

The letter from the appellant's friend states that since 2008, when the appellant began to complain about pain and swelling of her legs, the pain has become increasingly worse and the appellant is now unable to get out of the house due to stress, constant pain walking, standing, and sitting, and lack of sleep. The friend also writes that the appellant seems to be depressed and withdrawn because she is unable to do what she used to.

The appellant's daughter writes that the appellant finds it difficult to stand on her legs and feet long enough to sweep, vacuum, and mop floors and is unable to bend down to clean her bathroom. The appellant's daughter writes that she does the laundry and errands such as picking up milk, bread etc. once a week, takes her mother dinner, and scrubs her mother's feet and clips her toe nails. She has had to help her mother numerous times to stand from a sitting position and adds that when her mother is unable to avoid stairs, she takes one or two steps, then stops before taking another one or two steps. She reports a personality change in her mother, finding her quick to anger and often depressed and not wanting to leave the house.

In the March 28, 2012 consult letter, the vascular surgeon writes that the appellant recently sustained a ligament injury to her right ankle which has been considered for repair by another specialist and that the appellant complains that her right leg swells and throbs towards the end of the day. On examination, the

vascular surgeon reports a slightly swollen right leg compared to the left, intact pulses in both feet, bilateral varicose veins and spider veins. The surgeon comments that the appellant has deep venous system insufficiency of her right leg which will cause swelling. The "skin around the right ankle is still in good condition and hence we can anticipate healing." The vascular surgeon also writes "I do not think either her arterial or venous status is any contra indication to have her ligaments repaired if that is what she needs. From a vascular point of view the only treatment that we can offer is the use of a venous support stocking. She has a prescription for this."

At the hearing, the appellant clarified that the specialist referenced by both the general practitioner and vascular surgeon is an orthopaedic surgeon. The appellant stated that prior to her appointment with the vascular surgeon, she saw the orthopaedic surgeon who stated that he would make a "boot shoe" for her. The appellant's understanding is that, according to the orthopaedic surgeon, surgery is not an option due to swelling. The appellant stated that she was injured in November 2010 but continued working until July 2011 when she could no longer bear any weight. The appellant stated that she lives in a basement suite in her daughter's home and that her daughter does cleaning, assists with putting the appellant's stockings on, and sometimes her pants, provides foot care, sometimes attends to hygiene needs after toileting, and picks up things including groceries. The appellant stated that she drives herself to doctor appointments, to refill prescriptions, and to submit her assistance stub but that she barely leaves the house. The appellant also reported not being alert when driving due to taking Naproxen. In response to questioning, the appellant stated that she could do loads of laundry under 5 lbs. but that she is unable to do a whole lot of housekeeping and that she is not being treated for depression.

The ministry did not provide additional evidence at the hearing and stood by its reconsideration decision.

The ministry did not object to the admission of the letters submitted at the hearing. The panel finds that the three letters and the appellant's oral testimony directly relate to the appellant's medical conditions as diagnosed in the PR and are therefore in support of the information and records before the ministry at reconsideration and admissible pursuant to s. 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably concluded that the appellant has not met the all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical or mental impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years and, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform daily living activities (DLA) either continuously or periodically for extended periods and, as a result of those restrictions, the appellant requires help to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR which are set out below.

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 has a severe mental or physical impairment that

- (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.

(4) The minister may rescind a designation under subsection (2).

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Duration of Impairment

The ministry's position is that the appellant's general practitioner expressly stated that the duration of the appellant's illness would not be known until she was assessed by both specialists. Therefore, although the general practitioner agrees in the questionnaire that the appellant's conditions are likely to continue for two or more years, the ministry is not satisfied that impairment will continue for two or more years in the absence of information on results of the consultations that might resolve or minimize the impairment.

The appellant's position is that this legislative criterion is met by her general practitioner's confirmation in the questionnaire that the impairment will continue for at least two years. The appellant's advocate also argues that the duration of the appellant's other medical conditions are not in question.

The panel finds that, although on February 22, 2012 when completing the questionnaire the appellant's general practitioner placed a tick mark to indicate her agreement with the statement that the appellant's conditions are likely to continue for two years or more from today, the ministry was reasonable not viewing this evidence in isolation given the additional information provided by the same general practitioner. Of particular note is the information from the general practitioner provided on November 15, 2011 in the PR that the estimated duration of the impairment is unknown, that healing is not predictable, and that a specialist appointment is pending as well as the general practitioner's statement in the February 9, 2012 letter that the "duration of her illness is not known until both specialists have assessed her." The general practitioner has not provided any explanation to account for the conflicting information in the questionnaire respecting duration which appears to have been provided prior to the appellant being seen by either medical specialist and less than two weeks after the February 9, 2012 letter expressly stating that duration will not be known until the

appellant is seen by both specialists. While the panel notes the possibility that the general practitioner provided a different response given that the question in the questionnaire asks about medical conditions rather than impairment, this cannot be ascertained in the absence of an explanation from the general practitioner. At the hearing, the appellant stated that she understands the orthopaedic surgeon to be of the opinion that surgical intervention is not possible and that the right ankle will not improve; however, no substantiating information from the orthopaedic surgeon was provided. Furthermore, the information from the vascular surgeon in his March 28, 2012 letter is that the appellant's vascular condition (venous state) does not pose any contra indication to ligament repairs, if required, and that the vascular surgeon anticipates healing. The panel also notes that the vascular surgeon characterizes the appellant's ligament injury as being "recent" which is consistent with the general practitioner's comments in the PR and February 9, 2012 letter indicating the possibility of healing and the need for further investigation by the medical specialists. For the above reasons, the panel finds the ministry reasonable in not being satisfied that a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years as required under s. 2(2)(a) of the EAPWDA.

Severe Physical or Mental Impairment

Physical Impairment

The ministry's position is that the evidence in the PR and AR respecting the appellant's physical functional skills and ability to independently perform most aspects of mobility and physical ability with periodic assistance to lift/carry/hold over 10 lbs and difficulty standing more than 20 minutes, are more in keeping with a moderate degree of impairment. The ministry further contends that physical limitations and narrative in the questionnaire, considered in conjunction with the original application, do not demonstrate a severe physical impairment.

The appellant's position is that pain in her legs and feet impair her to the point that she is in constant pain and is severely limited in her ability to stand, walk, climb stairs, lift, carry and hold.

The appellant is diagnosed by her general practitioner with musculoskeletal (right and left ankle) and arthritis who originally reports that the appellant can stand for 20 minutes, is able to walk less than 1 block unaided, takes significantly longer walking outdoors, cannot lift over 10 lbs. necessitating periodic assistance, takes significantly longer climbing steps and is limited to 2 to 5 steps unaided, and can remain seated for less than 1 hour. Additionally, the general practitioner indicates that the appellant requires a cane, raised toilet seat and bath stool. In the questionnaire, the general practitioner confirms that the appellant can walk less than 1 block and remain seated for less than 1 hour but revises the appellant's lifting limit to that of only 5 lbs and the time she can stand to 10-15 minutes but, does not provide any explanation for these changes. While the panel finds the ministry reasonable in determining that the evidence provided in the original application and in the questionnaire establishes that the appellant has the ability to independently walk, climb stairs, and lift, the panel finds that the ministry has unreasonably characterized the described limitations as a moderate degree of impairment in view of the combined effect of the degree of limitation reported for walking, climbing stairs, lifting, and remaining seated. Therefore, the panel finds that the ministry unreasonably determined that a severe physical impairment was not established under s. 2(2) of the EAPWDA.

Mental Impairment

The ministry's position is that the physician's evidence that the appellant has good communication, only 1 deficit to cognitive and emotional functioning, and narrative identifying impacts on mood as relating to situational factors including chronic pain, inability to work and financial stress rather than an established mental impairment or brain injury do not support a severe mental impairment. The ministry further contends that the

information provided in the questionnaire does not differ greatly from the information in the original application and does not describe a severe mental impairment related to a serious mental health disorder.

The appellant's position is that as a result of her physical limitations and pain, has resulted in depression and impacted her cognitive functioning.

The evidence of the appellant's general practitioner in the PWD application is that the appellant's depression has a moderate rather than major impact on her daily functioning and that all other aspects of cognitive and emotional functioning have either minimal or no impact on daily functioning. This is supported by the general practitioner's evidence that the appellant has good communication abilities and that her DLA, including social functioning, are not restricted due to depression. The general practitioner's evidence in the questionnaire that three aspects of cognitive and emotional functioning, emotion (depression), bodily functions (sleep), and motivation have a major impact on her daily functioning and that the appellant requires continuous assistance with social functioning conflicts with the previous information and is not accompanied by an explanation for the change. The appellant's own evidence at the hearing is that she is not being treated for depression. In the absence of an explanation from the general practitioner for the reported change in the appellant's cognitive and emotional functioning identified in the questionnaire and the fact that the appellant is not being treated for depression, the panel finds that the ministry was reasonable in not being satisfied that a severe mental impairment was established.

Restrictions in the ability to perform DLA

The ministry's position is that the appellant's general practitioner reports that the majority of DLA are performed independently or require little help from others and therefore does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods. Specifically, the ministry points to the evidence in the AR that the appellant independently manages 23 of 28 aspects of DLA noting that periodic assistance is required for 3 aspects (dressing, laundry, and basic housekeeping), there is no description of how much longer some tasks of personal care take to perform, and that there is no explanation as to how the reported inability to use transit schedules relates to the appellant's medical conditions. Respecting the questionnaire, the ministry argues that although the need for continuous assistance is reported for a number of tasks of DLA, this information does not demonstrate a significant restriction in the appellant's ability to perform DLA given that the reported physical abilities of being able to stand for 10-15 minutes at a time, sit for 1 hour before getting up to move around, and lift up to 5 lbs do not prevent lifting laundry up to 5 lbs, doing basic housekeeping in short periods of time, or preparing food sitting down or cooking for 10-15 minutes at a time.

The appellant's position is that her physical impairment leaves her dependent upon her daughter for almost all housekeeping, help with dressing (primarily putting on stockings) and grooming (foot care and occasionally toileting), getting groceries and preparing meals.

The legislation requires that the minister be satisfied that, as a result of a severe physical or mental impairment, a person be directly restricted in the ability to perform DLA and that the restriction must be "significant" and either continuous or periodic for extended periods. Additionally, the legislation requires that the minister be satisfied that the requisite degree of restriction is in the opinion of a prescribed professional. The panel notes that the term "prescribed professional" as defined in s. 2 of the EAPWDR does not include medical office assistants.

The only evidence from a prescribed professional respecting the appellant's ability to perform DLA is provided by her general practitioner in the PWD application and in the questionnaire. The panel finds that the ministry

reasonably found that the information in the PR and AR indicates that the appellant independently manages almost all aspects of DLA. The information provided in the questionnaire that the appellant requires continuous assistance or is unable to perform aspects of the DLA personal care, basic housekeeping, shopping, meals, transportation, and social functioning significantly conflicts with the general practitioner's evidence in the PWD application. The ministry appears to accept the evidence of functional skills as presented in the questionnaire, which as previously noted, identify a reduced lifting capacity of 5 lbs. and an ability to stand for 10-15 minutes, but finds that these functional limitations as well as the ability to sit for up to 1 hour enable the appellant to manage her DLA in short periods of time. In addressing the conflicting evidence respecting DLA restrictions, the panel finds that the assertion in the questionnaire that the appellant requires continuous assistance with social functioning and transportation is not supported by the evidence originally provided by the general practitioner and is not accompanied by sufficient explanation in the questionnaire. Additionally, the panel notes that respecting transportation the appellant is able to independently drive. However, respecting the restrictions reported in the questionnaire for personal care, basic housekeeping, meals, and shopping, the panel finds that, although the general practitioner did not provide any explanation in the questionnaire to account for the different information, the physical functional limitations as originally reported in the PWD application, including the inability to walk 1 block unaided and need for a cane, are consistent with the restrictions identified in the questionnaire for these DLA and accepts that the evidence establishes that the appellant requires continuous assistance or is unable to perform aspects of these DLA. Based on this finding, the panel finds the ministry unreasonable in determining that it has not been established that in the opinion of a prescribed professional the appellant is directly and significantly continuously restricted in her ability to perform DLA under 2(2)(b)(i) of the EAPWDA.

Help with DLA

Regarding the need for help with DLA, the appellant argues that she requires the ongoing assistance from another person with personal care, basic housekeeping, shopping, meals, transportation, and social functioning as well as the need for assistive devices including a cane and bathroom aids.

The ministry argues that it has not been established that DLA are significantly restricted and therefore, it cannot be determined that significant help is required from other persons.

Regarding the need for help with DLA, the legislation requires that the need for assistance must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods in the opinion of a prescribed professional. The panel finds that the evidence of a prescribed professional establishes that the appellant requires continuous assistance with aspects of personal care, basic housekeeping, shopping, and meals as well as the use of a cane and bathroom aids. Therefore, the panel finds that the ministry unreasonably determined that the need for help as a result of a direct and significant restriction in the appellant's ability to perform DLA was not established under section 2(2)(b)(ii) of the EAPWDA.

In conclusion, while the panel finds that the ministry unreasonably determined that the criteria respecting the existence of a severe impairment which directly and significantly restricts the appellant's ability to perform DLA resulting in the need for help with DLA were not met, the panel finds that the ministry was reasonable in not being satisfied that the information respecting the duration of the appellant's current level of impairment established that it was likely to continue for 2 years.

Therefore, the panel finds that the ministry's decision was reasonably supported by the evidence and confirms the decision.