

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated March 22, 2012 which found that the appellant did not meet two of the five statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant meets the age requirement, and has a severe mental or physical impairment that is, in the opinion of a medical practitioner, likely to continue for two years or more. The ministry was not, however, satisfied that in the opinion of a prescribed professional the appellant's impairment directly and significantly restricts the appellant's ability to perform daily living activities (DLAs) either continuously or periodically for extended periods. The ministry also found that it could not be determined that the appellant, in the opinion of a prescribed professional, requires help, as defined in section 2(3)(b) of the EAPWDA, to perform DLAs.

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 did not attend the appeal hearing. After confirming that the ministry had been notified of the hearing, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the following:

- The appellant's PWD application, including a self-report signed by the appellant, a Physician's Report (PR) and Assessor's Report (AR). Both the PR and the AR were prepared and signed by the appellant's physician on December 14, 2011.
- The ministry's original decision, dated January 31, 2012 denying the appellant PWD status.
- The appellant's Request for Reconsideration, stamped as having been received by the ministry on March 8, 2012, and including a handwritten submission from the appellant.
- A "to whom it may concern" letter from the appellant's counsellor dated March 7, 2012.

In her self-report, the appellant explained that a few years previously she had injured her spine and broken her right wrist by falling down a flight of stairs. She subsequently had 4 unsuccessful spinal surgeries as well as surgery on her wrist. Her wrist still becomes sore now and then. Her spine causes extreme pain most of the time and prevents the appellant from doing many things. For example, she can walk a maximum of a couple of blocks before having to stop. Sitting, standing, bending, lifting, using stairs, and climbing in and out of a tub or shower are extremely hard. Lying for any length of time is painful. House cleaning has to be done a little at a time because bending is so hard and painful. Floors, dusting, cleaning bath rooms, and making beds are all difficult. The appellant wrote that she tries to take care of herself as best she can and most days it is a real struggle.

In her submission with the Request for Reconsideration, the appellant restated that she has undergone four failed spinal surgeries, that she suffers constant pain that doesn't allow her to lift, bend, climb stairs or to walk except for very short distances with the use of a cane. The appellant wrote that she requires help frequently to perform daily tasks such as housework and laundry. The pain in her right leg and spine is becoming more severe. She also needs assistance for personal care such as bathing and sometimes dressing.

In the PR, the appellant's physician of 6 years diagnosed failed lumbar fusion of the L4/L5/S1, second lumbar fusion, and grief reaction. The physician has seen the appellant 11 or more times in the past 12 months, and in narrative wrote "Back instability L4-5, L5-S1 causes low back pain and [right] radiculopathy. L5 nerve [with] weak dorsi fusion causing foot drag intermittently." The physician noted that the appellant is on pain medication and that she is sleeping poorly since witnessing the sudden death of her husband. The physician also reported that the pain medications do not interfere with the appellant's ability to perform DLAs. With respect to functional skills, the physician reported the appellant can walk up to 2 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 pounds, and can remain seated for less than 1 hour. The physician ticked the "yes" box indicating significant deficits with the following categories of cognitive and emotional function: executive (e.g. planning/organizing), memory, emotional disturbance (depression, anxiety),

and attention or sustained concentration, but noted that these deficits "should resolve when grieving settles down". Section E of the PR lists 10 "DLAs" with check boxes to indicate whether a DLA is restricted, and if so to indicate whether the restriction is continuous or periodic. The physician indicated the appellant is not restricted in personal self-care, meal preparation, management of medications, daily shopping, mobility inside the home, mobility outside the home, use of transportation or management of finances. Basic housework is shown as periodically restricted, with the notation "house keeper comes 1-2/month to do heavier things". Social functioning is shown as being restricted with the notation "withdrawn, grieving. Will go to [counsellor]". In response to the question "What assistance does your patient need with [DLAs]?" the physician wrote "No assistance aside from housekeeper."

In the AR, the physician described the appellant as "good" in 4 of 4 categories of "ability to communicate", and as "independent" in all categories of personal care, meals, pay rent and bills, and medications. All categories of "mobility and physical ability" are shown "independent" with the notation that the appellant uses an assistive device in the form of a walking cane for walking outdoors. The physician commented that "limited lifting/climbing stairs & walking due to back pain due to failed surgery/sciatica". Both categories of basic housekeeping are marked "independent" with the notation "not heavier [work such as] floors, vacuuming/bath rooms". 4 of 5 categories of shopping are shown as "independent"; the 5th category "carrying purchases home" shows the appellant as needing periodic assistance from another person with the notation "help from friends to carry groceries home." With respect to transportation, the appellant is shown as independent in the category dealing with getting it and out of a vehicle. The other two categories under transportation deal with public transit and are marked "N/A". The physician shows the appellant as independent in 5 of 5 categories of social functioning, with the notation "currently affected somewhat by grief", and as marginally functioning with both her immediate and extended social networks due to grief. Section B.4 of the AR is a section dealing with cognitive and emotional functioning, with the physician being asked to indicate to what degree the appellant's mental impairment restricts or impacts her functioning. The physician has indicated no impact for 9 out of 14 categories, with 5 of the categories (bodily functions - e.g. sleep disturbance, emotion- e.g. depression, attention/concentration, executive - e.g. planning and organizing, and memory) shown as minimally impacted. At the bottom of this section the physician noted "all impact related to recent witnessed death of husband. Should moderate over coming months". In the section dealing with assistance provided by other people for DLAs, the physician noted "N/A". Regarding assistive devices the physician noted "cane", and indicated no assistance is provided by assistance animals.

In the March 7, 2012 letter written by the appellant's counsellor, the counsellor noted that the appellant developed Posttraumatic Stress Disorder on November 13, 2012 on witnessing the death of her husband. The subsequent deaths of the appellant's father and paternal aunt compounded the grief process. The appellant continues to experience anxiety, flashbacks, distressing thoughts, emotional dysregulation with uncontrollable sobbing, depressed mood, irrational guilt, shaking, insomnia, nightmares, poor concentration and focus, hyper arousal with agitation, and social withdrawal. The counsellor wrote that the appellant requires "assistance with management of daily affairs such as decision making and document or form completion due to anxiety and concentration impairment".

In her Notice of Appeal, signed by the appellant on April 3, 2012 the appellant wrote that she disagreed with the ministry's reconsideration decision because her mobility is getting worse because

of increasing pain in her back and leg. Because of the dragging of her right foot she has fallen twice and is now using a walker. The appellant now gets much more help than before, with someone else doing her shopping, all cleaning, and looking after personal needs.

At the hearing before this panel the appellant said that she gets a lot of help from within the building where she lives. For example, the appellant says she never takes the garbage out herself or packs groceries up or down the stairs. Her friend and neighbour generally does these things for her. Another person does housekeeping weekly or biweekly. The appellant's sister calls 2 or 3 times every day and helps with some personal care. For example, the appellant now uses a chair borrowed from a charity and sits in the tub to shower. Her sister always helps her with getting on/off the chair as her right leg is weak and there is no grab bar. The appellant's sister often prepares vegetables for dinner and a sandwich for lunch. After work the appellant's sister usually does supper or if not the appellant can stand at the stove for short periods of time. Her sister usually does the after-dinner clean-up such as dishes and wipes the floor. The appellant's sister does laundry once or twice a week, makes the bed, cleans the oven, and wipes out the fridge. For walking outside the home the appellant uses a cane part of the time, or a walker for longer periods. She has had two falls and her right leg drags. Her neighbour has put a chair on the stair landing of the apartment building so the appellant can sit and rest on her way up or down the stairs. The appellant said that she used to be able to sit for 45 minutes to an hour but that she can't sit that long anymore.

In response to a question from the panel regarding mental impairment, the appellant cried and said that she often has severe nightmares. She will have a good day now and then, followed by 4 or 5 bad days. She hears her husband calling her throughout the day, and has nightmares about him screaming her name for help. The appellant dreams of the many hours she watched her husband die. A few days later her father passed away, followed by her aunt 2 or 3 weeks later. Her aunt had been like a mother to her for years.

The panel assessed the appellant's submission in her Notice of Appeal, and her evidence at the hearing as being respectively written and oral testimony in support of the information that was before the ministry at the time of its reconsideration decision, and admitted it as evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that in the opinion of a prescribed professional the appellant's severe impairments do not directly and significantly restrict her from performing DLAs either continuously or for extended periods, and that as a result of those restrictions the appellant does not require help to perform those activities?

The relevant legislative provisions are as follows:

EAPWDA section 2:

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.

EAPWDR section 2(1):

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.

The appellant's position is that her physical impairment restricts her ability to perform DLAs such that she has to rely heavily on others. She points out the help she receives with respect to meal preparation, shopping, housework, and personal care. She also refers to her use of an assistive device – a cane or a walker – for mobility outside her home. In her testimony the appellant did not expand on how her mental impairment affects her ability to perform DLAs. However, in the AR her physician did note that executive functioning – planning, organizing, sequencing, abstract thinking, problem solving, calculations) – were minimally impacted. Also with respect to the mental impairment, the counsellor's letter of March 7, 2012 indicated that the appellant requires assistance with decision making and form completion.

The ministry's position, as set out in the reconsideration decision, is that other than periodic restrictions to doing housework and moderate restrictions to social functioning, the appellant's physician has indicated that the appellant's ability to perform all other areas of daily living is unrestricted. The ministry stated that as it has not been determined the DLAs are significantly

restricted, it cannot be determined that the appellant requires significant help from other persons.

Directly and Significantly Restricted

In considering a person's ability to perform DLAs, the legislation requires that the minister be satisfied that "in the opinion of a prescribed professional", the person's severe mental or physical impairment directly and significantly restricts the person's ability to perform DLAs either continuously or periodically for extended periods. The prescribed professional relevant to the appellant's appeal is her physician.

In the PR, the physician reported that the appellant was unrestricted in all DLAs except for housework where periodic restriction was indicated, and social functioning where a restriction was indicated with the notation "withdrawn, grieving, will go to [counsellor]". The physician did not indicate whether this latter restriction was continuous or periodic. The counsellor, in the March 7, 2012 letter indicated that the appellant's grief, anxiety and concentration impairment do impact her ability to make decisions. The counsellor is not a medical practitioner and does not appear to be a prescribed professional, but even if she is a prescribed professional her evidence has to be considered in context with the physician's evidence from the PR that "this should resolve when grieving settles down", and from the AR that cognitive and emotional impacts are "minimal" and "should moderate over coming months". In the AR, the physician has assessed the appellant as independent in 40 of 41 functions associated with DLAs. The 1 exception was carrying purchases home, where the physician noted that the appellant requires periodic assistance in the form of help from friends to carry groceries home. Though describing the appellant as independent with respect to walking outdoors the physician noted she uses a cane, and though describing the appellant as independent with respect to basic housekeeping he noted she doesn't do the heavier tasks of housekeeping such as floors, vacuuming and bath rooms.

On balance, it would be difficult to interpret the evidence as showing that, in the physician's opinion, the appellant is significantly restricted in DLAs. Accordingly, the panel finds that the ministry reasonably determined that, in the opinion of a prescribed professional, the appellant's ability to perform DLAs is not directly and significantly restricted either continuously or periodically for extended periods.

Help in Relation to DLAs

Regarding the need for help with DLAs, the legislation requires that the need for assistance must arise from direct and significant restrictions in the ability to perform DLAs that are either continuous or periodic for extended periods in the opinion of a prescribed professional. Therefore, the panel finds that the ministry reasonably determined that as it has not been established that DLAs are directly and significantly restricted, it cannot be determined that help is required under section 2(2)(b)(ii) of the EAPWDA.

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