

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development ("the ministry") dated June 25, 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 has an impairment that 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 the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, 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 appellant was not in attendance at the hearing. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with s. 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration comprised a PWD application (Self-report (SR), Physician Report (PR) and Assessor Report (AR)) and a June 22, 2012 letter from the appellant submitted with her Request for Reconsideration.

In the PR, completed by the appellant's general practitioner of less than 1 year, the appellant is diagnosed with fibromyalgia and chronic headaches. The physician reports that severe fibromyalgia is incapacitating and is characterized by severe insomnia, very low energy, and moderately severe pain in the appellant's entire body. The appellant has not been prescribed medication or treatment that interferes with her ability to perform DLA and does not require any prostheses or aids for her impairment. With respect to functional skills, the appellant can walk 4+ blocks unaided on a flat surface ("walking is very painful"), climb 2 to 5 steps unaided, lift 5 to 15 lbs, and can remain seated for less than 1 hour. The appellant has no difficulties with communication. Significant deficits with cognitive and emotional function are reported for 2 of 11 specified areas, emotional disturbance and attention or sustained concentration with no additional information provided. The appellant's impairment is reported to directly restrict her ability to perform the DLA personal self care, meal preparation, mobility outside the home, and use of transportation continuously. Basic housework and daily shopping are periodically restricted. Management of medications, management of finances, and social functioning are not restricted. Mobility inside the home appears to have been originally reported as restricted but subsequently changed to indicate that it is not restricted though the box identifying the restriction as continuous remains "ticked." Description respecting periodic restrictions with DLA is that the appellant needs help with housework and shopping "at times" and that basic function is very compromised. When asked to describe the degree of restriction, the physician writes that the appellant is "unable to do activities she would like to." Assistance needed with DLA is described as "boyfriend has to prepare meals. Unable to use transportation – friend helps with this." The appellant is described as a sincere individual with real needs for assistance.

In the AR, completed by a social worker who had known the appellant for more than one month, the appellant's chronic pain due to fibromyalgia is described as restricting her ability to have an average life. The appellant is reported to have a good ability to communicate in the areas of writing and hearing while her ability in terms of speaking and reading is reported as satisfactory. With respect to mobility and physical ability, the appellant is independent walking indoors, requires periodic assistance from another person walking outdoors ("needs support/walk slowly") and standing ("short period of time [2 min]"), and requires continuous assistance from another person for climbing stairs ("avoid all stairs"), lifting ("no lifting at all", "cannot lift any grocery bags or household items/laundry"), and carrying/holding ("no"). When asked to indicate whether there is no impact, a minimal impact, a moderate impact, or a major impact on the appellant's daily functioning in 14 listed areas of cognitive and emotional functioning, the assessor reported a moderate impact for 2 of 14 listed aspects (consciousness and emotion), a minimal impact for 3 additional aspects (attention/concentration, executive, and memory), and no impact for the remaining 10 areas: bodily functions, which includes sleep disturbance; impulse control; insight and judgement; motivation; motor activity; language; psychotic symptoms; other neuropsychological problems; and other emotional or mental problems. Accompanying narrative is that the appellant is tired most of the time which affects her way of dealing with daily living, that she feels depressed/sad often with no hope at times, and she has to re-do activities to remember. With respect to DLA, the appellant is reported to independently manage all aspects of the DLAs personal care (pain is noted for 3 of 8 listed aspects -dressing, transfers on/off chair, transfers in/out of bed), meals (is slow with prep and cooking – cannot stand long), paying rent and bills, medications, and social functioning. Periodic assistance from another person is required for both aspects of basic housekeeping (laundry, basic housekeeping) and 1 of 3 aspects of transportation (getting in and out of a vehicle). The remaining 2 aspects of transportation (using

public transit and using transit schedules) are managed independently with the assessor noting that the appellant has to use public transit and needs a bus pass. The appellant requires continuous assistance from another person with 2 aspects of the remaining DLA, shopping (going to and from stores ("does not shop") and carrying purchases home) but independently makes appropriate choices and pays for purchases. The appellant has good functioning with her immediate social network and marginal functioning with extended social networks due to pain. The assessor indicates that the appellant uses a brace without providing any further detail. The assessor concludes that overall the appellant's daily living is affected by fluctuating/chronic pain and she is unable to physically look after her young children who do not reside with the appellant.

In the SR, the appellant describes fibromyalgia as a syndrome causing long-term whole-body pain and tenderness which has been linked to fatigue, sleep problems, headaches, depression, and anxiety. She reports that walking long distances is very hard and sometimes short distances are too. Sitting for short periods hurts her tail bone, lower back, and neck and walking around her house gets tiring. A heating pad helps her back just a bit. In her June 22, 2012 letter, the appellant writes of the death of her ex-husband and the resulting grief/family counselling and legal action respecting the custody of her children. Physically, she is very sore and almost immobilized by the end of each day as confirmed by her physician.

In her Notice of Appeal, the appellant reiterates that she experiences severe pain adding that it results in problems sleeping.

At the hearing, the ministry relied on its reconsideration decision but did not provide additional evidence.

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 prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

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.

Severity of Impairment

Physical Impairment

With respect to the existence of a severe physical impairment, the appellant's position is that the constant severe pain from fibromyalgia results in a severe impairment which impacts her daily living leaving her almost immobilized at the end of the day.

The ministry's position is that the functional skill limitations described by the appellant's treating physician are more in keeping with a moderate degree of impairment and that remedial treatment in the form of analgesics to ameliorate the pain are available. The ministry also takes the position that the appellant's information provided at reconsideration does not establish a severe physical impairment.

With respect to the appellant's physical impairment, the panel finds that a medical practitioner has diagnosed the appellant with fibromyalgia and chronic headaches. While the physician describes the fibromyalgia as being incapacitating, noting that it results in severe insomnia and very low energy, the physician also describes the pain as moderately severe and reports that although it is painful, the appellant can walk 4+ blocks, climb 2 to 5 steps, and lift 5 to 15 lbs without assistance. The assessor reports the appellant as unable to do any lifting, requiring continuous assistance with stairs, and only being able to stand for 2 minutes, thus necessitating periodic assistance with both standing and walking outdoors; walking indoors is managed independently with no noted limitations. The appellant's own evidence is that walking long distances is very hard, that sometimes short distances are also difficult, and that walking around her home is tiring. The panel

finds that the evidence of the physician and the appellant is reasonably consistent in terms of walking ability and is inconsistent with the assessor's information that the appellant is periodically unable to stand and is limited to walking for 2 minutes. The panel also notes that the physical functional limitations reported by the assessor appear at odds with the assessor's information that the appellant independently manages most physical aspects of DLA, including all aspects of meals. For these reasons, the panel places greater weight on the evidence of the physician, in conjunction with the appellant's own evidence, and finds that the ministry reasonably relied on the evidence of the appellant's physical functional skills reported by her treating physician. The physician reports that the appellant does not require any assistive devices for her impairment and, although the use of a brace is indicated by the assessor, it is unclear what type of brace is used, how often it is used or for what purpose. The panel also finds that there is no evidence to establish that the appellant is currently taking any pain medication with the only information being that the appellant would like to have the proper medication so that she does not have to feel sore and sick. Based on the above reasons and findings, the panel concludes that the ministry reasonably determined that the appellant's level of independent physical functioning and availability of ameliorative pain medication does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Mental Impairment

Based on the information in the appeal record, the appellant does not expressly argue that she has a severe mental impairment but does write that fibromyalgia has been linked to depression and anxiety.

The ministry's position is that a severe mental impairment has not been established. The ministry points to the absence of a diagnosed mental condition although two deficits with cognitive and emotional function are reported by the physician. The ministry also points to the assessor's evidence which does not identify a major impact on daily functioning for any aspect of cognitive and emotional functioning and indicates that those aspects which are either moderately or minimally impacted relate to the appellant being tired most of the time which affects her way of dealing with daily living.

The panel finds that a medical practitioner has not diagnosed the appellant with a mental impairment. The panel also finds that, although two deficits with cognitive and emotional function are identified by the physician, the physician indicates that there are no problems with communication or social functioning and provides no information to indicate that the appellant has any problems making decisions about personal activities, care or finances. The evidence of the assessor is that the appellant feels depressed/sad often but that there is no major impact on daily functioning for any of 14 listed aspects of cognitive and emotional function. The assessor also reports the appellant as independently managing the mental aspects of the listed DLA including shopping (making appropriate choices), personal care (regulate diet), and paying rent and bills (budgeting), transportation (using transit schedules). No evidence has been offered to suggest or establish that the appellant is being treated for a mental impairment. The panel finds that, in the absence of a diagnosis of a mental condition or narrative indicating a severe mental impairment and in view of the above noted evidence, the ministry has reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

While the appellant did not advance a position specific to her ability to perform individual DLA aside from noting that walking long distances, and sometimes short distances, is very difficult, she argues that she has constant pain which leaves her almost immobilized by the end of each day.

The ministry's position is that the evidence of the prescribed professionals establishes that the majority of DLA are performed independently or require little help from others and consequently does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

The legislation requires that the minister be satisfied that, in the opinion of a prescribed professional, 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. In this case, both the physician and the social worker are considered prescribed professionals under the legislation.

The evidence of both prescribed professionals is that the appellant is not restricted in her ability to perform any of the DLA relating to a mental impairment – social functioning and management of finances and medications. Additionally, no restrictions are identified for the cognitive aspects of any of the remaining DLA.

The evidence of the appellant's general practitioner is that the appellant is continuously restricted with personal self care, meal preparation, mobility outside the home, and use of transportation. Whether or not the physician considers the appellant to be continuously restricted with mobility inside the home is not entirely clear given that the physician has ticked both the box indicating that this activity is not restricted and the box indicating that it is continuously restricted. In light of the evidence of the physician that walking is painful and that the appellant has some limitations respecting the weight she can lift, the panel accepts that there is some ongoing restriction with mobility inside the home though the absence of any descriptive narrative and the functional skills reported by the physician do not suggest that the restriction is significant. The panel also notes that the assessor identifies the appellant as independently walking indoors with no noted restriction. Respecting the degree of restriction with the other DLA identified as continuously restricted, the physician writes only that the appellant is unable to do activities she would like to, that the appellant's boyfriend has to prepare meals, and that the appellant is unable to use transportation.

With respect to DLA the physician identifies as periodically restricted, basic housekeeping and shopping, the physician reports that help is needed "at times." It is unclear why the DLA meals and use of transportation are continuously restricted as they are arguably no more physically demanding, and perhaps less so, than basic housekeeping and shopping. The panel also notes that even though the assessor reported physical functional limitations much greater than those identified by the physician, most notably with walking and lifting, the assessor indicates that the appellant independently manages all aspects of meals though the physical tasks of meal preparation and cooking are done slowly.

The evidence of the assessor is that the appellant independently manages DLA with the exception of requiring periodic assistance with basic housekeeping (consistent with the physician), walking outdoors, and getting in and out of a vehicle as well as the continuous assistance of another person for 2 aspects of shopping (going to and from stores and carrying purchases home).

In assessing the somewhat confusing evidence respecting DLA, in particular the conflict between the physician's report that the appellant's boyfriend must make the meals and the assessor's reporting that the appellant independently manages meals, albeit slowly, the panel considered the information respecting DLA in conjunction with the information respecting the appellant's physical functional abilities. For the reasons previously stated when addressing severity of the physical impairment, the panel finds that the appellant's physical functional skills are such that she can stand for at least as long as it would take to walk 4 blocks and can lift 5-15 lbs. In view of these functional abilities, which were reported by the physician, the assessor's information that the appellant independently manages meals, and the evidence of both prescribed professionals that the appellant can manage some housekeeping, the panel finds that the evidence of the prescribed professionals does not substantiate a complete inability to manage meals but rather, that the appellant can manage meal preparation within her ongoing physical limitations.

In conclusion, while the evidence of the two prescribed professionals is somewhat inconsistent, the panel finds that it establishes that the appellant has ongoing, or continuous, restrictions in her ability to mobilize and to perform the physical aspects personal self care, basic housekeeping, shopping, meals, and use of transportation due to pain and fatigue. However, the panel finds that the evidence was reasonably viewed by the ministry as not meeting the legislative requirement that the restriction in the ability to perform DLA, either periodic or continuous, is significant. Based on the accepted evidence respecting the appellant's physical and mental functional skills which include the ability to walk 4+ blocks and lift 5-15 lbs., and the need for either no assistance or only periodic assistance with the majority of aspects of DLA, the panel finds that the evidence establishes that while the appellant experiences pain and has reduced endurance for performing DLA on a continuous basis and is, as the physician stated, "unable to do activities she would like to", the appellant is still able to manage the majority of aspects of DLA independently and requires mostly periodic assistance for the remaining aspects of DLA when her functional limits are exceeded. Therefore, the panel finds that the ministry was reasonable in not being satisfied that in the opinion of a prescribed professional the appellant is directly and significantly restricted in her ability to perform DLA either continuously or periodically for extended periods under 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

Regarding the need for help with DLA, the appellant's position is that she does not like feeling sore and weak and needing other people to do things for her.

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, s. 2(2) of the EAPWDA requires that the minister be satisfied that, in the opinion of a prescribed professional, a person needs help with DLA as a result of direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. Pursuant to s. 2 of the EAPWDR, help is defined as a person requiring an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the panel finds that the evidence of the prescribed professionals establishes that the appellant requires some assistance with the physical aspects of some DLA, the panel also finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that help is required to perform DLA as a result of direct and significant restrictions as is required by s. 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.