

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated April 26, 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 evidence before the ministry at reconsideration comprised:

- a PWD application which included a Physician Report (PR) and an Assessor Report (AR) both dated February 14, 2012 by the appellant's treating psychiatrist since November 2011;
- an April 24, 2012 letter from the appellant's general practitioner since 2002;
- a medical imaging report respecting an exam on 18-Sep-2009; and
- one page of an unsigned November 3, 2011 consultation letter from the psychiatrist who completed the PR and AR.

In the PR, the appellant is diagnosed with depressive disorder, arthritis, and lower back pain. The appellant, who is in her 40's, is reported to have developed depression as a teenager but to have had no treatment until October 2011. The appellant is reported to have been neglected as a child, has a spouse with bipolar disorder, and has four children. She has poor sleep and appetite and has no suicidal thoughts. The appellant has been prescribed Wellbutrin which is reported to interfere with her ability to perform DLA. No aids or prostheses are required for her impairment. With respect to functional skills, the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 5+ stairs unaided, lift 5 to 15 lbs, and can remain seated for 1 to 2 hours. The appellant has no difficulties with communication. A significant deficit with cognitive and emotional function is reported for 1 of 11 specified areas, emotional disturbance with narrative "depressive for a long time but left work a few months ago." Additional narrative from the psychiatrist is that although the appellant has been depressed she attended courses at a community college but has not worked because she was scared.

In the AR, the appellant is reported to have a good ability to communicate in the areas of speaking, reading, writing, and hearing. With respect to mobility and physical ability, the appellant is identified as being independent walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding with no further description provided. 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 psychiatrist reported a moderate impact for 2 of 14 listed aspects (bodily functions and emotion), a minimal impact for 2 additional aspects (attention/concentration and motivation), and no impact for the remaining 10 areas (consciousness, impulse control, insight and judgement, executive, memory, motor activity, language, psychotic symptoms, other neuropsychological problems, other emotional or mental problems). Accompanying narrative is that the appellant is depressed and anxious, cannot focus or concentrate when anxious and is not motivated to work due to fear. With respect to DLA, the appellant is reported to independently manage all aspects of all listed DLA - personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, transportation, and social functioning. Good functioning with both immediate and extended social networks is reported though the psychiatrist writes that the appellant requires "some support from her husband & children." Assistance is provided by family.

In the April 24, 2012 letter, the general practitioner writes that the appellant has several medical concerns that prevent her from working with a primary diagnosis of depression and anxiety as well as recurrent low back pain. The general practitioner writes that on April 17, 2012, the appellant reported "that she continued to have chronic daily back pain. This restricted her activities in the home and she required the daily help of her children to do housework and shopping. Her activities are limited to doing a little cooking and light jobs such as dusting and washing dishes." Additionally, the appellant is constantly living with fear and stress related to her anxiety disorder and avoids leaving the home as much as possible. The appellant also reports having low motivation due to depression and being chronically overwhelmed and seeing herself as incapable and afraid of everything. The general practitioner reports a very poor prognosis, long term symptoms, and no response to treatment to date and anticipates that the appellant will remain static in her condition.

The 2009 medical imaging report indicates no osseous or joint pathology in the sacroiliac joints, narrowing of

the disc space at L4-5 and L5-S1 with slight anterior displacement of the L4 in relation to L5 due to marked arthritic changes of the facet joints of the lower lumbar splen spine.

The November 3, 2011 psychiatric consultation letter recounts the appellant's self-reported history including a brief separation from her spouse in September 2011 and that the appellant reported that she takes medications which make her foggy, she has stopped socializing, she forces herself to do housework but cannot do her normal housework, her spouse hardly does any housework and, she has no suicidal thoughts. The psychiatrist confirms that the appellant had never seen a psychiatrist before or been on medication for depression until October 2011 and was, at the date of this letter, taking Celexa daily and Zopiclone at bedtime.

On appeal, the appellant submitted the following:

- an unsigned May 31, 2012 letter from the same psychiatrist who completed the PR and AR and authored the November 3, 2011 letter;
- a June 4, 2012 letter written by the appellant; and
- a 5-page advocates submission.

In the May 31, 2012 letter, the psychiatrist confirms the appellant's long history of depressive disorder, noting that she functioned reasonably well until September 2011 when she became increasingly depressed and was having panic-like attacks accompanied by depersonalization and paranoia and could not leave the house by herself. She was afraid to be alone and tended to isolate herself in the house and stopped talking to her friends and neglected herself. The appellant is noted to have reported becoming dependent on her four children because her spouse was unable to help due to his mental illness. Despite taking some courses to become a productive member of society, the appellant could not function due to her depression. Clinically, the appellant suffers from a severe major depressive disorder superimposed on chronic depressive disorder which is compounded by chronic pain disorder and life stress. As a result of her condition, the appellant could not function with daily living activities without significant help and support of her family. The psychiatrist reports that he continues to see the appellant, who never fails to keep her monthly appointment, for therapy and to monitor her progress. Currently, the appellant takes Wellbutrin XL 150 mg daily and cannot tolerate a higher dose because of dizziness and tiredness. The appellant also received supportive counselling. The psychiatrist concludes by stating that, in his opinion, the appellant is totally disabled and unfit to return to work in the near future.

In her June 4, 2012 letter, the appellant writes that she suffers from arthritis of the back, severe depression and anxiety and is restricted in doing daily activities. She reports being in pain most of the time and too depressed to do housework, shopping, laundry and cooking; her children help her do these things. She only drives routes she knows well due to great anxiety about getting lost and reports getting confused easily. She must go shopping with her children because she becomes overwhelmed and needs help at the check-out to pay for her purchases.

The panel finds that the letters from the appellant and her psychiatrist are further description of the impact of the appellant's previously diagnosed medical conditions and are thus admissible under s. 22(4) of the Employment and Assistance Act as being in support of the information and records before the minister at reconsideration. The advocate's submission is accepted as argument.

No additional evidence was provided by the ministry on appeal.

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 she is in pain most of the time due to arthritis in her back which impairs her ability to manage daily activities. The appellant's advocate argues that the ministry must exercise its discretion in interpreting and applying "severe" broadly and, in accordance with *Hudson*, must read the evidence of the physician and assessor in its entirety, place significant weight on the evidence of the appellant, and resolve any ambiguities in the legislation in favour of the appellant. Additionally, the advocate argues that, while the ministry correctly notes that employability is not a legislated criterion for PWD designation, if a person is medically unable to work it stands to reason that their medical conditions are severe and that employment is the concern of the appellant.

The ministry's position is that the information in the PWD application respecting the appellant's physical functional skills and independence with all aspects of mobility and physical ability does not establish a severe physical impairment.

With respect to the appellant's physical impairment, the panel finds that two medical practitioners, the psychiatrist and the general practitioner, have diagnosed the appellant with arthritis and recurrent/chronic daily low back pain and that the diagnoses are supported by the medical imaging report. In terms of the impact that these medical conditions have on the appellant's ability to function, the panel finds that the evidence establishes that despite ongoing lower back pain, the appellant is able to maintain a reasonable level of

physical function. In particular, the appellant manages walking indoors and outdoors, climbing stairs, lifting, and carrying/holding independently without the use of any assistance device or the assistance of another person. Additionally, the panel finds that the reported functioning in terms of the distance the appellant can walk, steps she can climb, weight she can carry, and time she can remain seated (which is not disputed by the appellant's own evidence, including that provided on appeal) was reasonably viewed by the ministry as not establishing a severe physical impairment. The April 24, 2012 letter from the general practitioner recounts the appellant's description of her back condition but does not indicate what her functional limits are in terms of ability to walk, climb stairs, lift/carry or remain standing or seated. The most recent medical evidence, the psychiatrist's May 31, 2012 letter, simply mentions that the appellant suffers from chronic back pain and arthritis without providing information respecting any impact on functioning. Both the appellant's general practitioner and psychiatrist express the opinion that the appellant is unable to work. The advocate argues that this is sufficient to establish a severe impairment. The panel finds, however, that employability is not a legislative criterion for designation as a PWD and therefore, is not alone determinative but rather, is a factor to be considered. In view of the above noted evidence respecting the appellant's level of independent physical functioning, the panel finds that the ministry reasonably determined that a severe physical impairment was not established under section 2(2) of the EAPWDA.

Mental Impairment

With respect to a severe mental impairment, the appellant's position is that her long-standing depression has worsened and is coupled with anxiety. As a result, the appellant argues that she has problems with focus and concentration and is without motivation to do housework and is dependent upon her children to manage DLA. The appellant's advocate points to the general practitioner's comment that the appellant's low back pain, depressed mood and anxiety with panic have been ongoing and disabling throughout the time she has known the appellant. The advocate's arguments previously outlined respecting legislative interpretation and the correlation of being unable to work with the existence of a severe impairment were also advanced in relation to the existence of a mental impairment.

The ministry's position is that a severe mental impairment has not been established by the information provided, including the psychiatrist's November 3, 2011 letter and the PWD application. Specifically, the ministry relies on the evidence in the AR that there are 2 areas of cognitive and emotional function which have a moderate impact on daily functioning while all other areas have either minimal or no impact and that the appellant is independently able to develop and maintain relationships, interact appropriately with others and make decisions about personal activities, care and finances.

The panel finds that the appellant's psychiatrist has diagnosed the appellant with a severe major depressive disorder superimposed on chronic depressive disorder with anxiety. The appellant's general practitioner has described the appellant's physical and mental conditions as being disabling as long as she has known the appellant which, according to the PWD application, is since 2002. In contrast, the appellant's psychiatrist reports that the appellant functioned reasonably well until September 2011 at which time the appellant became increasingly depressed and was having panic-like attacks. The appellant reports that pain and depression restrict her daily activities, her anxiety results in confusion and disorientation, and she feels overwhelmed.

Detailed information from the psychiatrist respecting the appellant's mental functioning is that she has 1 significant deficit with cognitive and emotional function, emotional disturbance, which the psychiatrist describes as depression and reports as having a moderate impact on daily functioning. While a moderate impact on daily functioning is also identified for bodily functions and a minimal impact is reported for attention/concentration and motivation, no impact on daily functioning is reported for the remaining 10 identified areas of cognitive and emotional function. Additionally, the psychiatrist reports that there is no major impact on daily functioning for

any of the 14 listed aspects of cognitive and emotional functioning despite being given the option to do so. Additionally, the psychiatrist reports that the appellant has no difficulties with communication and that the appellant independently makes appropriate shopping choices, manages her finances and medications independently, regularly attends her monthly appointments with the psychiatrist, has taken courses to increase her employability though she is unable to work, and has good social functioning.

The panel also considered the statement by the general practitioner that the appellant's concerns about her physical and mental conditions have been ongoing and disabling and the psychiatrist's opinion in his most recent letter of May 31, 2012 that the appellant "is totally disabled and unfit to return to work in the near future." The panel finds that the general statements by both physicians are not sufficient to outweigh the detailed information provided in the PWD application by the psychiatrist addressing the appellant's ability to function in terms of numerous aspects of cognitive and emotional functioning including her ability to communicate, interact socially, and make decisions and that the ministry was reasonable to rely on this information. In reaching this conclusion, the panel notes that the general practitioner's comment appears to identify restrictions with DLA due to pain rather than a mental impairment and that although the appellant is reported as constantly living in fear and leaving her home as little as possible, there is also evidence that the appellant has been able to leave her home to take college courses, regularly attends appointments with her psychiatrist, and is able to drive to familiar locations. The panel notes that in his May 31, 2012 letter, the psychiatrist describes the appellant's past mental history and her current diagnoses and treatment but does not provide any specific details respecting the appellant's cognitive and emotional functioning. Also of note is that the psychiatrist does not suggest that any of the information provided in the PWD application approximately 3 months earlier should be discounted or that there has been a change in the appellant's mental condition since the psychiatrist completed the PWD application and reported no major impact on daily functioning with any aspect of cognitive and emotional functioning and no restrictions with DLA. For these reasons, the panel finds that 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

Regarding the degree of restriction with DLA, the appellant's position is that her mental and physical impairments restrict her ability to perform DLA and that due to pain and depression she is dependent upon her children for shopping, housework and cooking. In furtherance of the appellant's argument, the advocate points to the most recent evidence from the appellant's psychiatrist, the letter of May 31, 2012, and the general practitioner's letter of April 24, 2012 as confirmation of the appellant's significant restrictions with DLA. The advocate also argues that as "significant" is not defined in the legislation, the ministry must use its discretion in interpreting and applying the terms fairly and liberally, giving appropriate weight to the medical professional's evidence. The appellant's advocate relies on *Hudson* as establishing that: there is no statutory requirement that more than 2 DLA be restricted; it is sufficient if the evidence of either the physician and assessor or the evidence of the physician and assessor when read together confirms the requisite restriction with DLA; and, the evidence of the prescribed professional's must be read in their entirety.

The ministry's position is that the evidence of the prescribed professionals does not demonstrate that a severe mental or physical impairment significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The ministry relies on the evidence of the psychiatrist in the PWD application that the appellant is independent with all DLA and the evidence of the general practitioner in the April 24, 2012 letter stating that the appellant is limited to doing a little cooking and light jobs such as dusting and washing dishes.

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.

The evidence of the appellant's general practitioner is that since 2002 when she began treating the appellant, the appellant's physical and mental conditions have been "disabling." When describing the impact of these "disabling" conditions on the appellant's ability to perform DLA, the GP indicates that due to back pain the appellant is restricted in her activities in the home and required daily help of her children for housework and shopping with the appellant being limited to a little cooking and light jobs such as dusting and washing dishes. The appellant is also reported to avoid leaving her home as much as possible. The GP does not provide any information specific to any of the other DLA defined in the legislation.

As previously noted, in contrast, the appellant's psychiatrist reports that the appellant "coped reasonably well" until September 2011, at which time her depression and anxiety worsened. At the time that the psychiatrist completed the PWD application, in February 2012 following the reported worsening of the appellant's mental impairment, the psychiatrist reported that the appellant was independent in terms of mobilizing indoors and outdoors and had no restrictions with any of the 33 listed aspects of the other DLA (personal self care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation) and has good social functioning.

The appellant's advocate argues that the evidence of the psychiatrist in his letters of November 3, 2011 and May 31, 2012 should be relied on with respect to the appellant's ability to perform DLA; presumably, the psychiatrist's evidence in the PWD application should be given little or no weight. The advocate acknowledges that the most recent letter from the psychiatrist does not identify any specific DLA but argues that the psychiatrist's comment that the appellant "could not function with daily living activities without significant help and support of her family" should be viewed together with the appellant's letter of June 4, 2012 identifying that most of the time she is in pain and too depressed to do her housework, shopping, laundry and cooking and only drives routes she knows well. The panel is not persuaded that such a direct link can be made given the evidence of the psychiatrist only approximately 3 months earlier in the PWD application that the appellant independently manages all listed aspects of these and all other DLA. The only indication that the appellant requires assistance with any DLA by the psychiatrist in the PWD application is the psychiatrist's response "some support from husband & children" when asked what help is needed for the DLA social functioning which is not consistent with the appellant's reported need for assistance with the DLA of housekeeping, shopping, and meals. As previously stated, the panel finds that the psychiatrist's May 31, 2012 letter does not discount or revise any of the information he provided in the PWD application nor does it offer any explanation which would account for such a significant change in the appellant's ability to manage her DLA. The panel also notes that the most recent evidence of the general practitioner in the April 24, 2012 letter states that the appellant's condition will remain static and, although it identifies some limitations in the appellant's ability to manage 2 DLA due to pain, cooking and housekeeping, the panel finds that the ministry reasonably viewed it as insufficient to establish significant restrictions with those DLA in light of the additional information respecting the appellant's physical functional abilities including the ability to walk 2-4 blocks and lift 5-15 lbs. With respect to the reference to the appellant being unable to do normal housework in the psychiatrist's November 3, 2011 letter, the panel finds that this comment appears in the psychiatrist's recounting of the appellant's self-reported history. Additionally, the panel finds that it is questionable that the November 3, 2011 letter, as it appears in the appeal record, is complete given that it is not signed by the psychiatrist and does not include either an assessment or any treatment recommendations both of which are typically the reason for requesting consultation with a specialist.

The appellant argues that the *Hudson* case establishes that there is no statutory requirement for more than 2 DLA to be restricted. However, neither is 2 DLA a "magic number" which automatically satisfies the legislative criteria. The evidence must be considered as a whole and in context. Given the degree of independence with

DLA and mobility/physical ability together with the physical and communication functional abilities reported by the psychiatrist in the PWD application, the limited information provided by the appellant's general practitioner, and the lack of detail of the information provided by the psychiatrist in his most recent letter, the panel finds 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 argues that she requires the assistance of her children with shopping, housework and cooking.

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 from family members with her 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.