

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 07 Aug 2012 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, the person requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: she has reached 18 years of age; and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 failed to appear at the hearing at the scheduled time, date and place. After waiting 15 minutes and after verifying that the appellant had received notification of the hearing at least 2 business days before the hearing date by examining the Canada Post tracking sheet showing successful delivery of the Notice of Hearing, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 12 April 2012. This contained a Physician Report (PR) dated 10 April and an Assessor Report dated 09 April 2012, both completed by the appellant's general practitioner (GP). The appellant has been the GP's patient for 2 years and the GP has seen her 2 – 11 times in the past year. The Application also included the appellant's Self Report (SR), with a note attached that she forgot to send it in with the original Application, but was forwarding it for consideration at reconsideration.
2. A diagnostic imaging report of a CT scan of the lower back, performed 17 April 2012.

In the PR, the GP diagnoses the appellant with arthritis - knees, degenerative changes L/S spine, resolved hepatitis C, depression, and past history of pharmaceutical i.v. drug use, the latter with onset 2005. Under health history, the GP writes: "Moderately severe osteoarthritis, affects hands and knees primarily. Moderate low back pain likely due to degenerative disc disease. Struggles with depression due to chronic pain, financial issues, etc. No i.v. drug use since 2005." The GP indicates that the appellant's impairment is likely to continue for two years or more, commenting: "long list of symptoms will likely worsen with time." In answer to the question whether the appellant had been prescribed any medication that interfere with her ability to perform DLA, the GP answers "No." Asked whether she uses any prostheses or aids for her impairment, the GP answers "No."

With respect to functional skills, the GP reports that the appellant can walk unaided 1 to 2 blocks, climb 2 to 5 stairs, lift 5 to 15 pounds and remain seated 1 to 2 hours. He reports no difficulties with communication. The GP reports significant deficits with cognitive and emotional function in the following areas: emotional disturbance, motivation, and attention or sustained concentration. Under additional comments, the GP states: "Moderately severe arthritis and low back pain, accompanied by depression causing problems with ADL and resulting [in] her incapable of any gainful employment."

In the AR, the GP indicates that the appellant lives with family/friends. With respect to the appellant's mental or physical impairments that impact her ability to manage DLA, the GP lists arthritis affecting hands, knees and lower back, and depression, likely secondary to chronic pain. As to ability to communicate, the GP assesses the appellant good for speaking and hearing and satisfactory for reading and writing. Regarding mobility and physical ability, the GP assesses her independent for walking indoors, and taking significantly longer than typical for walking outdoors, climbing stairs, and standing, with the comment that knee pain limits walking, standing and stairs. He assesses her as requiring periodic assistance from another person for lifting and carrying and holding, with the comment that she often gets help from friends for lifting and carrying.

With respect to cognitive and emotional functioning, the GP reports that the appellant's mental impairment has a major impact on emotion, a moderate impact on motivation, a minimal impact on consciousness, impulse control, insight and judgment, attention/concentration, executive, memory,

and language and no impact on bodily functions, motor activity, psychotic symptoms, and other neuropsychological problems. The GP comments that depression affects motivation and the appellant is on a stable dose of morphine.

As to assistance required to manage DLA, the GP assesses the appellant independent in all aspects of personal care. She requires periodic assistance for laundry and basic housekeeping, with the comment that she has help from friends. For shopping, periodic assistance is required for going to and from stores, making appropriate choices, and paying for purchases; continuous assistance is required for carrying purchases home with the comment that friends carry food. For meals, she is assessed as independent for meal planning and requiring periodic assistance for food preparation, cooking and safe storage. Periodic assistance is reported required for all aspects of paying rent and bills and medications, with the comment that she is frequently early for prescriptions with the occasional lost prescription. For transportation, she is assessed as independent for getting in and out of a vehicle and with periodic assistance required for using public transport and using transit schedules.

In terms of social functioning, the GP assesses the appellant as requiring periodic support/supervision, with no explanation or description, for ability to make appropriate social decisions, ability to develop and maintain relationships, interacting appropriately with others and ability to deal appropriately with unexpected demands. Regarding how the appellant's mental impairment impacts her relationship with others, the GP describes as "marginal functioning" her relationships with both her immediate and her extended social networks. There is no indication of any help required and there are no additional comments.

With respect to assistance provided for the appellant, the GP notes: "frequent help from friends doing housework, carrying." The GP does not indicate that any help is provided from the use of assistive devices or from an assistance animal. Under additional information the GP states: "multiple issues resulting in complete disability, affecting ADLs."

In her SR, the appellant describes her disability as chronic back pain, being treated with medication, severe arthritis in both knees (can randomly give out), depression - being treated with medication - and generalized anxiety disorder. She states she can only walk a block before taking a break; she can stand for a limited time only and has problems with organizational executive skills. She writes that within the past year her GP has tripled the dosage of her pain medication. This medication allows her to experience a lesser state of pain. The pain she does experience still greatly affects her ability to carry on with her daily living. In addition to her severe pain, she also has to deal with the side effects of the medication, such as drowsiness, sweat, constipation and lack of concentration. Despite medication, her pain continues to worsen and as a result her ability to do simple daily activities continues to worsen as well.

The appellant writes that in addition to her pain medication being tripled, her GP has prescribed antidepressants for her depression. She is scared most of the time and cries every day, which never used to be the case.

The SR goes on to list how her daily activities are directly and significantly restricted, with numerous examples. These include:

- To get in and out of the bathtub, she requires a handrail to maintain her balance. Her knees

give out on her and the potential for her to fall is high.

- She has to have quick showers because she cannot stand for long periods of time. She has to sit on the bathtub ledge while showering because of the pain she experiences while standing.
- Chopping, peeling, mixing and stirring are all incredibly painful and take her at least four times longer than normal.
- Getting out of bed can take her up to 20 minutes because of pain. Some days it hurts just to lift the blankets off her knees.
- It can take her four times longer to walk a few blocks. Simply walking two blocks can result in extreme pain for the rest of the day and sometimes the next day. Additionally she has become prone to falling because her knee gives out on her. She requires assistance to walk on any surface in winter.

She goes on to describe how she requires significant support and help from other people. She has arranged for a neighbour to help her with her shopping and laundry. She gets help from the following devices: handrail in bathtub, handrail by toilet, inhaler, can opener. She has also learned to rely on her environment, such as a shopping cart for support while shopping and leaning on the counter in the kitchen to ease the pain in her back and using something to pull on to get out of the couch or chair. She states that her GP has indicated that her condition will continue to worsen, which most likely will result in her requiring more aids in the future, such as braces, a cane and lifting devices.

The diagnostic imaging report gives as the lower back assessment: "Multilevel degenerative disease. Most notable is the moderately advanced stenosis at L4-5. Correlation with the neurological evaluation is required for complete assessment."

In her Notice of Appeal dated 24 August 2012, the appellant writes:

"Since I first applied for disability approximately one year ago, my physical and mental condition has steadily deteriorated. I have a severe impairment that significantly restricts my daily living activities to the point that I need significant help to accomplish most any task. I cannot walk more than 6 feet safely without the use of a cane or walker for support because my knee gives out and has caused me to fall and hurt myself several times. To have a shower, I need to take a chair and a phone with me. For example I can no longer pour myself a glass of milk from a full jug or open food jars. I cannot physically prepare myself a proper meal so I have to live on microwave and prepared foods. I have to pay to have my house cleaned, laundry and shopping done and my food put away. I need to grab the sink to pull myself off the toilet, which has caused it to come loose from the wall. I am afraid it is going to come right off and I could hurt myself. Upon waking it takes up to 15 min. to straighten up, breathe deep, straighten my legs and body until the pain and stiffness subside and for me to be able to get out of bed. This constant pain and anxiety is causing major depression and fear for my future quality of life."

The panel finds that the new information provided by the appellant in her Notice of Appeal concerning her medical condition is in support of the information and records that were before the ministry at the time of reconsideration. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

At the hearing, the ministry stood by its position at reconsideration.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA. Specifically the Ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions she requires help to perform those activities.

The Ministry did determine that she met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

2 (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.

The following section of the EAPWDR applies to this appeal:

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.

The panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal. As the appellant did not attend the hearing, the panel considers that her position appears to be based on her Notice of Appeal and the information contained in her PWD designation application, including her SW as well as the PR and AR completed by her GP.

Severity of mental impairment

The position of the ministry is that there is not enough evidence to establish a severe mental impairment. In the reconsideration decision, the ministry reviewed the evidence in the PR and AR, noting that the GP had indicated that the appellant has significant deficits in her cognitive and emotional functioning in the areas of emotional disturbance, motivation and attention. The ministry noted that in the AR, the GP indicated that her impairments have a moderate to minimal to no impact on the majority of her cognitive and emotional functioning, with major impact in the area of emotion. The ministry also noted that the appellant's depression affects her motivation. The ministry further noted that the appellant is on a stable dose of morphine. The ministry concluded that although the appellant's impairments impact her cognitive and emotional functioning, as she is able to manage her DLA either independently or with periodic assistance and can manage her social functioning with periodic assistance, evidence of a severe mental impairment has not been provided by her GP.

The position of the appellant appears to be that her GP has diagnosed her with depression. She is scared most of the time and cries every day. Her GP has reported that her depression has a major impact on her daily functioning. She has to deal with the side effects of her prescription pain medication, including drowsiness and reduced ability to concentrate. Overall, her position is that the evidence points to her having to cope with a severe mental impairment.

The evidence is that the GP has diagnosed the appellant with depression, secondary to her chronic pain. He has identified emotional disturbance as a significant deficit with cognitive and emotional functioning and having a major impact on her daily functioning. He has also identified motivation and attention/sustained concentration as significant deficits, though with moderate impact on daily functioning. However, apart from the assessment of "marginal functioning" relating to her ability to manage relationships, there are no descriptions or examples provided by the GP of how or to what extent the appellant's depression restricts her ability to function independently, effectively or appropriately. Without such information, and considering the evidence as reviewed by the ministry, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established.

Severity of physical impairment

The position of the ministry is that there is not enough evidence to establish a severe physical impairment. In reviewing the GP's evidence, the ministry noted that the appellant has moderately severe osteoarthritis affecting her hands and knees and moderate low back pain due to degenerative disc disease. The ministry noted the functional skills limitations reported by the GP (can walk 1 – 2 blocks unaided, etc.) and that the GP has indicated that the appellant does not require the use of any prostheses or aids for her impairments. In the AR, the GP indicates that she can independently walk indoors and that it takes her significantly longer to walk outdoors, climb stairs and stand due to knee

pain; however the ministry notes that how much longer these take has not been reported. The ministry also noted that the GP indicates that the appellant requires periodic assistance with lifting and carrying and holding, often getting help from friends to manage these tasks; in this connection the ministry refers back to the functional skills assessment where the GP indicates that she can lift 5 – 15 pounds and walk 1 - 2 blocks unaided. The ministry also noted that the appellant's arthritis affects her hands and knees and lower back and that her depression is related to her chronic pain. The ministry acknowledged that the appellant may experience limitations as a result her medical conditions; however the information provided by the GP does not confirm a severe physical impairment.

The position of the appellant appears to be that her arthritis in her arms and knees and her degenerative disc disease cause chronic pain, for which she has been prescribed a high daily dose of morphine, and which severely limits her mobility. Her condition has deteriorated to such an extent she cannot walk more than 6 feet safely without the use of a cane or walker for support, because her knee gives out and this has caused her to fall and hurt herself several times. Her impairment is such that she needs grab bars in the bathroom, has to lean on the counter or furniture elsewhere for support, must rely on friends for shopping because she can't do it herself, and is restricted to microwave or prepared foods because she can't stand long enough or use her hands to cut and chop or open cans or jars to make her own meals. With this evidence, It is unreasonable for the ministry to conclude that a severe physical impairment has not been established.

The legislation provides that the determination of the severity of impairment is at the discretion of the minister. The reasonable application of this discretion involves taking into account all the evidence, including that of the appellant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (her GP) identify the impairment and confirm that the impairment will continue for at least two years. While the appellant has stated in her Notice of Appeal that her condition – her impairment – has deteriorated to the point where she can only walk six feet without the use of a cane or walker, this has not been confirmed by the GP. The panel must rely on the evidence of the GP that describes her physical condition as moderately severe osteoarthritis, affecting hands and knees primarily, and moderate low back pain likely due to degenerative disc disease. However, in the Health History section of the PR, where the medical practitioner is asked to describe how the applicant's medical condition(s) impair the person, or elsewhere in the PR or AR, there is no description of how or to what extent these conditions manifest in her daily physical functioning. In particular, there is no confirmation about the appellant's knee randomly giving out and the associated safety risks. In the absence of such descriptive information that would shed light on the severity of the appellant's impairment, and in the light of the evidence summarized by the ministry, the panel finds that the ministry was reasonable in determining that the evidence did not establish a severe physical impairment.

Whether DLA are significantly restricted

The position of the ministry is that the evidence does not establish that, in the opinion of a prescribed professional, the appellant's impairment directly and significantly restricts DLA either continuously or periodically for extended periods. The reconsideration decision noted that in the PR the GP had indicated that the appellant has not been prescribed any medication and/or treatments that would interfere with her ability to perform DLA and that he does not indicate that she is restricted in her ability to manage her DLA. The ministry noted that in the AR, the GP indicates that the appellant can

independently manage all of her personal care. The GP indicates that she requires periodic assistance with the majority of her daily living activities; however the ministry held that "help from friends" or "friends carrying food" does not indicate that she requires this level of assistance for extended periods. Further in the ministry's view, as the appellant can walk 1 - 2 blocks independently and lift 5 - 15 pounds, her functional abilities do not indicate that she is unable to manage these tasks. The ministry notes that the GP has indicated that she requires periodic assistance with all of her social functioning and has marginal functioning with her immediate and extended social networks. The ministry notes, however, that there is no explanation or description of the degree and duration of support/supervision has been reported. The ministry acknowledges that the appellant's impairments impact her ability to manage her DLA but overall the ministry concludes that there is enough evidence to establish that the appellant meets this criterion.

The position of the appellant is that her DLA are directly and significantly restricted due to her disability, as explained by the numerous examples contained in her SR. Some of these examples relate to her difficulties with personal care, such as having to take quick showers because she can't stand for long. Other examples relate to her difficulties standing while preparing meals and her need for help from a friend for shopping and housecleaning. In addition, the appellant would also refer to the assessments provided by her GP in the AR where he reports periodic assistance from another person is required for almost all DLA, showing how much her ability to perform DLA are significantly restricted on an ongoing basis.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, not established in this appeal, and be in the opinion of a prescribed professional. The GP has not indicated that the appellant is restricted in any way with respect to personal care, assessing her as independent in all aspects of this DLA. The panel notes that in the AR the term "periodic assistance" refers to the need for significant help for an activity some of the time as would be the case where a person requires help due to the episodic nature of the impairment. As there is no evidence that the appellant's physical impairments are episodic, the panel is left with the conclusion that the ticks in the boxes under periodic assistance refer to the appellant obtaining assistance some of the time, the frequency of which is not described. With respect to the additional DLA relating to a person with a mental impairment i.e. make decisions about personal activities, care or finances; and relate to, communicate or interact with others effectively, the panel notes that there are no descriptions or examples of how her diagnosed depression impacts her ability to make decisions about his personal or family care, and with respect to the second, only that she has marginal functioning with both immediate and extended social networks, but without any explanation for these assessments. In the panel's view, assessing the appellant's overall ability to function as reported in the PR and AR, it is difficult to assess the GP's opinion as confirming that the restrictions to her ability to manage her DLA are "significant." The panel therefore finds that the ministry reasonably determined that this legislative criterion had not been met.

Whether help to perform DLA is required

In the reconsideration decision, the ministry noted that the GP has indicated that the appellant does not require any prostheses or aids and that she does not use an assistive device to compensate for her impairments. As it had not been established that DLA are significantly restricted, the ministry concludes that it cannot be determined that significant help is required from other persons and that the appellant does not require the services of an assistance animal.

The position of the appellant is that, as a result of her arthritis and lower back pain, she requires the assistance of others for shopping and housework. Moreover, her condition has deteriorated to such an extent that she needs to use a cane or walker to walk anything more than a few feet.

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

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.