

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated August 30, 2012 which held that the appellant did not meet 4 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant did meet the age requirement. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment, in the opinion of a medical practitioner, that is likely to continue for at least 2 years 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) dated June 20, an Assessor Report (AR) dated April 10, 2012 and a Self Report (SR) dated April 10, 2012,
- a Request for Reconsideration dated August 13, 2012,
- a fax and telephone log dated August 30, 2012 from the reconsideration officer to the appellant's physician.

In the PR, the appellant's physician indicates that she suffers from diffuse muscular pains, "NYD", not yet diagnosed. The appellant's physician of 5+ years reports that the appellant has had diffuse muscular pains in her arms and legs since April 2011 and that it hurts her to walk or use her arms. Multiple investigations and specialists referrals have not revealed a cause and multiple medications have been tried without improvement. The prescribed professional (PP) indicates that the appellant has not been prescribed any medications and/or treatments which interfere with her ability to perform DLA. No aids or prostheses are required for her impairment. Regarding Degree and Course of Impairment, the PP states that he does not know how long the appellant's symptoms will last because he does not have a diagnosis for her problems. With respect to functional skills, the PP indicates that it is unknown; how far the appellant can walk unaided on a flat surface, how many stairs she can climb unaided and how long she can remain seated. With respect to the appellant's limitations in lifting, both "unknown" and "no lifting" are indicated. The appellant is reported as having no difficulties with communication and no significant deficits with cognitive and emotional function.

In the section of the report related to restrictions in ability to perform DLA, the physician has not completed an assessment and made a note at the bottom of the section that he "did not fill out this section and someone else filled it out."

The AR was completed by a registered nurse who has known the appellant for 3 weeks, seen her 2-10 times and conducted both an office interview as well as a home assessment with the appellant. In the AR, the appellant is reported to have satisfactory ability to communicate in the areas of speaking, reading, writing (able to do it slowly due to pain), and hearing. With respect to mobility and physical ability, the appellant is noted as taking significantly longer than typical with walking indoors and outdoors (very slow and painful, takes 6-7 times longer). Continuous assistance from another person is required for; climbing stairs (extremely difficult and painful), standing (maximum 5 minutes), lifting (maximum lift is a coffee mug), and carrying/holding (unable). The assessor has added a note that the appellant "advises that all mobility is very slow and painful."

It is noted that there is no formal diagnosis of mental/emotional disorder however the assessor states that the appellant advises that she has many issues. 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 notes a major impact for 4 listed aspects; bodily functions, attention/concentration, motivation and other emotional or mental problems, (applicant is very fearful of falling- has lurching irregular gait when walking- also continuous pain), a moderate impact for 2 aspects; emotion and motor activity, a minimal impact for 2 additional aspects; executive and memory and no impact for the remaining 6 areas; consciousness, impulse control, insight and judgement, language, psychotic symptoms, other neuropsychological problems. Accompanying narrative is that the appellant is often moderately depressed due to loss of function, voices despair regarding future outcomes, frequent suicide ideation (monthly) as related to pain intensity and immobility.

With respect to DLA: under Personal Care, the appellant is reported to independently manage 6 aspects; dressing (unable to use buttons or zippers, all clothes are pull on), grooming, bathing, toileting, feeding self and regulating diet however, she takes 5-6 times longer than typical for each one. For transfers in/out of bed, the appellant requires continuous assistance (75-90% of time) and transfers in/out of chair, uses a assistive device (requires a chair with arms); under Basic Housekeeping both aspects, laundry and basic housekeeping, requires continuous assistance from another person or unable; under Shopping 3 out of 5 aspects of DLA are independently managed (reading prices and labels, making appropriate choices and paying for purchases) whereas going to and from stores and carrying purchases home requires continuous assistance from another person or unable. Noted is that the appellant requires help continuously to cut meat. Under Meals, 1 aspect of meal planning is independently managed whereas 2 aspects; food preparation and cooking require continuous assistance or unable (unable to chop, peel, cut, or lift pots, etc.) and 1 aspect of safe storage of food requires periodic assistance from another person (depends on container and weight). Under Pay Rent and Bills, budgeting is independently managed, banking requires periodic assistance from another person (physically able, slowly, mentally totally capable) and pay rent and bills (paid directly by 3rd party). Under Medications, most aspects are independently managed while filling/refilling prescriptions requires continuous assistance from another person and notes delivery service. Under Transportation, it is noted that the appellant moves very slowly taking significantly longer than typical and guards her legs and hips to avoid pain, using public transit and using transit schedules are noted as unable and "likely unable".

In regard to Social Functioning, the appellant was noted to be independent under able to secure assistance from others. The assessor also explains that the appellant is socially withdrawn to a large extent due to pain and she is unable to participate with former traditional activities,

In response to how the mental impairment impacts the appellant's relationship with her immediate social network and her extended social network, the AR has noted good to marginal functioning in both areas. It is added that the appellant participates as physically able, has socially withdrawn from many family events due to pain, has major social isolation related to pain immobility and loss of function, has need for ongoing assistance from others and is very fearful of falling. The appellant receives assistance from family and is not yet using any equipment or devices to help compensate for her impairment and she is working hard at trying to stay as independent as possible.

In the SR, the appellant describes her loss of ability; for house cleaning, laundry, cooking, holding a coffee cup (needs to use both hands), walking a block (needs to rest frequently), climbing stairs (5-10 is very hard), waiting for the bus is too uncomfortable, washing her hair is very hard, climbing in and out of the shower, when holding a pen and writing she must stop and rest and holding the phone. The appellant states that for the last year she has been in constant pain, 24/7. The appellant's husband cooks, does the housekeeping and laundry and helps the appellant with everything to include sitting, standing and helping her lay in bed. The appellant adds that she is taking medicine but it does not always help her. The appellant indicates that she spends days in her room crying because of the pain and does not go out anywhere only when she has a doctor's or dentist's appointment.

In the request for reconsideration, the appellant indicates that she is using a walker but is now required to use a wheelchair. Also the appellant states that her husband takes care of all the household chores as she cannot do them or cook anymore. The appellant adds that she cannot bathe and that her husband has to help her in and out of bed.

In the copy of the faxed telephone log, the reconsideration officer advises the appellant's physician that the appellant has requested that any clarification of information be requested from the appellant's physician. The reconsideration officer then asks the appellant's physician if he would like to change any of the information on the Physician's Report after considering some of the information provided by the assessor and the appellant,

including that there are restrictions to all mobility activities and many DLA, there are major impacts to numerous areas of cognitive and emotional functioning and that the appellant now uses a wheelchair and walker. The physician's response is indicated as NC (no change).

At the hearing the appellant testified that she needs assistance as she has been dealing with pain for the last 16-17 months and it is only getting worse. Although having had a variety of tests, nothing has shown the appellant's cause for pain. She now has a wheelchair however cannot use it in her home surrounding, as it is too hilly. The appellant finds that she is homebound, depending on others for rides or taking cabs. On good days when the appellant's arms are less painful, she continues to use a walker however, depends on her husband to lift it on and off the sidewalk. The appellant states that she has only 1 or 2 good days a month and finds moving around the house difficult. The appellant states that she has seen several pain specialists, a Rheumatologist and had many blood tests but has not yet had X-rays or a CT scan. A visit to a physiotherapist was too painful so the appellant has not returned. The appellant for about the last month is taking Gabapentin and Ketorolac (Toradol) for pain. She indicates that her doctor whom she sees every 2 weeks is stubborn, that he has seen her move about and because he can't find the cause of her pain does not fill out her forms. The appellant states that she has told the physician about her physical limitations and at times been frustrated with him. In response to a question, the appellant stated that she mistakenly filled out part of the physician report and then tried to erase her responses and the physician chose to use this form rather than a new one. The appellant explained that the response of "no lifting" in the functional skills assessment was her response.

The panel finds that the appellant's testimony is further description of the impact of her pain on her daily functioning and is therefore 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 ministry stood by its reconsideration decision.

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 is likely in the opinion of a medical practitioner to continue for at least 2 years and 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.

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

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.

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

2 (1) For the purposes of the Act and this regulation, **"daily living activities"** ,

- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
 - (i) prepare own meals;
 - (ii) manage personal finances;
 - (iii) shop for personal needs;

- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

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

Duration of Impairment

The appellant's position is that she has been suffering for about 17 months and her medical condition is getting worse and it's reasonable to expect it will continue for 2 years.

The ministry's position is that in terms of duration, the appellant's physician does not indicate that the appellant's impairment is likely to continue for 2 years or more. The appellant's physician reports that he does not know how long the appellant's symptoms will last because he does not have a diagnosis for her problems.

The panel finds that the appellant's physician has admitted that he does not have a diagnosis for the appellant's medical condition and therefore cannot specify duration. Therefore, the panel finds that the ministry reasonably determined that there is not sufficient evidence, that in the opinion of a medical practitioner, the appellant's impairment is likely to continue for at least 2 years pursuant to section 2(2)a of the EAPWDR.

Severity of Impairment

Physical Impairment

With respect to the existence of a severe physical impairment, the appellant's position is that she is in constant pain, 24/7 which limits her ability to manage daily activities, her mobility is very slow and painful; she takes 6-7

times longer than typical, requires continuous assistance from another person for climbing stairs, can only stand for 5 minutes, can only lift a coffee mug and is unable to carry/hold. The appellant states that her husband has to help her lay down and on good days when she has less pain in her arms, she uses a walker however requires help to get it on and off the sidewalk.

The ministry's position is that the information in the PWD application and the appellant's request for reconsideration does not establish a severe physical impairment. The appellant's physician was contacted by the reconsideration officer, with the agreement of the appellant, in order to determine if he wanted to make changes to the PR however, he indicated no change.

With respect to the appellant's physical impairment, the panel finds that although the general practitioner has not yet made a diagnosis, he reports that the appellant has diffuse muscular pains in her arms and legs since April 2011 and it hurts her to walk or use her arms. The PP has also indicated that multiple investigations and specialists referrals have not revealed a cause and multiple medications have been tried without improvement. In the PR it is noted that the appellant's functional skills are unknown but also that the appellant does not require any aids for her impairment. Although the appellant reports that she tried a wheelchair and that she currently uses a walker; the assessor indicated that no assistive devices are currently used and the appellant is working hard at trying to stay as independent as possible. With respect to mobility and physical ability, the appellant is noted as taking significantly longer than typical with walking indoors and outdoors (very slow and painful, takes 6-7 times longer). Continuous assistance from another person is required for; climbing stairs (extremely difficult and painful), standing (maximum 5 minutes), lifting (maximum lift is a coffee mug), and carrying/holding (unable). The assessor has added a note that the appellant "advises that all mobility is very slow and painful."

After being provided an opportunity to consider some of the information provided by the assessor and the appellant, including that there are restrictions to all mobility activities and many DLA and that the appellant now uses a wheelchair and walker, the physician advised the ministry that there is no change to his assessment in the PR. In view of the above noted evidence, 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 she has many mental and emotional issues. In relation to the appellant's daily functioning in 14 listed areas of cognitive and emotional functioning; the assessor notes a major impact for 4 listed aspects; bodily functions, attention/concentration, motivation and other emotional or mental problems, a moderate impact for 2 aspects; emotion and motor activity and a minimal impact for 2 additional aspects; executive and memory. The appellant is often moderately depressed due to loss of function, has despair regarding future outcomes and has frequent suicide ideation related to pain intensity and immobility. In regard to Social Functioning, the appellant was noted to be independent under able to secure assistance from others. The assessor also explains that the appellant is socially withdrawn to a large extent due to pain and she is unable to participate with former traditional activities, In response to how the mental impairment impacts the appellant's relationship with her immediate social network and her extended social network; the AR has noted good to marginal functioning in both areas and that the appellant has socially withdrawn from many family events and has major social isolation related to pain immobility and loss of function.

The ministry's position is that a mental impairment has not been diagnosed by a medical practitioner and according to the PR; the appellant has no significant deficits with cognitive and emotional function and no

indication that social functioning is impacted. Therefore, the minister is not satisfied that the appellant has a severe mental impairment.

The panel finds that the appellant's general practitioner of 5+ years has not diagnosed the appellant with a mental impairment while the assessor who has known the appellant for 3 weeks and visited the appellant at her home has indicated in the AR that, although there is no formally diagnosed mental/emotional disorder, the appellant advises of many mental and emotional issues, 4 major and 2 moderate impacts on Cognitive and Emotional Function as well as requirements for support/supervision under Social Functioning. As the legislation requires that the minister be satisfied that the appellant has a severe mental impairment, 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 she has lost her ability; for house cleaning, laundry, cooking, holding a coffee cup, walking a block, climbing stairs, waiting for the bus, washing her hair, climbing in and out of the shower, holding a pen, writing and holding the phone. The appellant's husband cooks, does the housekeeping and laundry and helps the appellant with everything to include sitting, standing and helping her lay down in bed.

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 most recent evidence where the appellant's physician has indicated that there is no change to the PR. Therefore, the ministry finds that the legislated criteria have not been met.

The panel finds that the appellant's physician of 5+ years, with whom she meets every 2 weeks, did not complete the section of the PR relating to restrictions to DLA and, when provided an opportunity to consider some of the information provided by the assessor and the appellant, including that there are restrictions to many DLA, the physician indicated that there is no change to his assessment. According to the assessor: under Personal Care, the appellant is reported to independently manage 6 aspects; dressing (unable to use buttons or zippers, all clothes are pull on), grooming, bathing, toileting, feeding self and regulating diet however, she takes 5-6 times longer than typical for each one. For transfers in/out of bed, the appellant requires continuous assistance (75-90% of time) and transfers in/out of chair, she also uses a assistive device (requires a chair with arms); however the panel finds that chair arms are not an assistive device as defined in the legislation; under Basic Housekeeping both aspects, laundry and basic housekeeping require continuous assistance from another person or unable; under Shopping 3 out of 5 aspects of DLA are independently managed (reading prices and labels, making appropriate choices and paying for purchases) whereas going to and from stores takes and carrying purchases home requires continuous assistance from another person or unable. Noted is that the appellant requires help continuously to cut meat. Under Meals, 1 aspect of meal planning is independently managed whereas 2 aspects; food preparation and cooking require continuous assistance or unable (unable to chop, peel, cut, or lift pots, etc.) and 1 aspect of safe storage of food requires periodic assistance from another person (depends on container and weight) and the panel finds that there is no indication of the frequency or duration of the assistance required. Under Pay Rent and Bills, budgeting is independently managed, banking requires periodic assistance from another person (physically able, slowly, mentally totally capable) however, the panel finds that there is no indication of the frequency and duration of the assistance required and pay rent and bills (paid directly by 3rd party); however the panel further finds that the fact of direct payment of rent does not provide an indication of the appellant's ability to perform

this task. Under Medications, most aspects are independently managed, while filling/refilling prescriptions require continuous assistance, defined as "all prescriptions delivered", which the panel finds does not provide an indication of the appellant's ability to perform this task. Under Transportation, it is noted that the appellant moves very slowly taking significantly longer than typical and guards her legs and hips to avoid pain, using public transit and using transit schedules are noted as unable. This has been determined from an office interview and 2 visits to the appellant's home. The assessor also includes comments that the appellant advises that activities like shopping, cooking were done readily until the past year and now she is unable to do any of the associated tasks alone. The assessor also comments, with respect to the appellant not using assistive devices, yet, that the appellant is working hard at trying to stay as independent as possible.

The panel finds it troubling that while the appellant sees her physician every 2 weeks, when given the opportunity by the reconsideration officer to make changes to the PR, he would only indicate no change.

The prescribed professional has reported that the appellant has continuous restrictions with her daily living activities of housekeeping, 2 out of 4 tasks of shopping, and 2 out of 4 tasks of meals, while the physician who sees the appellant every 2 weeks has not provided a specific diagnosis of a physical impairment and did not assess any restrictions despite being given an opportunity to reconsider his assessment. The panel finds that the legislation requires that the minister be satisfied that as a result of a severe physical or mental impairment, a person be directly restricted in the ability to perform DLA. Therefore, 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 husband or another person for most daily living activities, most of the time. Although she has a wheel chair and a walker, she still requires help with their use to be mobile.

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.

The panel also finds that the ministry reasonably determined that, as a severe mental or physical impairment has not been determined, direct and significant restrictions in the appellant's ability to perform DLA have not been subsequently established and it cannot be determined that help is required to perform DLA as a result of direct and significant restrictions as is required by 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.