

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry) reconsideration decision dated November 28, 2012 which found that the appellant did not meet three of the five statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that the appellant's impairment was likely to continue for at least two or more years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- 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; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal, 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 the time of the reconsideration decision consisted of:

- 1) The appellant's Request for Reconsideration (RFR) with attached typed letter (the Typed Letter), both dated November 14, 2012, and a handwritten letter dated November 13, 2013 (the Letter);
- 2) Medical Report – Employability completed by a medical practitioner dated March 20, 2012 indicating that the appellant had a head injury in 1986 and has post traumatic stress, headache, and low back pain (2003), that her medical condition will last more than 2 years and is not episodic in nature. The medical practitioner reports that the appellant is unable to work from her headaches, dizziness, lack of energy and low back pain (the Medical Report);
- 3) Clinical records of the appellant's general practitioner dated 2003 through October 14, 2009 (11 pages);
- 4) Xray/Ultrasound Report Dorsal Spine dated January 13, 2005 indicating that apart from minor muscular spasm, the dorsal spine is normal;
- 5) Report of a neurologist dated May 28, 2010 indicating that the appellant has borderline carpal tunnel changes in her right hand. The report also indicates that the appellant has a combination of tension-type headaches and migraines that are relatively mild;
- 6) Xray/Ultrasound Report Dorsal Spine dated June 21, 2010 indicating that the appellant has early spondylosis of the dorsolumbar spine, mild sacroiliitis and minor muscular spasm;
- 7) Letter from the appellant's acupuncturist dated June 25, 2011 indicating that the appellant has received acupuncture or massage treatment since March 2005 for frequent headaches and low back pain.
- 8) An Operative Report dated December 7, 2009 indicating that the appellant underwent a laparoscopy to remove two small cystic lesions;
- 9) Surgical Pathology Report dated December 7, 2009;
- 10) Pelvic Ultrasound Report dated June 12, 2009;
- 11) Report of an Otolaryngologist dated November 7, 2011 indicating that the appellant had stuffiness in her nose, probably due to enlarged middle turbinates;
- 12) Note from the appellant's general practitioner dated June 9, 2012 indicating that the appellant is suffering from memory loss due to head injury in the past (the Doctor's June 2012 Note);
- 13) Record of Employment from the appellant's employer dated September 5, 2009;
- 14) Record of Employment from an employer, undated, reporting the appellant's last day of work to be June 26, 2008;
- 15) Record of Employment from another employer dated October 31, 2007;
- 16) Record of Employment from another employer dated September 20, 2004;
- 17) Copies of the appellant's paystubs from an employer from December 28, 2007 to June 2008; and a
- 18) A PWD application comprised of a Self-report (SR) signed by the appellant on September 17, 2012; a

Physician Report (PR) dated September 15, 2012 completed by the appellant's general practitioner; and an Assessor Report (AR) also dated September 15, 2012 and completed by the same practitioner. On the PR, the general practitioner does not indicate how long the appellant has been his patient and on the AR the general practitioner reports that he has seen the appellant two to ten times in the past year.

In her Notice of Appeal the appellant states that her headaches are not better, she has numbness of the limbs, hearing loss, and back ache.

The panel notes that the appellant speaks very little English and that her first language is Cantonese. The panel further notes that the appellant has previously sought an adjournment of her hearing set for January 2013 in order to have an interpreter with her, she had an appointment with a disability advocate in early January but never attended the appointment, and had not taken any other steps to secure an advocate or obtain an interpreter for the hearing, the panel proceeded with the hearing.

However, before proceeding with the hearing, the panel also confirmed that the appellant was able to understand the process through her witness, who was able to translate from English to Cantonese and Cantonese to English. In addition, by the request of the appellant, the appellant's son attended by telephone and was able to translate for the appellant.

The appellant also confirmed, through her witness, that her general practitioner completed the Notice of Appeal and that she signed it. She also confirmed that a translator prepared the Typed Letter and the Letter (together the Letters), that the Letters were read to her in Cantonese, that she agrees with the information in the Letters, and that she signed both of the Letters.

Admissibility of New Information

At the appeal hearing, the appellant and her witnesses gave oral testimony which provided more detail with respect to the restrictions she faces and the help she receives in managing DLA. The panel has admitted the oral testimony into evidence as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on the reconsideration decision and submitted no new information.

Physical Impairment

In the SR, the appellant states that she has chronic headaches and memory loss, early degenerative disc disease in her back and waist. She also states that her right leg and left arm constantly feel numb because her nerves are deteriorating, and she cannot hear anything. She states that because she continuously takes a medication, she vomits all the time and has symptoms of anemia.

In the PR, the general practitioner reports that he has seen the appellant 2-10 times in the last 12 months. He reports that the appellant has osteoarthritis of spine and both knees, spondylosis of the spine, and degeneration of the D5-D8. He indicates that the appellant is 158 cm tall and weighs 125 pounds.

Functional skills reported in the PR indicate that the appellant can walk 1 to 2 blocks, can climb 2 to 5 steps unaided, is not able to lift and can remain seated for 2 to 3 hours.

In the AR, the general practitioner reports that the appellant has arthritis of the spine. He reports that the appellant's ability to communicate in 3 of the 4 listed areas is good (speaking, reading, writing) but that her hearing is poor and she has left hearing impairment. The general practitioner indicates that the appellant is independent with walking indoors and outdoors and standing, but is unable to lift. The general practitioner does not provide any further information with respect to the appellant's ability to climbing stairs, or carrying and

holding.

In the Typed Letter the appellant states that her general practitioner does not understand her situation and how she suffers. The appellant states that it has always been hard for her to look for a job, that she has been suffering with pain in her back and legs for over 2 years and it is getting worse. The appellant states that she has pain in both legs and her right leg is numb. She also states that she has concussion sequelae and headaches everyday from a head injury sustained many years ago and she has difficulty sleeping. The appellant also states that she lost hearing in her left ear and requires a hearing aid. She reports that treatment she has taken medications, attended acupuncture treatment, and exercised but nothing has helped her. She reports that she is suffering from physical pain and financial difficulties, that no one understands what she has been through and that nothing helps.

In the Letter, the appellant states that she injured her head 20 years ago and that her memory is poor. She reports that she came to Canada in 1998 and tried to attend English classes but had trouble remembering what she learned. She worked at a noodle factory from 2002 to 2004 but found the work too physically demanding as it caused increased pain in her upper and lower back. The appellant took some time off, tried various other jobs, but eventually had to stop working due to her pain. She also reports that her hands go numb and her low back problems also caused her feet to hurt. She states that in the last few years she has attended massage and acupuncture treatment which helps temporarily but she cannot afford to continue treatment financially.

At the hearing, the appellant stated that she has a sore back and leg, wears a corset for support and has headaches. The appellant frequently held her head and rubbed her eyes. She reports that she has trouble walking and needs help with shopping. She stated that her situation is critical because half of her body is unable to do anything and it is very painful on her feet.

Mental Impairment

In the Letter, the appellant states that she has anxiety and feels hopeless about her situation. In the SR, the appellant states that she feels helpless and hopeless.

In the PR, the general practitioner reports that the appellant does not have any significant deficits with any of the 12 listed aspects of cognitive and emotional function.

In the AR, for section 4, cognitive and emotional functioning, where asked to complete for an applicant with an identified mental impairment or brain injury, the general practitioner has not noted any impact to any of the 14 listed items.

At the hearing, the appellant stated that she feels hopeless and does not know what to do and needs help. She also stated that she take the bus to the community centre where she does some exercise but after she gets home again she is tired and in too much pain to go out again or do much of anything. The appellant states that she stays in bed or on the couch.

DLA

In the SR, the appellant states that she has constant limitations with any mobile activities; is weak with walking, lifting, climbing stairs, shopping and housework. She reports that she cannot make right decisions because of constant headaches. The appellant states that because she cannot work she has limited finance/money to support herself and cannot have treatment for her disease.

In the PR, the general practitioner reports that the appellant has no restrictions with personal self care, meal preparation, or management of medications. He reports that it is unknown if the appellant has restrictions with

basic housework and daily shopping but he also indicates that she has periodic restrictions in those areas. He reports that the appellant is restricted with respect to mobility inside and outside the home, use of transportation and management of finance but does not indicate whether those restrictions are continuous or periodic. The general practitioner also reports that the appellant has difficulty walking due to degenerative arthritis of the knee and headache.

In the AR, the general practitioner reports that the appellant is independent with walking indoors, walking outdoors and standing but is unable to lift but does not provide any other comments. He reports that she is independent with the following tasks: meal preparation, food preparation, cooking, taking medications, filling/refilling prescriptions, safe handling and storage of medications, getting in and out of a vehicle, using public transit, using transit schedules, dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed), transfers (on/off of chair), laundry and basic housekeeping. He reports that the appellant requires periodic assistance with shopping (going to and from stores, reading prices and labels, and making appropriate choices). He reports that shopping activities are restricted due to her arthritis of the spine, but he does not provide any further comments regarding a description of the type and amount of assistance needed.

In the Typed Letter, the appellant states her son is busy with school and works part time so she cannot ask him to help her. She states that her friend helps her with her grocery shopping and weekly housecleaning.

In the Letter the appellant states that she needs a bus pass and treatment.

At the hearing, the appellant's evidence was that she has trouble walking because her legs are numb, and shopping and needs assistance with housecleaning. The appellant confirmed that she is able to cook, wash her hair, wash her body and do some housecleaning.

The appellant's witness reported that he will take her shopping or get her groceries for her and that he goes to her house once a week to help her clean. The witness also stated that sometimes he helps her with banking by paying bills for her, or picking up her prescriptions.

Need for Help

In the SR, the appellant states that she has to use a cane for any physical activities. She states that she needs treatment for her disease but does not provide any further information regarding the treatment she needs. She also states that she has no family support either.

On the PR, the appellant's general practitioner does not provide any comments about any assistance that the appellant may need.

On the AR, the appellant's general practitioner reports that the appellant has assistance from family, but there are no comments as to the amount or frequency of the assistance. He also reports that she would benefit from a cane.

In the Letter the appellant states that she needs a bus pass and physiotherapy treatment.

At the hearing, the appellant stated that she may get a wheelchair sooner or later and that she needs money for a bus pass, ear phones and chiropractic treatment.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant:

- does not have a severe physical or mental impairment;
- that the appellant's DLA's are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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.

Severe physical impairment:

The appellant's position is that she has constant back pain radiating down her legs, chronic headaches, memory loss, hearing problems, and numbness in her hands. She reports that she has trouble walking and needs help with shopping. She stated that her situation is critical because half of her body is unable to do anything and it is very painful on her feet.

The ministry acknowledges that the appellant's arthritis in her spine and knees may impact her physical functioning, but that the functional skill limitations described by the general practitioner are more in keeping with a moderate degree of impairment, not a severe physical impairment and that the evidence does not establish that the appellant has a severe physical impairment. In particular, the ministry relies on the PR, in which the general practitioner reports that the appellant can walk 1-2 blocks and can climb 2-5 stairs unaided.

Panel Decision

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

While the appellant states that her general practitioner does not understand how critical her situation is, the panel finds that the considerable medical evidence provided, including the PR, AR and the general practitioner's clinical records, indicate that the appellant has seen her general practitioner on many occasions, that he has written her several notes for treatment, and that he is aware of her physical condition. The panel finds that there are inconsistencies in the general practitioner's evidence in that on the PR, he indicates that the appellant has restrictions with mobility inside and outside the home, whereas on the AR, he reports that the appellant is independent with walking indoors and outdoors.

The panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with osteoarthritis of spine and both knees, spondylosis of the spine, and degeneration of the D5-D8, a prior head injury causing post traumatic stress and headaches, and hearing loss. While the medical evidence indicates that the appellant has some impairments with her functional limitations, with respect to lifting and perhaps some mobility, the PR indicates that the appellant can walk 1 to 2 blocks, can climb 2 to 5 steps unaided, and can remain seated for 2 to 3 hours. Overall, the panel finds that the medical evidence indicates that the appellant's functional limitations are in the moderate range rather than severe.

Although the Medical Report indicates that the appellant is unable to work and the appellant states, in the SR, and the Letter that she cannot work, the panel notes that employability is not a criterion for designation as

PWD.

The panel finds that the evidence of the general practitioner indicates that the appellant's physical impairment is more in keeping with a moderate impairment than a severe impairment and the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe physical impairment under section 2(2) of the EAPWDA, was reasonable.

Severity of mental impairment:

The appellant's position is that she has anxiety and that she feels helpless and hopeless about her situation. She states that she goes to the community centre to exercise but after she gets home, she does not feel like doing anything and spends most of the time in bed or on the couch.

The ministry argues that there is no evidence from a medical practitioner identifying that the appellant has a severe medical impairment. In particular, the ministry notes that the general practitioner indicates that the appellant does not have any significant deficits in the areas of cognitive and emotional functions.

Panel Decision

The panel finds that the evidence of the general practitioner does not indicate that the appellant has any mental impairment. On the PR the general practitioner reports that the appellant does not have any significant deficits with cognitive and emotional function. On the AR, the general practitioner reports that the appellant's communication is good and for section 4, cognitive and emotional functioning, where asked to complete for an applicant with an identified mental impairment or brain injury, the general practitioner has not noted any impact to any of the 14 listed items.

Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment under section 2(2) of the EAPWDA, was reasonable.

Restrictions in the ability to perform DLA

The appellant's position is that her physical and mental impairments directly and significantly restrict her ability to perform all DLA because she has trouble walking, needs help with shopping, needs help to lift and carry items and feels helpless and hopeless. The appellant's evidence is that her friend helps her with shopping and some cleaning once per week. The appellant stated that her son is too busy to help her.

The ministry's position is that the evidence of the prescribed professional is inconsistent in that on the PR the general practitioner states that the appellant requires periodic assistance with basic housekeeping, daily shopping, mobility in/outside the home and use of transportation, but on the AR, the general practitioner states that the appellant is independent with walking in/outdoors and use of transportation.

The ministry also argues that the general practitioner's evidence is inconsistent as on the AR he reports that the appellant requires periodic assistance with reading prices and labels and making appropriate choices, but that he also states that her reading and writing ability is good and she does not have any cognitive impairments.

The ministry's position is that the AR does not indicate that the appellant takes significantly longer to perform DLA's, there is no information on how often or the duration of the assistance provided and there is not enough evidence to establish that the appellant's impairments significantly restrict her ability to manage DLA's,

continuously or periodically for extended periods.

Panel Decision

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant – it must be more than trifling and more than merely an inconvenience. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, an analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably satisfy the ministry that they have been met.

The panel finds that the evidence of the prescribed professional, the general practitioner, establishes that the appellant is independent with 5 out of 8 DLA (*preparing her own meals, managing personal finances, use public or personal transportation facilities, performing personal hygiene and self care, and managing personal medication*). The evidence establishes that the appellant needs periodic help with 2 of 8 DLA (*shopping and basic housekeeping*) but the general practitioner does not provide any further information to indicate how much time is required or that the assistance needed is for an extended time. The appellant's evidence and the evidence of her witness indicate that the help shopping is quite minimal, only once per week. With respect to the last DLA, moving about indoors and outdoors, the general practitioner's evidence is inconsistent and at the hearing, the appellant was moving around independently without the need of assistance or a cane.

Based on the evidence, the panel concludes that the ministry was reasonable in finding that the appellant's impairment does not significantly restrict her ability to perform DLA, either continuously or periodically for extended periods. In particular, the panel finds that the noted restrictions in the appellant's ability to perform some aspects of some DLA were reasonably viewed by the ministry as not constituting a direct and significant restriction of the appellant's ability to perform DLA in the opinion of a prescribed professional thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA.

Help with DLA

The appellant argues that she requires help with shopping, lifting and needs money for a bus pass and treatment such as massage therapy, chiropractic treatment and physiotherapy. The appellant's position is that she requires help from her friend, use of a cane, and may need a wheelchair.

The ministry's position is that as it has not been established that DLA's are significantly restricted, it cannot be determined that significant help is required from other persons, and no assistive devices are required.

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) of the requirement for 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 a prescribed professional establishes that the appellant requires some assistance with tasks of some DLA, the panel finds that the general practitioner did not provide any further information as to how much or how often any assistance is required. By the appellant's own evidence she only requires some assistance with shopping and basic housekeeping once per week. While the appellant may require a cane periodically she was not using a cane or other assistive device at the time of the hearing. Although the appellant states that she may require a wheelchair in the future, there was no medical evidence

to support her statement in that regard.

The panel 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 the appellant requires help to perform DLA as a result of those restrictions.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence and a reasonable application of the applicable legislation in the circumstances of the appellant, and therefore confirms the decision.