

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 16 November 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 her ability to perform daily living activities (DLA) 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 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

At a hearing on 05 March 2013, the appellant requested an adjournment because she had just learned that her advocate most familiar with her file had been injured in a motor vehicle accident. The appellant understood that the advocate would be able to be back at work within a couple of weeks. The ministry did not object to an adjournment. After due consideration, the panel agreed to the requested adjournment.

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

1. The appellant's PWD Designation Application dated 27 August 2012. The Application contained:
 - The appellant's Self Report (SR).
 - A Physician Report (PR1) dated 06 September 2012 completed by the appellant's general practitioner (GP) who has known the appellant 2.5 years and seen her 2 - 10 times in the past year.
 - An Assessor Report (AR1) dated 06 September 2012, completed by the same GP.
2. The appellant's Request for Reconsideration, dated 09 November 2012, including a submission by the appellant, referring to passages in her Application documentation as argument for reconsideration.

The appellant's Notice of Appeal was dated 24 November 2012 and made reference to her submission at reconsideration.

Before the hearing, the appellant sent to the Tribunal a Submission dated 14 February 2013 containing additional comments by her GP on 7 pages of the Physician Report (PR2) and Assessor Report (AR2).

In PR1, the GP diagnoses the appellant with 1) CFS (chronic fatigue syndrome) – onset 2005, and 2) menopausal – onset also 2005. In AR1, the GP adds the diagnoses of social isolation, low concentration and motivation.

The panel will summarize the evidence from PR1, AR1, and the SR, noting any changes included in PR2 and AR2, relating to the appellant's impairments as it relates to the PWD criteria at issue.

Severity of impairment

Health history/severity

PR1:

The GP writes:

“Due to poor concentration, memory problems & anxiety she developed CFS which inevitably makes her quality of life poor and aggravates her barriers.”

The GP indicates the appellant has been prescribed medications which interfere with her ability to perform DLA, listing several analgesics.

The GP indicates that the appellant does not require any prosthesis or aids for her impairment.

The GP confirms that the appellant's impairment will continue for 2 years or more, commenting: “CFS; cannot lift heavy objects & do light tasks.”

Under general comments, the GP writes:

"Due to poor concentration and memory, complicated by CFS, quality of life is impaired."

SR:

The appellant writes that she has a severe medical condition. She is in her seventh year of menopause, suffering from chronic fatigue. Her short-term memory is not good; she loses her concentration and also suffers from anxiety now from lack of sleep. She tires easily. She adds she also sweats a lot because she gets many hot flashes in a day.

Physical impairment

Functional skills

PR1:

The GP reports that the appellant can walk 2 to 4 blocks unaided, climb 2 to 5 steps, lift under 5 lbs., and remain seated for 1 to 2 hours. She has no difficulties with communications.

Mental impairment

Ability to communicate

AR1:

The GP reports the appellant has good levels of ability in speaking, reading, writing and hearing.

Cognitive and emotional deficits

PR1:

The GP reports significant deficits for memory, motivation and attention or sustained concentration.

PR2:

The GP adds the comment: "short term memory not good, struggling with motivating; due to memory, attention problematic."

Cognitive and emotional functioning impacts on daily functioning

AR1:

The GP reports a moderate impact for attention/concentration, with minimal impacts for consciousness, emotion, insight and judgment, executive, memory, and motivation. No impacts reported for the 7 other listed areas. The GP comments: "problems with concentration creating a knock on effect on attention, planning & eventually motivation."

AR2:

The GP adds the comment: "Poor concentration, as well as short-term memory problems, impacting daily function[ing] substantially."

Ability to perform DLA

PR1:

The GP reports that the appellant is not restricted in the following DLA: personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, mobility outside the home, management of finances, and social functioning. The GP reports that the appellant is restricted in the use of transportation on a periodic basis, with the comment that transportation is problematic and the appellant needs help from other people.

PR2:

The GP adds the comment: "Memory and attention problems, gets tired easily & fatigued." And: "Chronic fatigue, concentration not well, tired and inattentive."

Mobility and physical ability

AR1:

The GP reports that the appellant is independent for walking indoors, walking outdoors, climbing stairs, standing and carrying and holding; periodic assistance is required for lifting, with the comment: "cannot lift too heavy things & can only do light housework."

AR2:

Regarding lifting, the GP adds: "no strength & stamina."

Other DLA

AR1:

Personal care: independent in all aspects.

Basic housekeeping: independent for laundry, requiring periodic assistance for basic housekeeping. (AR2 comment: Cannot lift things. Fatigue with standing.)

Shopping: requiring periodic assistance for going to and from stores (AR2 comment: memory & attention, fatigue), making appropriate choices (AR2 comment: inattention and memory impaired), and carrying purchases home (AR2 comment: fatigue; no stamina); independent for reading prices and labels and paying for purchases.

(Comment: needs help with housekeeping, cannot lift heavy objects, therefore shopping difficult too.)

Meals: independent in all aspects.

Pay rent and bills: independent in all aspects.

Medications: independent in all aspects.

Transportation: independent in all aspects.

Social functioning:

AR1:

The GP assesses the appellant independent in all listed areas: appropriate social decisions, able to develop and maintain relationships, interact appropriately with others, able to deal appropriately with unexpected demands, and able to secure assistance from others.

The GP reports marginal functioning with the appellant's relationship with her immediate social network (AR2 comment: cognition, frustration) and good functioning with her extended social network.

General comment: "To socialize: if known support structures which are in place."

No safety issues are reported.

Help required to perform DLA

AR1:

The GP reports that the appellant receives help required from friends. (AR2 comment: help with transportation & chores, lifting things)

No assistance is provided through the use of assistive devices or by an assistance animal.

Additional comment: the GP states: "Due to memory, concentration & lack of social skills, difficult to live totally independently."

At the rescheduled hearing on 26 March 2013, the appellant and her advocate reviewed the additional comments provided by the GP in the Submission dated 14 February 2013 (PR2 and AR2). In addition, in her statement to the panel and in answer to questions, the appellant gave the following testimony:

- Her menopausal condition is severe, having continued for the past seven years and contributing to her fatigue and short-term memory loss. Her friends notice her frequent hot flashes; she sweats a lot and this causes problems with body odor.
- She cannot do any heavy lifting – she weighs only 100 pounds.
- She is now living in a motel, so she does not have to do much housework. She either heats up food with the microwave provided in the motel room or goes to a friend's home and cooks for both of them.
- She either walks to the store for groceries or her friend will drive her there.
- Asked how her problems with concentration affect her daily life, she stated that her inability to concentrate prevented her from taking any courses.
- She had a blood transfusion years ago. She feels that this may have led to heavy metals being in her blood. There is also a possibility that she may have thyroid problems. She feels that both these possibilities may contribute to her current condition. She plans to discuss these issues with her GP and have them checked out with further tests.

With the exception noted below, the panel finds the additional comments provided by the GP and appellant's testimony at the hearing is in support of information that was before the ministry on reconsideration. The evidence of the GP is further to the notations made in the original application and the appellant's testimony further elaborates on her medical condition and living situation. The panel therefore admits this new information as evidence pursuant to section 22(4) of the Employment and Assistance Act. The panel cannot accept as evidence the appellant's references to the possibility of heavy metal in her blood or a possible thyroid condition, as these were not diagnosed conditions put forward in PR1 or AR1 and therefore not before the ministry 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 (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.

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.

Severity of impairment

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, 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 (in this case, the appellant's physician) identify the impairment and confirm that impairment will continue for at least two years.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." The cause is usually set out as a disease, condition, syndrome or even by a symptom (e.g. pain). A severe impairment requires the identified cause to have a significant impact on daily functioning.

Physical impairment

The position of the ministry, as set out in the reconsideration decision, is that the functional skill limitations described by the GP are more in keeping with a moderate degree of impairment. The ministry noted that the GP states that "due to poor concentration, memory problems & anxiety [the appellant] developed CFS which inevitably makes her quality of life poor and aggravates her barriers." However, while the GP indicated that the appellant requires periodic assistance with carrying and holding, the remainder of her mobility and physical abilities is considered independent. Although the ministry acknowledged that the appellant's impairments may impact her physical functioning due to her CFS and not being able to lift heavy objects, based on the information provided by the GP, the ministry found that there was not enough evidence to establish a severe physical impairment.

The position of the appellant is that there is ample evidence to demonstrate a severe physical impairment. This is confirmed by her GP, who reported that because of her CFS she cannot lift heavy objects and needs help with shopping and basic housework.

The evidence relating to restrictions in the appellant's physical functioning due to her menopausal condition and CFS is that she is limited to being able to walk unaided 2 to 4 blocks, climb 2 to 5 steps and lift under 5 pounds. In commenting on the degree and course of her impairment, the GP noted that due to her CFS she "cannot lift heavy objects & do light tasks." This is clarified in AR1 where the GP stated she "cannot lift too heavy things & can only do light housework." In PR1 the GP reports that she is not restricted in any DLA except the use of transportation, which the GP assesses as

"problematic," without further explanation. The GP also states that the appellant gets tired easily and fatigued, but provides no specific description or examples as to how or to what extent her fatigue restricts daily functioning. In AR1 the GP reports a further restriction regarding the periodic need for help with shopping and housework, though no description is provided as to how often and under what circumstances such help is required. Overall, the panel finds that the ministry was reasonable in concluding that the limitations described by the GP were more in keeping with a moderate physical impairment; the panel therefore finds that the ministry was reasonable in determining that a severe physical impairment had not been established.

Mental impairment

The ministry noted that the GP identified significant deficits in the areas of cognitive and emotional functions regarding memory, motivation and attention or sustained concentration. The GP also indicated that there was a moderate impact on daily functioning to attention/concentration and minimal impacts in six other areas. The position of the ministry is that, based on the information provided by the GP, there is not enough evidence to establish a severe mental impairment.

The position of the appellant is that with the short-term memory problems and attention/concentration difficulties identified by the GP, she suffers from a severe mental impairment.

The panel notes that the appellant's GP has not diagnosed a specific mental health condition as an impairment. The GP has reported significant cognitive and emotional deficits with respect to memory, motivation and attention/concentration. In terms of impacts on daily functioning, the GP reports one moderate impact, that with respect to attention/concentration and minimal impacts in seven other periods. In the additional comments submitted after reconsideration, the GP noted: "Poor concentration, as well as short-term memory problems, impacting daily function[ing] substantially." However, the GP has not provided any information as to what these impacts are and how they restrict daily functioning. Asked to give an example at the hearing, the appellant stated that her concentration problems prevented her from taking any courses. In terms of social functioning and decision making – the two prescribed DLA that are specific to severe mental impairment – the GP reports that no support or supervision is required and that the appellant is fully independent in all aspects. On the basis of the information provided, the panel finds that the ministry was reasonable in determining that a severe mental impairment had not been established.

Significant Restrictions to DLA

The ministry's position is that there is not enough evidence from the GP to establish that the appellant's impairments significantly restrict her ability to manage her DLA, either continuously or for extended periods.

The appellant's position is that she is directly and significantly restricted in a number of DLA, including shopping, basic housekeeping and use of transportation.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA, either continuously or periodically for extended periods, must be a result of a severe impairment, a criterion which has not been established, and be in the opinion of a prescribed professional. This does not mean that other evidence should not be factored in, but the legislative

language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied". Accordingly, the panel will examine the evidence relating to each DLA for which the GP, the appellant's prescribed professional, has specifically noted restrictions, using the list of DLA set out in section 2(1) of the EAPWDR:

- Move about indoors and outdoors: the GP reports she is able to walk 2 to 4 blocks unaided and climb 2 to 5 stairs.
- Perform housework to maintain the person's place of residence in acceptable sanitary condition: the GP assesses the appellant requiring periodic assistance from another person for basic housekeeping, commenting "cannot lift things, fatigue & stamina," but does indicate that she "can only do light housework."
- Shop for personal needs: the GP assesses the appellant requiring periodic assistance from another person for going to and from stores, making appropriate choices and carrying purchases home, with comments relating to memory, motivation, fatigue and stamina.
- use public or personal transportation facilities: in PR1 the GP notes that the appellant is restricted on a periodic basis, commenting "problematic;" in AR1, the GP assesses her independent in all aspects of this DLA.

The panel notes that the appellant is assessed as independent for all other DLA requiring physical effort. In terms of the DLA relating to a person with a mental impairment, namely (i) make decisions about personal activities, care or finances, and (ii) relate to, communicate or interact with others effectively, the panel can find no information that would indicate that these DLA are in any way restricted. For the housework and shopping DLA, no explanation is provided as to how often, for how long or under what circumstances the periodic help is required. As there is no indication that the appellant's impairments are episodic in nature, the panel takes "periodic" here to mean "some of the time," rather than "for extended periods." Viewed as a whole, the panel finds that the evidence reasonably supports the ministry's conclusion that the appellant's ability to perform DLA is not directly or significantly restricted continuously or periodically for extended periods.

Help with DLA

The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

The appellant's position is that she relies on ongoing help from friends to manage such DLA as shopping, housekeeping and transportation.

The evidence is that the appellant receives some assistance from others with aspects of some DLA. There is little or no narrative to provide detail about the nature, frequency or duration of the assistance provided. There is simply insufficient evidence to show that the appellant relies upon "the significant help or supervision of another person." The appellant does not use assistive devices or an assistance animal.

Accordingly, the panel finds that the ministry reasonably concluded that, as it has not been established that DLA are significantly restricted, the appellant does not need help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation was reasonably supported by the evidence and was a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.