

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of November 5, 2012, which found that the appellant did not meet three of 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 in the opinion of a medical practitioner the appellant's impairment is likely to continue for at least two 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; or that
- the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

## 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 information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a physician's report (PR) and assessor's report (AR) both completed and signed by the appellant's physician on March 9, 2012. The application also included a self-report signed by the appellant on February 29, 2012.
- A letter from the ministry to the appellant, dated August 29, 2012 including a decision summary advising the appellant that she had been found ineligible for designation as a PWD.
- An undated letter from the physician stating that he had not performed a full functional assessment of the appellant and had relied substantially on the appellant's self-report and his own records.
- The appellant's written submission to the ministry's reconsideration officer, dated October 4, 2012.

### *Diagnoses*

The appellant has been diagnosed by her physician as having severe fibromyalgia, with generalized body pain, insomnia and fatigue.

### *Mental Impairment*

- In the PR the physician indicated the appellant has no significant deficits with cognitive and emotional function. The two sections of the AR that are to be completed only for applicants with an identified mental impairment or brain injury (section B.4 – cognitive and emotional functioning, and section C- social functioning ) were left blank by the physician.
- In her written submission of October 4, 2012 the appellant stated that she suffers from depression and anxiety which impacts her ability to perform DLA, and in her self-report she wrote that she finds it hard to think straight "when things are really bad."
- Section 2(1)(b) of the EAPWDR identifies two DLA that are specific to a person with a severe mental impairment: (i) decision-making with respect to personal activities, self-care and finances, and (ii) social functioning. In the AR the physician reported the appellant as having a good ability to communicate and as being independent with respect to personal care, medications and bill-paying. The physician indicated no problems with social functioning, though the appellant wrote that she hardly goes out with friends anymore due to her pain.

### *Physical Impairment*

- In terms of functional skills, the only limitation identified by the physician is that the appellant is limited to lifting 15 to 35 pounds. The physician was not able to say whether the appellant is limited in her ability to walk unaided.
- The appellant wrote that pain limits her ability to walk or stand for periods of time, and that she

occasionally suffers from incontinence.

#### *DLA*

- The physician wrote in the PR that the appellant's symptoms of fibromyalgia – pain, insomnia, fatigue – impact her DLA. He has provided no detail as to how any particular DLA is impacted.
- The appellant has indicated that she has problems with mobility, is sometimes unable to cook for herself, and takes longer than typical to do housework.

#### *Help*

- The physician indicated the appellant is independent with all DLA, while noting she does get some help from friends.
- The appellant wrote that since she recently moved she has only one friend who helps her.

#### *Oral Testimony*

The appellant did not attend the appeal hearing. The panel confirmed that the appellant had been notified of the hearing, and proceeded with the hearing in accordance with s. 86(b) of the *Employment and Assistance Regulation*.

The ministry relied on its reconsideration decision and did not provide any new information.

## PART F – Reasons for Panel Decision

The issue on this 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, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### EAPWDA:

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.

**EAPWDR section 2(1):**

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.

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**Mental Impairment**

The appellant did not advance an argument with respect to severe mental impairment, other than to note that depression and anxiety have an impact on her ability to perform DLA.

The ministry's position is that the evidence does not establish that the appellant has a severe mental impairment.

*Panel Decision*

To assess the severity of an impairment one must consider the nature of the impairment and its impact on daily functioning as evidenced by functional skill limitations and the degree of

independence in performing DLA. The legislation makes it clear that the determination of severity 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.

The appellant's physician has provided no diagnosis of a mental health condition. He has indicated that he has prescribed medication, but has given no indication as to what the purpose of the medication is, and there is no evidence as to whether the appellant is taking that medication or whether it is having any effect on her. There is no medical evidence that the appellant's depression has any impact on her ability to perform DLA independently.

In light of the limited evidence of severe mental impairment, the panel finds that the ministry reasonably found that this legislative criterion was not satisfied.

### **Severe Physical Impairment**

The appellant's position is that the physician has described her fibromyalgia as being "severe", and that the fibromyalgia and related symptoms have greatly restricted her ability to perform DLA, particularly with respect to housekeeping, cooking and anything requiring mobility.

The ministry's position is that while it acknowledges that the appellant may have some physical limitations as a result of her medical conditions, the evidence does not establish a severe physical impairment.

#### *Panel Decision*

The appellant's physician of 22 years described the appellant's fibromyalgia and related symptoms as being "severe". He took the time to write a letter informing the ministry that he had relied primarily on the appellant's self-report and that he had not himself conducted a "full functional evaluation" of the appellant, yet the information he provided in the AR and PR is not reflective of the limitations and restrictions that the appellant says that she experiences. Despite the appellant's narrative of pain and physical limitations, there is no information from the physician to confirm or even to indicate that the appellant's medical condition impacts her ability to perform DLA independently.

Given the medical information, the panel finds that the ministry was reasonable in determining that the evidence has not established that the appellant has a severe physical impairment.

### **Significant Restrictions to DLA**

The appellant's position is that her medical conditions significantly limit her ability to perform DLA, in some cases continuously, and in other periodically.

The ministry's position is simply that as the AR indicates that all aspects of DLA are managed independently, the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods.

*Panel Decision*

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician. This doesn't mean that other evidence shouldn't 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".

Other than the general statement that the appellant's symptoms impact her DLA, the physician has provided no other indication that in his opinion the appellant is restricted in any way, and has provided no evidence as to the extent, timing, or duration of any restrictions. The physician has indicated that the appellant can perform all DLA independently. Even the appellant's evidence on restrictions to DLA is limited. She hasn't provided any detail as to how often she is unable to prepare her own meals, what limitations she has doing housework other than needing to rest every hour, how her difficulties with mobility restrict her abilities to perform DLA, or how frequently and for how long these restrictions arise.

Based on the foregoing, the panel finds that the ministry reasonably concluded that this legislative criterion was not satisfied.

**Help with DLA**

The appellant's position is simply that she does require help with DLA, even though her access to help is limited in her new location. If she can't get help, then things just don't get done.

The ministry's position is that since it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

*Panel Decision*

Other than an indication that the appellant receives help from friends, the physician has provided no specifics with respect to help she receives from others. The appellant similarly has provided no specifics as to what sort of help she receives, or the frequency or extent of such help. There is simply insufficient evidence to show that the appellant relies upon the significant help or supervision of another person. The physician's evidence is that the appellant performs all DLA independently, and that she does not use assistive devices or an assistance animal. Accordingly, the panel finds that the ministry reasonably concluded that the appellant does not need help with DLA.

**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.