

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of November 8, 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

With the consent of the parties the appeal hearing was conducted in writing in accordance with s. 22(3)(b) of the *Employment and Assistance Act* (EAA).

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 signed by the appellant's physician – a general practitioner - on August 28, 2012. The application also included a self-report form signed by the appellant on August 16, 2012.
- A letter from the ministry to the appellant, dated October 3, 2012 including a decision summary advising the appellant that she had been found ineligible for designation as a PWD.

On appeal the appellant submitted the following new information:

- A written submission in the form of a "To whom it may concern" letter dated December 8, 2012;
- An undated letter from a physician – a physician colleague of the appellant's general practitioner - stamped as received by this Tribunal on December 10, 2012;
- A letter from the appellant's neighbour, dated December 5, 2012; and
- A Medical Report – Employability form (the MRE) dated May 22, 2012.

Each of the items of new information provides additional detail with respect to the appellant's impairments and the impact of those impairments; accordingly the panel has admitted them into evidence as being written testimony in support of the information and records that were before the ministry, as per s. 22(4) of the EAA. The panel has not admitted the evidence of a new potential diagnosis – rapid heartbeat – referenced in the appellant's December 8, 2012 written submission as it is not confirmed by a medical practitioner, was not before the ministry at the time of reconsideration, and is not in support of information or records that were before the ministry.

The ministry relied on its reconsideration decision and provided no new information.

Physical Impairment

- The diagnoses provided by the general practitioner in the PR are fibromyalgia, scleroderma, osteoarthritis and chronic pain syndrome. He noted that the diseases are not curable but they will be better some days and worse others.
- In terms of functional skills, the general practitioner noted that the appellant can walk less than 1 block unaided on a flat surface, with additional detail in the health history portion of the PR to the effect that the appellant "...Has to stop walking after = 1 level block, wait few mins + then continue." The appellant can climb 2 to 5 steps, lift 5 to 15 pounds, and has no limitations with respect to ability to remain seated. The general practitioner noted the appellant has no difficulties with communication.
- In her self-report the appellant wrote that she also suffers from Raynaud's syndrome and extreme shoulder pain. She wrote that driving long distances causes extreme swelling and throbbing of muscles, and that her last long trip driving resulted in tennis elbow/golfers elbow. She explained that she is always in pain "but some days are manageable."

- In her written submission of December 8, 2012 the appellant wrote that over the past 3 or 4 months the severity of her impairment has increased.

Mental Impairment

- The appellant's general practitioner did not provide a diagnosis of a mental impairment in the PR.
- In the PR the general practitioner did indicate significant deficits with cognitive and emotional function – emotional disturbance (depression) and attention.
- The general practitioner completed section B.4 of the AR, which provides a more detailed assessment of cognitive and emotional function. This section is to be completed for an applicant "...with an identified mental impairment or brain injury." The general practitioner has indicated a major impact in terms of 1 out of 14 categories of cognitive and emotional function - bodily functions (*sleep disturbance etc.*). He noted moderate impacts in 4 other categories and no impact in the remaining 9 categories. He noted that the 4 "moderate impacts" are variable depending on pain levels being experienced by the appellant.
- The general practitioner completed the "Social Functioning" portion of section C of the AR, which also is to only be completed "...if the [appellant] has an identified mental impairment, including brain injury." He indicated that the appellant is independent in all aspects of social functioning, and that she is "good functioning" in terms of immediate social network (except on bad pain days) and extended social networks.
- In the MRE the general practitioner wrote that the episodes of the appellant's impairment have occurred chronically the last few months and can be expected to increase and decrease.
- In her self-report the appellant wrote that she has difficulty concentrating, that she experiences periods of depression, anxiety and frustration because of constant pain, and that she questions her self-worth.
- In her letter of December 5, 2012 the neighbour wrote that recently the appellant has been in extreme pain and doesn't want to interact with anyone, leading the neighbour to believe the appellant is "extremely depressed."

DLA

- In the AR the general practitioner noted that the appellant is fully independent with respect to meal preparation, paying rent and bills, and managing her medications.
- He also noted that she is fully independent in 8 of 8 aspects of personal care, though she has trouble lifting her arms to brush her hair, and sometimes has to roll out of bed and "crawl" up the wall to transfer out of bed.
- The general practitioner indicated that the appellant is independent in 4 of 5 aspects of personal shopping, needing periodic assistance only with respect to carrying purchases home.
- With respect to use of transportation the general practitioner noted the appellant periodically needs help getting in or out of a vehicle. He also noted that she needs periodic assistance with laundry and basic housekeeping.
- In her self-report the appellant wrote that household chores are hard to do on days of inflammation and chronic pain. Sleep is "often" disrupted. In order to get out of bed she "quite often" has to "roll off of the bed + use my hands to crawl up the wall to a standing position."
- With respect to periodicity and duration of restrictions to her ability to manage DLA, the

appellant referred in her Notice of Appeal to the MRE saying that her medical conditions are episodic in nature, with episodes chronically lasting a few months and are expected to recur "...up + down..."

Help

- The general practitioner noted that the appellant does not require prostheses or aids, and that she does not have an assistance animal. She lives alone, and assistance is provided by friends.
- In her letter of December 5, 2012 the appellant's neighbour wrote that over the past year she has been periodically assisting the appellant with DLA. The frequency of her assistance has increased over the past 3 or 4 months to "three to four times a week sometimes more depending on [the appellant's] pain levels.
- The neighbour writes that she helps with meal preparation, shopping, housecleaning, getting out of bed, brushing her hair and anything else she needs.

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.

Severe Physical Impairment

The appellant's position is that her general practitioner has clearly indicated that her impairment is severe and episodic.

The ministry takes the position, as identified in its reconsideration decision, that while it acknowledges that the appellant has limitations when it comes to physical functioning there is not enough evidence to establish a severe physical 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 extent of the appellant's ability to engage in paid employment is not a legislated criterion for severity. 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 evidence of the general practitioner is that the appellant does have some limitations to her physical functional skills. She is somewhat limited in walking outdoors, though it appears that the appellant can walk further than 1 block after resting for a few minutes. How much further is not specified. Similarly, she is limited to lifting somewhere in the range of 5 to 15 pounds.

However, there is little in the way of evidence to show that those limitations translate to direct or significant restrictions on the appellant's ability to perform DLA independently. Based on the evidence of the general practitioner, which is not contradicted by the evidence of the appellant or the appellant's neighbour, the appellant performs most aspects of most DLA independently.

The appellant proffered the December 10, 2012 letter from the physician colleague of her general practitioner, apparently in support of her written statement that the severity of her impairment has increased in the past 3 or 4 months. However, in that letter the physician colleague provided no professional opinion on the appellant's medical condition, saying that he had never seen the appellant prior to that day and that he would only be able to document from the records "things like the number of visits, diagnoses given, lab & imaging results, etc." There is no medical confirmation that the severity of the appellant's impairment has increased since the general practitioner completed the PR.

Accordingly, the panel finds that the ministry reasonably concluded that the evidence does not establish that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant has not expressly advanced an argument with respect to severe mental impairment, though she has indicated that she experiences periods of depression and anxiety.

The ministry's position, as set out in its reconsideration decision, is that confirmation of a severe mental impairment has not been provided.

Panel Decision

The legislation requires that a severe impairment must be identified by a medical practitioner. The appellant's general practitioner has provided no diagnosis of a mental health condition. There is insufficient evidence to show that the appellant has any significant difficulty with decision-making or social functioning, and the evidence of the general practitioner shows on balance no more than a moderate impact in terms of cognitive and emotional functioning.

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

Significant Restrictions to DLA

The appellant's position is that she is directly and significantly restricted in a number of DLA.

The ministry's position is that there is not enough evidence from the general practitioner to establish that the appellant's impairments significantly restrict her ability to manage the majority of her DLA, either continuously or 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 general practitioner. 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".

In this case, the evidence indicates that the appellant is not directly or significantly restricted with respect to 5 of the 10 prescribed DLA – meal preparation, managing finances, managing medications, decision making, and social functioning/communication – as she performs these functions independently.

With respect to 3 additional DLA – personal care, shopping, and transportation – the appellant is restricted periodically in one of the several aspects of each DLA. Regarding personal care, she occasionally can't brush her hair. Regarding shopping, she needs help lifting or carrying – presumably for items that weigh more than her 5 to 15 pound lifting limitation. There is no evidence to indicate that the appellant is not capable of using a wheeled shopping cart to carry groceries. With respect to transportation, the appellant periodically needs help to get into or out of a vehicle, but the appellant's evidence is that she is capable of driving a vehicle, subject to experiencing discomfort on long trips. There is no evidence to describe how frequently the referenced restrictions arise or their duration.

With respect to the 2 remaining DLA – housekeeping and moving about indoors/outdoors, despite the neighbour's evidence that she assists the appellant 3 to 4 times a week, there is no indication of what sort of help she provides in the way of housekeeping, or how often the appellant requires this assistance. There is no narrative to indicate how the appellant's impairment prevents her from doing at least the lighter aspects of housekeeping.

Despite her evidence that she is in continuous pain, the appellant acknowledges that it is "some days manageable." Her self-report uses the terminology "at times", "on days of inflammation and pain", "often disrupted", "quite often" in describing restrictions to DLA, and in her written submission the appellant stresses the "episodic" nature of her impairment, however as noted there is no clear indication for any DLA how often the restrictions arise or how long they last. There is also no evidence to indicate that any of her DLA are continuously restricted.

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 appellant's position is simply that she relies on ongoing help from her friends and neighbour.

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.

Panel Decision

The evidence is that the appellant receives 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 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.