

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (“the ministry”) dated November 19, 2012 which held that the appellant did not meet 3 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 met the age requirement and that a medical practitioner has confirmed that the appellant has an impairment that is likely to continue for at least 2 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, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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 appellant was not in attendance at the hearing. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with s. 86(b) of the Employment and Assistance Regulation. The ministry requested the attendance of an observer at the hearing; however, as the appellant was not in attendance to provide her consent, the ministry observer did not attend the hearing.

The evidence before the ministry at reconsideration included the following.

- A PWD application comprised of a Self-report (SR) signed by the appellant on July 11, 2012 a Physician Report (PR) dated July 19, 2012 completed by the appellant's general practitioner of 2 months and an Assessor Report (AR) also dated July 19, 2012 and completed by the same general practitioner.
- A July 27, 2012 psychiatric assessment with a signed handwritten notation by the psychiatrist ("the first psychiatrist") dated July 30, 2012 noting that the appellant had been given a follow up appointment for September 5, 2012 which the appellant cancelled.
- A diagnostic radiology report respecting a July 12, 2012 exam.
- A September 27, 2012 letter from a different psychiatrist ("second psychiatrist") which references the second psychiatrist's initial consult which the panel notes is not included in the appeal record.
- An October 22, 2012 letter written by the same general practitioner who completed the PR and AR recounting the appellant's own description of her functioning.
- A two-page handwritten description of the appellant's functioning written in the third person but signed by the appellant; this appears to have been prepared for and relied on by the general practitioner to prepare the above noted October 22, 2012 letter.
- A 5 page typewritten self report in which the appellant describes her condition and her worst days.
- An undated 5-page submission from an advocate.

Diagnoses

The appellant has been diagnosed by her general practitioner with bipolar disorder, osteoarthritis, and COPD. Additionally, the first psychiatrist diagnosed the appellant with obesity and mood disorder due to substance abuse – possible bipolar mood disorder. The appellant also reports having Type 2 diabetes and sleep apnea though neither condition is confirmed by a medical practitioner.

Physical Impairment

- In the PR the general practitioner reports that as a result of osteoarthritis of the knees, the appellant walks slowly, has difficulty using stairs or standing long, and uses a cane and walker. COPD is reported to cause shortness of breath on exertion.

- Where asked to provide height and weight "if relevant", the general practitioner reported a height of 5'4 and weight of 280 lbs.
- Functional skills reported in the PR indicate that the appellant can walk 1 to 2 blocks unaided, climb 5+ steps unaided and has no limitations with lifting or remaining seated.
- In the AR, the appellant is reported as independent with lifting though she cannot carry very heavy objects for a prolonged time. Walking indoors/outdoors and climbing stairs take significantly longer.
- The appellant reports being able to walk ½ block and stand for a maximum of 10 minutes with the need to sit and rest quite frequently when she is out walking due to shortness of breath and pain in her legs and back hip.
- The radiology report identified: osteoarthritis of the right knee ("mild tricompartmental") and the left knee ("moderately severe medial compartment"); no evidence of abnormality in either ankle or the left hip; lungs clear but for a calcified nodule with no pulmonary hyperinflation suggestive of emphysema.
- The second psychiatrist opines that the appellant is severely disabled from a medical and psychiatric point of view.

Mental Impairment

- In the PR, the appellant's bipolar disorder is described as "fairly stable but moodswings" with additional narrative that when in the depressive phase the appellant is very depressed and cannot function. Past hospitalizations are noted.
- The general practitioner reports a good ability to communicate.
- In the PR, significant deficits in 5 of 11 listed aspects of cognitive and emotional function are reported – memory, motivation, emotional disturbance, impulse control, and attention or sustained concentration. The latter three are identified in the AR as having a major impact on daily functioning with executive functioning having a moderate impact and the remaining 10 aspects as having either no or minimal impact. No descriptive narrative is provided by the general practitioner.
- The general practitioner indicates that the appellant independently manages all 5 listed aspects of social functioning and has good functioning with extended social networks.
- The mental status exam (MSE) by the first psychiatrist states: somewhat anxious; mood and affect were euthymic [normal]; and, otherwise MSE was within normal limits.
- The appellant reports the need for reminders from her sister to manage aspects of daily living including bathing and medications as well as the need for addictions counselling/treatment.
- The appellant reports that she can have a very low mood for days or months and suicidal thoughts.
- The second psychiatrist opines that the appellant is severely disabled from a medical and psychiatric point of view.

DLA

- The general practitioner reports that the majority of listed tasks of the DLA personal care, basic housekeeping, shopping, and transportation are managed independently without any noted restriction while the remaining listed tasks of these DLA take significantly longer than typical to perform (dressing, bathing – needs a safety bar), basic housekeeping (needs to rest), going to and from stores, carrying purchases home (very difficult to carry large bags), getting in and out of a vehicle (due to pain), using public transit (cannot use due to anxiety).
- All listed tasks for the DLA meals, medications, and social functioning are managed independently with no noted restrictions.

- The appellant independently manages 2 of 3 aspects of the DLA paying rent and bills – banking and paying rent and bills - but requires periodic assistance from another person with budgeting.
- The appellant reports that on her worst days she stays in bed all day and sleeps sometimes for a day, days, or weeks, or months.

Need for Help

- The general practitioner reports that the appellant currently uses a cane daily, a cart when grocery shopping, and requires a walker, scooter, and bathing aides.
- When asked to comment on assistance provided by other people, the general practitioner wrote “mostly self except transportation, budgeting, shopping.”
- The appellant reports that she needs daily reminders and assistance from another person and/or assistive devices (cane, walker, bathing aides, scooter) for aspects of mobility, personal care, medications, housekeeping, meals, grocery shopping, budgeting, and transportation (rides from family, uses a rented walker, and uses Handy-Dart).

At the hearing, the ministry relied on its reconsideration decision but did not provide additional evidence.

PART F – Reasons for Panel Decision

The issue on 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, in the opinion of a prescribed professional, directly and significantly restricts her from performing DLA either continuously or periodically for extended periods thus necessitating the need for help with 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.

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

EAPWDR

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.

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.

Severe Physical Impairment

The appellant's position, as put forward in her Advocate's submission at reconsideration, is that a severe physical impairment is established by the evidence of her pain due to osteoarthritis and shortness of breath due to COPD which limits her mobility resulting in the need for a number of assistive devices.

The ministry's position is that the medical information provided is unclear and at times contradictory. In particular, the ministry notes physical functional skill limitations and radiological reports which do not support a severe physical impairment and which are contradicted by the reported need for assistive devices for walking and bathing.

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.

The panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with COPD and osteoarthritis and has confirmed that both medical conditions are likely to continue for 2 years thus meeting the requirement of s. 2(2)(a) of the EAPWDA. The panel also finds that, although the first psychiatrist provides the additional diagnoses of substance abuse and obesity, neither is confirmed by a medical practitioner as being likely to last for at least 2 years. The appellant states that she suffers from Type 2 diabetes and sleep apnea; however neither the diagnoses nor duration of these conditions has been confirmed by a medical practitioner. Accordingly, the panel will consider the reasonableness of the ministry's decision respecting severity of physical impairment based on the evidence respecting the appellant's COPD and osteoarthritis.

The panel finds that there is insufficient medical information to establish that the result of the appellant's COPD and arthritis is a severe impairment of physical functioning. For example, while both the general practitioner and first psychiatrist confirm COPD, there is no report or other information describing or quantifying the breathing limitations; and further, the fairly recent diagnostic imaging report indicates that, but for a calcified nodule, the appellant's lungs are clear with no sign of emphysema. Similarly, respecting the diagnosis of osteoarthritis, with the exception of "moderately severe medial compartment" osteoarthritis of the left knee, the medical imaging report identifies findings of either normal or "mild" for the right knee, both ankles, and hips. which the panel finds, supports the general practitioner's assessment that the appellant can independently walk 1-2 blocks and manage all but heavy or prolonged lifting, rather than the more limited functioning reported by the appellant. While the panel acknowledges the second psychiatrist's opinion that the appellant is severely disabled from a medical point of view, this assertion is not supported by any description of any medical conditions or resulting functional impairment. For the above reasons, the panel concludes that 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.

Severe Mental Impairment

The appellant argues that a severe mental impairment is established by the general practitioner's evidence of several significant cognitive and emotional function deficits which have a major impact on daily functioning and the narrative that the appellant cannot function when severely depressed. The appellant also points to the evidence of past hospitalizations and argues that she is sometimes bedridden for months.

The ministry's position is that a severe mental impairment has not been established. The ministry relies on the evidence that the general practitioner reports no, minimal, or moderate impact on daily functioning for 10 of 14 listed areas of cognitive and emotional functioning. The ministry further takes the position that despite a major impact on daily functioning being reported in 3 areas, there is no descriptive narrative provided to explain this level of impact and furthermore, the general practitioner's evidence does not identify a corresponding impact on DLA and social functioning.

Panel Decision

The panel finds that although significant deficits with a number of areas of cognitive and emotional functioning are identified, three of which are reported to have a major impact on daily functioning, there is no explanation or substantiating analysis provided. Furthermore, the information respecting the appellant's ability to function in terms of specific daily tasks does not reflect a severe impairment of mental functioning. In particular, the

general practitioner indicates that the appellant has good social functioning, including good functioning with extended social networks, and that with the exception of budgeting, which requires the periodic assistance of another person, the appellant independently manages all other listed "mental" tasks of daily living. Of note, the appellant's own evidence reflects good functioning with family members. Additionally, the general practitioner writes that the appellant's bipolar disorder is "fairly stable" though she has mood swings. While the general practitioner reports that the appellant is unable to function when severely depressed and there is evidence of past hospitalizations as well as the appellant's assertion that she is bedridden for up to month's long periods, there is no evidence establishing when or how often these events occurred in the past and the current medical information does not indicate that the appellant is currently experiencing this level of incapacity. While the second psychiatrist opines that the appellant is severely disabled from a psychiatric point of view, no basis or explanation for that conclusion is provided. The panel also notes, that the results of the first psychiatrist's assessment, which was completed only two months prior to the second psychiatrist's letter, indicated that but for being somewhat anxious, the appellant's mental status was within normal limits. For these reasons, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

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 DLA to the point that she requires a number of assistive devices and the ongoing assistance of her family with shopping, meals, and transportation and to provide daily reminders respecting personal grooming and housekeeping.

The ministry's position is that the evidence of the prescribed professionals establishes that although some DLA take longer to complete, the appellant independently manages all of her DLA. The ministry also points to the general practitioner's comment that DLA are managed "mostly self except transportation, budgeting and shopping."

The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant takes significantly longer mobilizing indoors and outdoors but that she can independently manage distances of 1-2 blocks. The majority of the listed tasks for all other DLA are managed independently, including laundry, all tasks associated with meal preparation, and all aspects of social functioning. The only restrictions to DLA identified are that some aspects of some DLA, including personal care, housekeeping, shopping, and transportation, take significantly longer, and that the appellant requires a safety bar for bathing and the periodic assistance of another person with budgeting. The appellant is able to use Handy-Dart as a means of transportation and avails herself of a rented walker and a shopping buggy for grocery shopping. While the general practitioner indicated that the appellant is unable to function during a severe depressive episode, presumably the periods of being bedridden referenced by the appellant, the only evidence of any impact on DLA from a mental impairment from a prescribed professional is the aforementioned need for periodic assistance with budgeting. The panel concludes 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 criterion of s. 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the use of assistive devices and the significant assistance of another person to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is 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) as 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 the prescribed professional establishes that the appellant requires some assistance with tasks of some DLA, the panel also 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 decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.