

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of November 20, 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) signed by the appellant's physician on July 15, 2011 and an assessor's report (AR) signed by a social worker on May 31, 2012. The application also included an uncompleted self-report form signed by the appellant on June 27, 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 "To whom it may concern" letter from the appellant's daughter.

On appeal the appellant submitted new information in the form of a letter from her physician, dated December 13, 2012 (the December 13 Letter). The letter provides additional detail with respect to matters on which the physician had previously expressed an opinion, and was accepted as evidence by the panel as being written testimony in support of the information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the EAA.

Mental Impairment

- The physician did not make a diagnosis of mental impairment in either the PR or the December 13 Letter.
- In terms of functional skills in the PR, the physician noted no difficulties with communication, and no significant deficits with cognitive and emotional function.
- In section B1 of the AR the social worker wrote that the appellant experiences "...severe anxiety, stress, fear..."
- Section B4 of the AR, dealing with cognitive and emotional impacts, and the portion of section C dealing with social functioning, are to be completed only for an applicant with "an identified mental impairment or brain injury." The social worker completed section B4 and identified major impacts to 2 out of 14 categories (emotion/excessive anxiety and attention/poor short term memory), moderate impacts to 1 out of 14 categories (bodily functions – eating problems), and minimal impact to 1 category (consciousness – confusion). The other 10 categories are identified with "no impact." She commented "Very poor short term memory cause of confusion at times. Because of the severe life-threatening nature of disability, she is constantly anxious, stressed and in fear."
- Similarly, the social functioning portion of section C of the AR was completed, with the appellant shown as independent in 5 of 5 categories of social functioning, and described as "good functioning" in terms of both immediate and extended social networks.

Physical Impairment

- The appellant's physician of 4 years diagnosed progressive decompensated liver disease with autoimmune hepatitis, and chronic airway obstruction.

- In terms of physical functional skills the appellant is described by the physician in the PR as being unrestricted in all categories – walking unaided on a flat surface, climbing stairs, lifting, and remaining seated.
- In section F of the PR the physician commented "This patient is not employable due to the nature of her chronic progressive disease."
- In section B.1 of the AR the social worker noted "Autoimmune cirrhosis (failing liver and complications)...ascites (fluid retention in abdominal cavity). Nauseated and dizzy."
- In section B.3 the social worker indicated the appellant requires either periodic or continuous assistance with walking (both indoors and out), climbing stairs, standing, and lifting/carrying/holding due to "...unpredictable nature of swelling abdominal cavity and numerous other life-threatening complications, activities involving mobility can be impossible for consecutive days. Will get dizzy."
- In section B.4 the social worker commented "Will go days without an appetite."
- The daughter's letter says that the appellant has lost 80% of her liver.
- In the December 13 Letter the physician noted "[The appellant] might be considered for liver transplant in future..."

DLA

- In section B.3 of the PR the physician indicated that the appellant has not been prescribed any medication or treatments that interfere with her ability to perform DLA.
- In section E the physician noted that the appellant is directly and continuously restricted in 2 DLA – basic housework and daily shopping – due to shortness of breath and occasional edema. She indicated she did not know about any restrictions the appellant has with respect to 2 DLA – meal preparation and mobility (specifically mobility outside the home). The physician noted no restrictions to the remaining DLA.
- In the AR the social worker indicated the appellant needs either periodic or continuous assistance with all aspects of 2 DLA - personal care and basic housekeeping. She needs continuous assistance with 2 out of 5 aspects of shopping (going to and from the stores and carrying purchases home) and 3 out of 4 aspects of meals (planning, preparation and cooking). In terms of transportation, the appellant can independently get in and out of vehicles, but she needs continuous assistance using public transit (unable days/weeks) and periodic assistance using transit schedules and arranging transportation due to forgetting the schedule. She is completely independent with respect to paying rent and bills, and substantially independent in terms of managing medications.
- In the December 13 Letter the physician noted that "[The appellant is] not able to do tasks of daily living on most days."

Help

- In the PR the physician indicated that the appellant requires no prostheses or aids, but that she "...gets assistance from family."
- In the AR the social worker indicated that the appellant uses no assistive devices or assistance animal, but that help for DLA is provided by "son and friends."
- In the December 13 Letter the physician wrote that "She is very dependent on the help of friends and family" and "She does need significant help at home but cannot afford this".

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.

Mental Impairment

The appellant's position is that she suffers from severe anxiety, stress and fear because of the life-threatening nature of her impairment.

The ministry's position as expressed in the reconsideration decision is that the evidence provided does not demonstrate a severe mental impairment as the physician has not provided a mental health diagnosis, has identified no deficits to cognitive and emotional functioning, and has identified no restriction to social functioning. The ministry also noted that the impacts to cognitive and emotional functioning and accompanying narrative noted by the social worker are not indicative of a severe mental impairment.

Panel Decision

The legislation requires that a severe impairment must be identified by a medical practitioner. The appellant's physician has provided no diagnosis of a mental health condition in either the PR or in the December 13 Letter. There is no evidence that the appellant has any difficulty with decision-making or social functioning, and the evidence of the social worker shows on balance 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.

Severe Physical Impairment

The appellant's position is that she has a chronic, progressive, life-threatening medical condition that prevents her from being employed and which significantly impairs her ability to manage her DLA.

The ministry takes the position, as identified in its reconsideration decision, that the physician has not reported any "untoward" functional skill limitations and argues that the information provided does not evidence 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.

Unfortunately, in this case there is a significant degree of inconsistency in the evidence from the prescribed professionals. In the PR the physician reports that the appellant has virtually no limitations in terms of functional skills, while the social worker indicates in the AR that the appellant requires periodic or continuous help with virtually all functional skills. The social worker completed the AR some 10 ½ months after the physician completed the PR, but the social worker made no reference to having reviewed the PR and provided no comment as to why her assessment of functional skills varies so much from the physician's assessment. In the circumstances where the physician has known the appellant for more than 4 years while the social worker has just met the appellant, and where the social worker has given no indication that she has consulted any clinical data or reports, the panel prefers the evidence of the physician where there is inconsistency between the two.

There are also some glaring discrepancies between the physician's evidence as given in the PR and in the subsequent December 13 Letter. For example, the PR indicates that the appellant is independent with respect to most DLA, while the December 13 Letter indicates that she is not able to do DLA most days. It may be that over the course of the 17 months between the two documents the

appellant's condition worsened, or it may be that the physician had misunderstood the extent of the impacts of the appellant's medical condition, or there may be some other explanation. Where there is inconsistency between the two documents, the panel gives more weight to the more-detailed PR rather than to the tersely worded December 13 Letter, particularly because the latter document provides no explanation for the radical differences between the two.

The panel acknowledges that the appellant has a chronic, progressive medical condition. However, given the functional skills assessment provided by the physician and the physician's evidence in the PR that the appellant independently manages most DLA, the panel finds that the ministry reasonably determined that the appellant does not have a severe physical impairment.

Significant Restrictions to DLA

The appellant's position is that she is directly and significantly restricted in at least 7 DLA – meals, shopping, use of transportation, basic housekeeping, mobility, personal care, and medication management.

The ministry's position is that as the physician states that the appellant is able to perform the majority of her DLA without restriction the evidence does not establish that the appellant's impairments significantly restrict her ability to manage her DLA, either continuously or for extended periods.

Panel Decision

With respect to management of medications, the social worker indicated that the appellant is independent in 2 out of 3 aspects but that she needs periodic assistance from another person with respect to "taking as directed" because she "forgets occasionally". There is no information on how often this occurs, or how this is directly caused by her impairment. This would not seem to be a "direct" or "significant" restriction.

With respect to all other DLA, there is little or no narrative to explain how the appellant's impairment directly restricts her from performing the DLA, how frequently the restrictions arise, or in most cases the duration of the restrictions when they do arise. For example, there is no explanation for how the appellant's impairment restricts her from preparing meals, using public transportation or performing light housekeeping tasks. In other cases the restriction – for example with respect to shopping – appears to be linked to functional skills limitations such as mobility and lifting/carrying/holding but those limitations have not been confirmed by the physician in either the PR or the December 13 Letter.

On balance, the panel finds that the ministry reasonably concluded that the evidence does not establish that the appellant's impairment directly and significantly restricts her ability to manage her DLA either continuously or periodically for extended periods.

Help with DLA

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

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.