

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated December 4, 2012 which found that the appellant did not meet three of the five 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 her 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; and,
- the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal 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 evidence before the ministry at the time of the reconsideration decision included the following:

- 1) Person With Disabilities (PWD) Application comprised of the applicant information dated September 4, 2012 with no description provided by the appellant of her disability or how it affects her life and her ability to take care of herself, and physician report and assessor report completed by the appellant's family physician of more than 3 years, both dated September 11, 2012;
- 2) Handwritten comments made by the appellant with respect to the PWD application; and,
- 3) Request for Reconsideration dated November 21, 2012.

Diagnoses

The appellant has been diagnosed by her general practitioner with major depression, degenerative disc disease (DDD) and left lateral epicondylitis (otherwise known as "tennis elbow").

Physical Impairment

- In the physician report, the general practitioner indicated that the appellant has constant pain from her DDD, that she takes more than 50% longer to carry out her activities of daily living ("ADL's") and she takes medications for her back pain. She also experiences constant pain with the lateral epicondylitis, takes cortisone shots and anti-inflammatory medications with no relief and it is painful for her to lift and to use her left hand.
- For additional comments, the physician indicated that the appellant's conditions have been going on for a long time and she has not improved to the extent to be able to function normally and she is unlikely to be well enough mentally and physically to be gainfully employed.
- Functional skills reported in the physician report indicated both that the appellant can walk 1 to 2 blocks unaided and also that she can walk less than one block, she can climb 2 to 5 steps unaided, and both that the appellant can lift 5 to 15 lbs. and that she can lift under 5 lbs., and she can remain seated less than 1 hour.
- The physician reported that the appellant has not been prescribed any medications or treatments that interfere with her ability to perform her daily living activities (DLA) and she does not require any aids for her impairment.
- In the assessor report, the appellant is reported as taking significantly longer than typical with all tasks of mobility and physical ability, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. The physician commented that it takes the appellant more than 50% longer to complete these tasks because of ongoing back and left arm pain, that she has a feeling of constant pain in her lower back and is stiffer in the morning. Bending and walking is painful and also lifting and using her left hand is painful.
- In her handwritten notes to the PWD application, the appellant stated that she experiences drowsiness or dizziness from her pain medication and she gets major headaches in the morning from the pain and anti-depression medications. The appellant agrees that she can walk 1 to 2 blocks unaided, but this used to be 6 to 8 or more blocks and that she cannot lift any weight with her left arm but can lift 5 to 15 lbs. with her right arm.

Mental Impairment

- In the physician report, the general practitioner reported that the appellant has longstanding depressive symptoms and her last patient health questionnaire (PHQ) score was 16. She has seen a psychologist and is on medications but her symptoms are not improving. Because of her persistent low mood, she is not motivated to do a lot and would like to stay isolated and does not enjoy going out to socialize.
- The general practitioner reported the appellant has a good/satisfactory ability to communicate.

- In the physician report, a significant deficit is reported in 1 of 11 listed aspects of cognitive and emotional function in the area of emotional disturbance. In the assessor report, this area is identified as having a major impact on the appellant's cognitive and emotional functioning. Additionally, a moderate impact is identified in the area of motivation, with no impacts identified for the remaining 12 areas. No descriptive narrative is provided by the general practitioner.
- The general practitioner indicated that the appellant independently manages all 5 listed aspects of social functioning and has good functioning with extended social networks.
- The appellant stated that she gets depressed because she cannot physically do what she wants to do. In her handwritten notes to the PWD application, the appellant wrote that her depression is getting worse as time goes by and she considers that there are major impacts to her daily functioning in the areas of motivation and motor activity and that she requires periodic support with securing assistance from others.

DLA

- In the physician report, the general practitioner indicated that the appellant is not restricted in any of her DLA with the exception of daily shopping and that the degree of restriction with this DLA is that it takes longer. However, the general practitioner commented in the health history section of the report that, as a result of constant pain from her DDD, it takes the appellant more than 50% longer to carry out her DLA.
- In the assessor report, the general practitioner reported that 6 out of 8 listed tasks of the DLA personal care are performed independently without any noted restriction while the remaining two tasks (transfers) take significantly longer than typical to perform.
- The appellant does not require periodic or continuous assistance from another person with any aspect of any of her DLA.
- All listed tasks for the DLA meals, paying rent and bills, medications, and social functioning are managed independently with no noted restrictions.
- While the appellant independently does her laundry, she takes significantly longer than typical with basic housework, with the comment that this takes 50% longer. It also takes significantly longer than typical for the appellant to perform 2 out of 5 tasks of shopping (going to and from stores and carrying purchases home) and 1 out of 3 tasks of managing transportation (getting in and out of a vehicle).
- In her handwritten notes to the PWD application, the appellant agreed that she is not restricted with personal self care, management of medications, mobility inside and outside the home, use of transportation and management of finances. However, the appellant stated that meal preparation and basic housework are restricted since they take longer and that social functioning is restricted as described by the general practitioner in his additional comments, specifically that she is not motivated to do a lot as a result of her persistent low mood and she would like to stay isolated and does not enjoy going out to socialize. The appellant explained that it takes her longer to do her laundry and that food preparation and cooking take 30% longer to perform.

Need for Help

- The general practitioner reported that the appellant does require an aid for her impairment, and does not need or use an assistive device.
- When asked to describe what assistance is necessary where none is available, the general practitioner wrote "not applicable."
- The appellant noted in her comments to the PWD application that the assistance she does receive from other people is from friends for gardening, replacing lights, snow removal and painting.

In her Notice of Appeal, the appellant expressed her disagreement with the reconsideration decision.

At the hearing, the appellant provided the following oral evidence:

- The appellant reported that she is in pain all the time and cannot work, that she cannot even pick up a coffee cup with her left arm. The appellant stated that she is right-handed but any task requiring two hands is difficult for her. Some days the pain in her lower back due to DDD is so bad she cannot get up off the couch or out of bed and while pain killers help for a little while, they never completely take the pain away. The appellant stated that her condition has deteriorated since her family physician completed the reports and she recently went to see a doctor in another community who is looking at helping her manage the pain.
- The appellant reported that she does what she has to do because she has no family or friends to help her, but she suffers for it. With preparing meals, if she stands too long she will get muscle spasms in her back and legs. Any tasks of housekeeping that take two hands are difficult. She drives herself for grocery shopping but it takes a while because she walks slowly and uses a cart and cannot reach too high or low. It takes her longer than it used to with getting in and out of a vehicle.
- The appellant lives alone and reported that she does not have family or friends to help her with her DLA and that although she gets things done, she suffers for it.

The panel admitted the appellant's evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail in support of information that was before the ministry on reconsideration.

At the hearing, the ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, that the appellant is not eligible for designation as a person with disabilities (PWD) as she does not meet all the criteria in Section 2 of the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, 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, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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;

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- (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.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of her pain due to DDD and left lateral epicondylitis, which persists despite taking daily pain medications and periodic cortisone injections.

The ministry's position is that the information provided by the general practitioner indicates that the appellant is able to walk 1 to 2 blocks unaided, to climb 2 to 5 steps unaided and to lift 5 to 15 lbs. with her right hand and to sit for less than an hour, despite ongoing pain in the appellant's lower back and left elbow for which she receives appropriate medications and treatment. The general practitioner does not indicate that the appellant requires periodic or continuous assistance from another person or an assistive device to manage any of these tasks. Although the ministry acknowledges that the appellant's impairments impact her physical functioning, the available evidence does not support a finding of a severe physical impairment.

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 medical practitioner, the appellant's general practitioner, has diagnosed the appellant with DDD and left lateral epicondylitis. Although the physician reported that it takes the appellant more than 50% longer to complete tasks of mobility and physical ability because of ongoing back and left arm pain, the appellant is nevertheless able to walk 1 to 2 blocks unaided and to climb 2 to 5 steps unaided and to lift 5 to 15 lbs. with her dominant right hand, without the use of an assistive device or the assistance of another person to perform these tasks. The appellant stated that her condition has deteriorated since the physician completed his reports and she recently consulted with a physician regarding pain management, but there were no further medical reports provided from a specialist or from the family physician, as an addendum to his reports. While the appellant reported that some days the pain in her lower back due to DDD is so bad she cannot get up off the couch or out of bed, there was no indication of the frequency that this occurs. The physician reported that the appellant is unlikely to be well enough to be gainfully employed, and the evidence demonstrates that the appellant is impaired in her physical functioning; however the panel finds that the ministry reasonably concluded that it currently shows a moderate degree of impairment. Therefore, 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 diagnosis of major depression and evidence of significant cognitive and emotional function deficits which have an impact on daily functioning. The appellant also argues that she has persistent low mood and is not motivated to do a lot, she would like to stay isolated and does not enjoy socializing, and she requires periodic assistance with securing assistance from others.

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 impact on daily functioning for 12 of 14 areas of cognitive and emotional functioning. The ministry further takes the position that despite a major impact on daily functioning being reported in the area of emotion and a moderate impact to motivation, there is no descriptive narrative provided to explain this level of impact. The ministry acknowledges that the appellant's most recent PHQ score of 16 is in the moderate to severe range.

Panel Decision

The panel finds that although a significant deficit is identified in the area of emotional disturbance which is assessed as having a major impact on the appellant's daily functioning, the only other impact identified is of a moderate degree in the area of motivation and there is no further explanation or description provided. All other areas of cognitive and emotional functioning are assessed as having no impact from a mental impairment. The appellant stated that her depression is getting worse as time goes by and she considers that there are major impacts to her daily functioning in the areas of motivation and motor activity and that she requires periodic support with securing assistance from others; however there was no updated letter or report from her general practitioner or a psychiatric specialist to confirm the appellant's assessment of a deterioration in her condition. While the appellant points out that the physician reported that she her last PHQ score was 16, which the ministry admits is in the moderate to severe range, and that she is not motivated to do a lot and does not enjoy going out to socialize, the panel finds 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 indicated that the appellant has a good/satisfactory ability to communicate and has independent social functioning, including good functioning with her extended social networks. There is no indication of support or supervision required in the various areas of social functioning, and there is no explanation or description provided by the general practitioner in this section of the assessor report. The appellant independently manages all other listed tasks of daily living that relate to a person with a mental impairment, including managing her personal care and finances independently. 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 but does not receive assistance in various areas of DLA, including meal preparation, basic housework, daily shopping and social functioning.

The ministry's position is that the evidence of the prescribed professionals establishes that although some tasks of some DLA take 50% longer to carry out, the majority of the aspects of DLA (22 of 28) are still performed independently. The ministry points out that the appellant is able to use her right arm and lift weights up to 15 lbs.

The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant is not restricted but takes 50% longer walking indoors and outdoors and she can independently manage distances of 1 to 2 blocks. The majority of the listed tasks for all other DLA are managed independently and the appellant

does not require periodic or continuous assistance from another person with any aspect of any DLA. The only restrictions to DLA identified in the physician report is for daily shopping and the degree of restriction is that it takes longer, specifically with going to and from the store and carrying purchases home. Some other aspects of some DLA also take 50% longer than typical, including personal care (transfers in/out of bed and on/off of chair), basic housekeeping and getting in and out of a vehicle. The appellant stated that it takes her longer to do her laundry, and that food preparation and cooking take 30% longer to perform and that the assistance she receives from her friends is for gardening, replacing lights, snow removal and painting. The panel finds that the assistance identified by the appellant is for heavy household and yard chores. When asked what assistance the appellant needs that is not currently available, her family physician responded "not applicable." 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 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 significant 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.

The evidence of the prescribed professional does not establish that the appellant requires assistance with any aspects of her DLA, and 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.