

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 11 December 2012 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, the person requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: she has reached 18 years of age; and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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

- SR1

The appellant writes that, due to her severe chronic exertional and environmental asthma and allergies, going outside can be a life-threatening situation. Things like weather, smells -- cut grass, smoke, trees, and pollution -- all contribute to her anxiety of dying of her asthma like her grandmother did.

She must have complete control over her living and working environments in order to be able to function.

It is very difficult for her to be in a relationship because of her physical limitations and allergies and being prone to infection. Her food allergies also hinder meals together. She has great difficulty with smells like mint, toothpaste, spices; certain scents all affect her breathing. Basic household chores can be very challenging when her breathing is compromised i.e. cooking, cleaning, and laundry.

When she is having breathing troubles she sleeps at least 12 to 15 hours a night and still feels tired when she gets up. It is impossible to make any plans because she never knows how her breathing is going to affect her on any given day.

She had to put her daughter in foster care because she could no longer keep her safe. She could get away from her at any time and cause injury to herself or her daughter because she was too slow.

The appellant adds a hand-written note dated 18 October 2012 entitled "These are the things that affect me daily and year-round." She lists the following:

- Exertional asthma: showering, walking, bending, vacuuming, getting in and out of her car, standing from sitting position, leaving the house in cool weather, any outdoor activities, sex, dancing, swimming, mowing the lawn.
- Environmental asthma: cold air, smoke -- fireplaces, cigarettes, nicotine, smells -- chlorine, bleach, mint, cut grass, evergreens, mold and germs (prone to infections, careful not to get sick).
- Allergic asthma: Foods -- banana (can kill her), tomatoes (hives), dairy (breathing), barley, pork, beans, soy, dark chicken meat, whole grains, garlic, onions, salmon, shellfish, strawberries (with any other fruit causes constipation), mint (burns skin and affects breathing). Medications -- aspirin, penicillin, painkillers, codeine, morphine, and others.

- SR2:

The appellant writes that she has had breathing problems all of her life. Through all the years doctors have tried all kinds of medications and puffers and none of them worked for her. The only way she managed to survive this long is by being very cautious of everything she does. Because she lives alone she has to be very careful not to over-exert herself because when that happens she can't function well enough to eat properly or even get to the phone to call for help. She does not go outside if the temperature is lower than 3°. She has to take antihistamines every day of the year to combat the effects of evergreens, molds, pollens and other pollutants such as smoke from wood fires or cigarettes.

When she shops for groceries she has to read labels as well as pace herself and only gets exactly what she needs. The loading and unloading of groceries is very exerting and sometimes it takes her a few days to unload her car without help.

If she wants to go for a simple walk (slow) she has to check the temperature and stay on flat ground and hope nobody is burning anything. After a bad experience she now no longer walks

alone.

She had to put her daughter in foster care when she was nine years old because she could not keep up with her -- it became too dangerous for both of them.

Household chores are very challenging because if she over-exerts herself vacuuming or changing the sheets on the bed she can't even think of preparing a meal so she doesn't get to eat properly.

Because of her compromised immune system she has to avoid crowds at all costs.

She has trouble getting out of her car and opening the door and getting up the stairs. After that she usually has to lie down and have a nap the can last 2 to 3 hours.

She sleeps on average 15 hours a day.

- Friend B letter:

Friend B writes that it seems as if the appellant's body shuts down when she over-exerts herself. Then she can only sleep. She may sleep from 10 to 13 hours a day, but also has a two hour nap the day after that. It just knocks her body off course for a few days.

Mental impairment

- PR:

Significant cognitive and emotional deficits: 1 identified – emotional disturbance.

Comment: Hard to be positive all the time. Severely depressed from medical conditions.

- AR:

Cognitive and emotional functioning: no major impacts reported. Moderate impact: emotion, attention/concentration, executive, memory, motivation, and motor activity. No impact on the remaining 8 listed areas. Comment: impact on functioning is all due to asthma and bronchospasm, and can't think strait, gets fatigued and then has to rest and sleep.

- SR1

The appellant writes that her financial situation is causing her extreme anxiety. She has to be very cautious about what she eats and has to read all the labels of products that come into her home.

Living in such poverty has caused her depression to worsen day by day. She can't afford to live and she's extremely tired of existing like this.

- SR2

The appellant writes that it is very depressing not being able to function in the normal world. Her life has to be very controlled in everything she does. She feels like she is 90. That scares her to death.

- SW note

The connection between chronic conditions such as asthma and depression and anxiety is well documented. The appellant has agreed to return to see her on a regular basis to support her in developing some strategies to manage her depression more successfully.

Ability to perform DLA

- AR:
Independent for all aspects of personal care, meals, pay rent and bills, medications, transportation. Periodic help required for basic housekeeping and the going to/from stores and carrying purchases home from shopping,
No support/supervision required for all areas of social functioning. Good social functioning with both immediate and extended social networks.
- Friend B letter:
Friend B writes that the appellant cannot exert herself doing such things as bending down to pick something heavy up from the floor, vacuuming, bringing in objects off her deck into her house, carrying a bag of flour up the stairs, etc. If she does too much housework at one time she ends up taking a nap: she has no choice.
When the weather is really cold, the appellant needs to rely on the kindness of friends to shop for groceries and pay some of her bills. This is the only way that she can survive right now.

Help required/provided

- From the AR:
Assistance is provided by friends. The GP identifies help is required shopping and to/from store. Occasionally needs help with housekeeping and cleaning.
- Friend A letter:
Friend A has often helped with housework as well as made deliveries to assist in her life when she was unable to leave the house in the winter months because of her crippling asthma. She would also often pick up food for her and escort her to [another city] for specialist appointments.

In her Notice of Appeal dated 20 December 2012 the appellant gives as reasons for appeal:

"Because I am still not well enough to go out into the cold weather without becoming sick. I am reliant on other people at this time to do my shopping and banking. I'm not able to afford to winterize my car or buy special foods or supplements to help keep me healthier than I am now. If I do have to go out of my house I need to be very cautious of germs and illness because of my poor immune system."

At the hearing, in her remarks and in answer to questions, the appellant presented the following evidence:

- The appellant explained that her longtime doctor retired in 2011. She went to another doctor, who ordered a number of tests (heart, lung, etc) but could find nothing else wrong with her. This doctor was not sympathetic to her conditions. She began seeing her current GP beginning in October 2012. When she advised the GP about her PWD denial, he said that he refused "to play that game." The GP recently upped her dosage of her anti-depressant medication.
- She stated that she had been suffering from her asthma and allergic conditions all her life, but managed to get by working at home as a seamstress. This changed in February 2012 when she became very ill as a result of being outside when it was too cold and her condition has been worse since then.

- She cannot go outside when the temperature is 3° or less. She has a car but cannot afford to fill it with gas or have winter tires installed. Although her daughter only lives a short distance away, she needs help from friends to drive her to visit her. Friends also pick up groceries for her and even pay for them because of her financial situation.
- In addition to being confined to her home in cold weather, she can't go out when there is smoke in the air from burning wood or at times of the year when pollen is prevalent. Moreover, she now does not go out alone, as she had a recent black-out and needs someone with her to help out if this happens again.
- When she was younger, she had to be taken to the emergency room many times for allergy/asthma attacks. She has not had to go to the ER in the past several years.
- She sleeps 10 to 15 hours every night. In addition, if she does any housework like changing her bed she will have to take a nap of a couple of hours. Friends will often come and do housework for her. The exertion of going up the stairs or carrying groceries into the house affects her breathing to the point where she will also need a nap during and after such activities.

The panel finds the appellant's testimony at the hearing is in support of information that was before the ministry on reconsideration. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

At the hearing, the ministry relied on its position at reconsideration.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA.

Specifically the Ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions she requires help to perform those activities.

The Ministry did determine that she met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

2 (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.

The following section of the EAPWDR applies to this appeal:

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.

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.

Severity of impairment

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment," as set out in section A, Diagnoses, of the PR. This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." The cause is usually set out as a disease, condition, syndrome or even by a symptom (e.g. pain). A severe impairment requires the identified cause to have a severe impact. The assessment of severity is therefore based on the impact on daily functioning, in such areas as functional skill limitations, cognitive and emotional deficits and impacts, restrictions on the ability to manage DLA and assistance required.

Physical impairment

In the reconsideration decision, the ministry reviewed the contents of SR2 and the other information provided at reconsideration, noting that no additional information was submitted by the GP or the appellant's previous physician(s) and stated that the reconsideration decision was based on the information in the original PWD application. The ministry referred to the PR and the functional skills reported (can walk 4 blocks unaided etc.) The ministry also noted that in the AR the GP reports that the appellant requires periodic assistance with walking outdoors due to her allergies and the remainder of her mobility and physical abilities are considered independent. Also noted was the GP's comment that the appellant lives an isolated life due to her severe problems with smells, odours, etc. which causes her asthma and allergies to flare up. The ministry concludes that based on the information provided by the GP there is not enough evidence to establish a severe physical impairment.

The position of the appellant is that her asthma and allergies have been diagnosed as being severe. She is unable to go outside alone; her ability to go anywhere is restricted by environmental conditions, including cold weather, and her negative reaction to such conditions. Her asthma and allergies produce breathing problems which require her to sleep up to 15 hours per night and to have a nap after any exertion. Because of her medical conditions, she has had to give up her daughter to foster care for both her and her daughter's safety. This information establishes that she suffers from a severe physical impairment.

The panel notes that the determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the appellant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner identify the impairment and confirm that impairment will continue for at least two years. In the present appeal, the physical impairments identified by the GP that will continue for at least two years are severe asthma (exertional, environmental and allergic) and severe allergies. The panel notes that, while asthma and allergies have been diagnosed as severe, to establish a severe impairment requires evidence that the impacts on daily functioning are severe.

While the testimony of the appellant both at the hearing and in the SRs, together with the letters of support from her friends, points to a high degree of physical impairment, the panel finds many gaps in the information provided by her GP to substantiate a severe physical impairment. For example:

- The GP reports that the appellant requires periodic assistance from another person for walking out doors. The appellant states that she needs company when going outside because of fear of blackouts. The GP does not explain why she needs company, nor does he confirm a tendency towards blackouts.
- The GP reports that the appellant is very cautious and has to avoid smells and smoke. The appellant states that she cannot go outside when the temperature is less than 3°, when there is smoke from burning wood or when pollen is prevalent. The GP does not confirm the need to avoid cold weather. Moreover there is no information given, even a "guesstimate," as to how many days per week/month/year such conditions might be expected to prevail.
- The appellant states that because of her conditions she sleeps up to 15 hours per day and has to take a nap after any exertion. While it would be unreasonable to expect this to be confirmed by a third-party observer, it would be reasonable to expect that the GP confirm that the requirement for such sleep is consistent with the nature and degree of her medical conditions.

The panel acknowledges that the appellant giving up her daughter to foster care may be an indicator of the degree of the appellant's physical impairment. However, this in itself cannot be considered to be determinative of a severe physical impairment. Without further medical information, such as that outlined above, that would substantiate severe impacts of the appellant's medical conditions on her daily functioning, the panel finds that the ministry reasonably determined that a severe physical impairment had not been established.

Mental impairment

In the reconsideration decision, the ministry noted that in the PR the GP identifies significant deficits in cognitive and emotional function in the area of emotional disturbance. The ministry also noted that in the AR the GP indicates a moderate impact on the appellant's emotion, attention/concentration, executive, memory, motivation and motor activity and no impact to the remainder of her cognitive and emotional functioning. It is the ministry's opinion that impacts described by the GP are more in keeping with a moderate degree of impairment. Therefore, based on the information provided by the GP, the ministry concluded that there is not enough evidence to establish a severe mental impairment.

The position of the appellant is that she has been diagnosed with depression and anxiety, for which her GP has recently upped the dosage of her anti-depressant medication. The connection between chronic conditions such as asthma and depression and anxiety is well documented. The evidence supports a finding of a severe mental impairment.

The panel notes that there is little substantive evidence regarding the appellant's mental impairment. In identifying emotional disturbance as the one significant deficit with cognitive and emotional function, the GP comments: "Hard to be positive all the time. Severely depressed due to medical conditions." In making his assessments on the 6 areas of impact on daily cognitive and emotional functioning, the GP comments: "Impact on functioning is all due to asthma and bronchospasm, and can't think straight, gets fatigued and then has to rest and sleep." No restrictions are reported requiring support/supervision for social functioning, with good functioning reported with both

immediate and extended social networks. Without any difficulties reported for social functioning, and in the absence of any further information on how, how often and under what circumstances the reported moderate impacts manifest in daily functioning, the panel finds that the ministry reasonably determined that a severe mental impairment had not been established.

Whether DLA are significantly restricted

The ministry in the reconsideration decision noted that the appellant requires periodic assistance with basic housekeeping, going to/from stores and carrying purchases home. However the GP has not provided any information on how often or the duration she requires assistance in these areas. The ministry notes that, unfortunately, the GP indicates that the majority of the appellant's DLA are independent and there is no indication that she takes significantly longer to perform them. In addition the GP indicates that she is independent in all aspects of social functioning and is good with her immediate and extended social networks. Therefore the position of the ministry is that it does not have enough evidence from the GP to establish that the appellant's impairments significantly restrict her ability to manage her DLA, either continuously or periodically for extended periods.

The position of the appellant is that the evidence clearly shows that she is restricted in her mobility outside the home due to her asthma and allergies. In addition her GP has reported that she needs periodic assistance for housework, and for shopping in terms of going to/from stores and carrying purchases home. There is sufficient evidence to establish that this criterion has been met.

As noted above under severity of physical impairment, the panel considers the evidence with respect to the appellant's ability to perform the DLA "move about indoors and outdoors" to be incomplete. The GP has not confirmed why the appellant needs company when she goes outdoors and no information is provided as to how often the adverse environmental conditions, which cause her asthma and allergies to flare-up, prevail. In terms of basic housework and shopping, while the GP has indicated that periodic assistance is required, no narrative is provided that gives a picture of how and how often these activities are significantly restricted. Without this information, and as those DLA applicable to a person with a mental impairment with respect to social functioning are not assessed as having any difficulties, the panel finds that the ministry reasonably determined that this criterion had not been met.

Whether help is required to perform DLA

The position of the ministry 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. No assistive devices are required.

The appellant's position is that she requires the significant assistance of another person to perform DLA, particularly for shopping, driving to see her daughter and basic housework.

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.