

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 03 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

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 evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 28 August 2012. The Application contained:
 - The appellant's Self Report (SR1)
 - A Physician Report (PR1) dated 28 August 2012 completed by the appellant's general practitioner (GP) who has known the appellant for 2 years and seen her 2-10 times in the past 12 months.
 - An Assessor Report (AR1) dated 28 August 2012 completed by the same GP.
2. The appellant's Request for Reconsideration, dated 19 November 2012, including a note giving her reasons for the request (SR2) and revised versions of the PR (PR2) and AR (AR2) dated 19 November 2012 with pages marked that they contain new information.

The panel will summarize the evidence relating to the appellant's impairments as it relates to the PWD criteria at issue. The evidence from the original PR and AR will be presented first, followed by any changes reported in the revised versions.

In PR1, the GP diagnoses the appellant as hearing impaired, and having depressive mood and hip pain. In the Request for Reconsideration, the appellant states that her doctor has also diagnosed chronic venous insufficiency in her left leg. In PR2, the GP uses "depression" instead of "depressive mood"

Physical impairment

- In SR1, the appellant writes that when she was younger she was hit by a car while riding her bike. Since then she has chronic back pain, making walking difficult.
- In PR1, under health history/severity, the GP reports that when walking the appellant experiences pain in both hips and has to stop frequently due to her elevated BMI. The GP reports that the appellant's height and weight are relevant: 5'1" and 300 pounds.
- The GP states that being hearing impaired, it is difficult for the appellant to communicate with other people. In PR2 the GP adds that the appellant states she had a head injury as a child. She has used a hearing aid since age 10.
- Functional skills: appellant is able to walk 1 to 2 blocks unaided, climb 2 to 5 steps, lift 5 to 15 pounds and can remain seated 2 to 3 hours. Difficulties with communication due to being hearing impaired are noted; she uses a hearing aid.
- In PR2, ability to walk unaided revised to less than 1 block.
- In AR1, for communications: speaking, reading and writing are rated as good; hearing is poor -- even when using the hearing aid questions have to be repeated several times.
- Mobility and physical ability: the appellant is assessed as independent for all listed activities, but taking significantly longer than typical for walking indoors, walking outdoors, climbing stairs and carrying and holding, with the GP noting that she does not need assistance doing

these activities but needs more time to do it due to elevated BMI and hip pain.

- In AR2, the GP assesses the appellant independent with respect to walking indoors and standing and requiring periodic assistance from another person for walking outdoors, climbing stairs, lifting and carrying and holding, with the GP noting that the father helps the appellant and she uses a cane.

Mental Impairment

- In SR1, the appellant writes that she suffers from anxiety attacks. When shopping she has to shop as quickly as possible; she doesn't like being out around town or in settings where there are too many people; she spends most of her time at home.
- In PR1, under health history/severity, the GP states the appellant has had a depressive mood since her mom moved away. Due to this she takes longer than usual to complete assignments and tasks. She is studying English and math and computing. Her depression causes her to overeat, increasing her body weight, which in turn is directly related to musculoskeletal pain. The GP states that the appellant was abused as a child and has difficulty dealing with that.
- In PR2, the GP adds that the appellant has had depressive mood for 20 years. She was sexually assaulted when she was age 4. She tried to commit suicide when she was 16. She suffers from anxiety and panic attacks.
- Cognitive and emotional function: The GP reports significant deficits in three areas: emotional disturbance, motivation and attention or sustained concentration. The GP comments that the appellant gets depressive feeling which causes loss of motivation and concentration.
- In AR1, 2 of the cognitive and emotional deficits -- emotion and attention/concentration -- are assessed as having a moderate impact on daily functioning. Her executive abilities are also assessed as having a moderate impact. No major impacts are reported. A minimal impact is assessed for memory and motivation. No narrative or comments are provided.

Ability to perform DLA

- In AR1, the GP reports the following assessments (the GP's comments in parenthesis):
 - Personal care: independent in the majority of sub-activities except taking significantly longer than typical for transfers in/out of bed and on/off of chair (hip and knee pain).
 - Basic housekeeping: taking significantly longer than typical for laundry and basic housekeeping (hip pain)
 - Shopping: independent for making appropriate choices and paying for purchases; taking significantly longer than typical for going to and from stores, reading prices and labels, and carrying purchases home.
 - Meals, pay rent and bills, medications and transportation: independent in all aspects.
 - General comment: due to depression patient gained weight, morbid obesity causes patient to have difficulty with mobility.
- Social functioning: independent in all listed areas. Marginal social functioning reported with both immediate and extended social networks.
- In PR2, the GP completes the section regarding DLA. The GP reports that with the exception of management of medications the appellant is actively restricted in all listed DLA including social functioning. (Appellant takes longer than usual to perform DLA. Father is helping with housework. Depressed mood and anxiety causes difficulty to interact with others. Father/aunt assist appellant with meals/housework/shopping.)

- In AR2, the GP reports the following revised assessments:
 - Personal care: periodic assistance required for dressing, grooming, bathing, toileting and transfers on/off of chair; independent for feeding self, regulate diet.
 - Basic housekeeping periodic assistance required for laundry and basic housekeeping.
 - Shopping periodic assistance required for all aspects.
 - Meals: periodic assistance required for food preparation and cooking; independent for meal planning and safe storage of food.
 - Pay rent and bills and medications: independent for all aspects.
 - Transportation: periodic assistance required for all aspects.
- Social functioning: independent in all listed areas except for dealing with unexpected demands, where periodic assistance is required (anxiety, depression)
- General comment: the appellant suffers from anxiety and depression; combined with poor hearing she does not communicate well. Poor mobility due to obesity.

Help required/provided :

- In AR1, help provided by family is reported. The appellant uses a hearing aid.
- In AR2, the GP notes that the appellant's father and aunt assist the appellant with DLA. The use of a cane is also reported.

The panel notes that the GP has not provided any explanation for the differences in the assessments described in the two PR/AR sets.

In her Notice of Appeal dated 17 December 2012, the appellant gives as reasons for appeal:

"Because I am totally unable to shop, do housework or prepare any but the most simple of meals as I must remain seated with legs elevated."

After reconsideration but before the hearing, the appellant submitted a note dated 21 December 2012 stating that she suffers from chronic venous insufficiency and attached a number of images for reference.

At the hearing, The ministry stood by its position at reconsideration.

The ministry did not object to the admissibility of the new information provided by the appellant in her Notice of Appeal and the images contained in her submission of 21 December 2012. The panel finds this information is in support of the information and records that were before the ministry at the time of reconsideration. The information is further to her statement in SR2 that her doctor has diagnosed her with chronic venous insufficiency. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act. The panel is however not in a position to take this evidence into account as no interpretation of the images is provided and the chronic venous insufficiency diagnosis has not been confirmed by a medical practitioner. (See Part F below.)

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). In the present appeal, the cause is a set of health issues diagnosed by the GP: depressive mood (depression), hearing impairment and hip 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 impacts, restrictions on the ability to manage DLA and assistance required.

Mental impairment

In the reconsideration decision, the ministry notes that the GP in both PR1 and PR2 indicates that the appellant has significant deficits in her cognitive and emotional functioning in the areas of emotional disturbance, motivation and attention. The GP reports that the appellant gets depressive feelings, which cause loss of motivation and concentration. As the assessor, the GP indicates in both applications that the appellant's impairments have moderate, minimal or no impact on her cognitive and emotional functioning, the ministry concludes that, based on the information provided by the GP, there is not enough information to establish a severe mental impairment.

The position of the appellant is that her depression has a major impact on her life. Her depression causes her to overeat which in turn causes an increase in body weight, which is directly related to her musculoskeletal pain. With a history of childhood sexual assault and a suicide attempt in her teens, she has suffered this depressive mood for 20 years, complicated by anxiety and panic attacks. All this is evidence of a severe mental impairment.

The panel has reviewed the evidence regarding the appellant's mental impairment as set out in both sets of the PR and AR. As noted above, what is important in the determination of severity of impairment is the impact that the appellant's depression has on daily functioning. The panel notes that while the GP has reported significant deficits in cognitive and emotional functioning in the areas of emotional disturbance, motivation and attention/concentration, the GP does not report that these deficits have any major impact on cognitive and emotional functioning, indicating instead moderate impacts in three areas, with no narrative provided to substantiate these assessments. In terms of social functioning, the GP reports the appellant independent of the need for support/supervision in all areas, except in AR2, where support/supervision is indicated for being able to deal appropriately with unexpected demands. In light of the lack of information regarding the impact of the appellant's depression on her daily functioning, the panel finds that the ministry reasonably determined that a severe mental impairment had not been established.

*Physical impairment**A) Hearing impairment*

The panel notes that the ministry did not make a separate determination on the severity of the appellant's hearing impairment as a physical impairment. The GP has diagnosed the appellant with hearing impairment, though no information is provided as to whether this affects both ears, or one ear only, though PR2 indicates the hearing aid is for the right ear. She has used a hearing aid since age 10. The only information provided by the GP on the impact of the appellant's hearing impairment on daily functioning is his comment that the appellant's hearing is poor -- even when using the hearing aid questions have to be repeated several times. In the absence of any further information on the degree of the appellant's hearing impairment and the impact on daily functioning, the panel finds that the ministry was reasonable in determining that the hearing impairment was not a separate severe physical impairment.

B) Hip pain

The position of the ministry is that while acknowledging that the appellant's hip pain impacts her ability to walk, the GP has not described why she could walk 1 to 2 blocks unaided in August (PR1) but in November she can walk less than one block (PR2). The ministry further notes that she could independently manage all of her mobility and physical functions in August but in November she requires periodic assistance, help from her father and the use of a cane. The GP has not explained what changed in her conditions from August to November 2012. Therefore based on the information provided by the GP, the ministry found that there is not enough evidence to establish a severe physical impairment.

The position of the appellant is that her hip pain and her recently diagnosed chronic venous insufficiency together severely limit her mobility. She needs a cane and the help of her father for many activities requiring physical effort and even so it takes her longer than typical to do anything. All this points to 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 are the hearing impairment (discussed above) and hip pain. The diagnosis of chronic venous insufficiency referred to by the appellant in her SR2 and her submission and alluded to in her Notice of Appeal have not been confirmed by her medical practitioner; therefore the panel cannot consider this diagnosis in relation to the PWD criteria at issue in this appeal.

The panel notes the evidence presented in PR1 and AR1: the appellant can walk unaided 1 to 2 blocks without any assistance, albeit slowly; that she needs no assistance for mobility and physical activity but she needs more time to do them; she is able to perform most of her DLA independently, with the note that some (transfers in/out of bed, on/off chair, basic housekeeping and aspects of shopping) take significantly longer than typical due to hip pain. Based on these assessments, the panel would find it difficult to conclude that the appellant had a severe physical impairment.

However, the evidence presented in PR2 and AR2 presents a picture of a more serious impairment. The GP reports that the appellant can walk unaided less than one block and then only with the use of a cane. For many of her DLA, periodic help from her father is required. The panel finds that it is reasonable for the ministry to expect that, given the changed assessments 3 months apart, the GP would provide the rationale or explanation for the differences between the two sets of documents. Without such information, the panel finds that for the hip pain the ministry reasonably determined that a severe physical impairment had not been established.

As no evidence had been presented or argument made that the combination of the hearing impairment and hip pain compounded the impacts of the two impairments on the appellant's daily functioning, the panel finds that the ministry reasonably determined that for the totality of the two impairments a severe physical impairment had not been established.

Whether DLA are significantly restricted

The position of the ministry, after reviewing the two sets of PR and AR, is that while the appellant's impairments impact her ability to manage her daily living activities, the evidence provided by the GP does not indicate that her impairment directly and significantly restricts DLA either continuously or periodically for extended periods.

The position of the appellant is that the evidence from the GP, particularly in PR2 and AR2, clearly show that her ability to perform DLA are significantly restricted, with those DLA requiring physical effort (personal care, basic housekeeping, shopping, meals and transportation) requiring periodic assistance from another person, particularly her father and her aunt. There is sufficient evidence to demonstrate that this criterion has been met.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, not established in this appeal, and be in the opinion of a prescribed professional. As with the severity of impairment criteria discussed above, it is reasonable that the ministry would expect that the opinion of a prescribed professional be substantiated by information that would satisfy the ministry that the direct and significant restrictions in the ability to perform DLA, either continuously or periodically for an extended period, are validated. No such detail is provided in the present appeal. With respect to DLA requiring physical effort, in AR1, the GP assessed the appellant as taking significantly longer than typical for transfers in/out of bed, on/off chair, basic housekeeping and aspects of shopping; however, how much longer is not explained or described. In AR2, the GP assessed the appellant requiring the periodic assistance of another person for most aspects of personal care, basic housekeeping, shopping, meals and transportation, but no explanation is provided as to what kind of help is entailed, or for how long, how often or under what circumstances.

With respect to the DLA relating to a person with a mental impairment, the DLA under EAPWDR section 2(1)(b) must also be considered: (i) make decisions about personal activities, care or finances; and (ii) relate to, communicate or interact with others effectively. With regard to (i), the GP indicates in AR2 that the appellant requires periodic support/supervision regarding dealing with unexpected demands. Respecting (ii), the panel notes that there is no evidence, apart from some difficulties in communicating related to hearing impairment, that the appellant is significantly restricted in this regard. The panel finds that as a severe mental impairment has not been established, and

absent any further information as to restrictions in social functioning, the panel finds it difficult to conclude that these two DLA were significantly restricted.

Based on the foregoing, and without the information to substantiate the tick marks in the documentation, or explain the significant discrepancy between AR1 and AR2 regarding DLA, the panel finds that the ministry reasonably determined that the information provided did not establish that this criterion had been met.

Whether help to perform DLA is required

In the reconsideration decision, the ministry noted that the appellant requires the use of a hearing aid. The position of the ministry is that, as it had been established that DLA are not significantly restricted, it can be determined that significant help is not required from other persons. The appellant does not require the services of an assistance animal.

The position of the appellant is that she needs significant help to perform DLA: the hearing aid, the use of a cane and the need for significant help from other persons all result from the significant restrictions in her ability to perform DLA as reported in the documentation.

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.