

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated November 13, 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 August 30, 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 8 months, both dated August 30, 2012;
- 2) Request for Reconsideration- Reasons dated November 1, 2012.

Diagnoses

The appellant has been diagnosed by her general practitioner with chronic back pain, with a date of onset of 2012. The appellant also reports having a stress ulcer and asthma though neither condition is confirmed by a medical practitioner.

Physical Impairment

- In the physician report, the general practitioner indicated that the appellant has significant pain to her back all the time which interferes with her ability to complete activities of daily living ("ADL's") despite conservative treatment and medication.
- Functional skills reported in the physician report indicated that the appellant can walk 1 to 2 blocks unaided, she can climb 2 to 5 steps unaided and can lift 5 to 15 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 (3 times longer) with all tasks of mobility, including walking indoors and outdoors, climbing stairs, and standing, and requires continuous assistance from another person with lifting and carrying and holding.
- In her Request for Reconsideration, the appellant stated that she injured her back at work a few times and her family doctor had a CT scan done, among other tests, and determined that she has detached discs in her back and is unfit for work. The appellant stated that she is also on medication for a stress ulcer and for asthma.

Mental Impairment

- The general practitioner has not diagnosed a mental disorder and reported that the appellant has no significant deficits with cognitive and emotional function.
- The general practitioner also indicated that the assessment of social functioning, for an applicant with an identified mental impairment, is not applicable.
- In her Request for Reconsideration, the appellant stated that she is suffering from stress.

DLA

- In the assessor report, the general practitioner reported that a majority of the listed tasks of the DLA personal care take significantly longer than typical for the appellant (3 times longer) and that she also uses an assistive device with transfers in/out of bed and on/off a chair. The physician explained with respect to an assistive device "...table, couch and uses something to hold on." The appellant is independent with grooming and feeding herself and regulating her diet.
- The appellant also takes significantly longer than typical with 1 out of 5 tasks of shopping (going to and from stores) and with 2 out of 3 tasks of managing transportation (getting in and out of a vehicle and

using public transit).

- The appellant requires continuous assistance from another person with the DLA of basic housekeeping with the comment that she "needs help lifting" and with the shopping task of carrying purchases home since she needs help with carrying.
- All listed tasks for the DLA of managing meals, paying rent and bills, and managing medications are performed dependently with no noted restrictions.
- In her Request for Reconsideration, the appellant stated that she is not fit for work.

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, other than the explanation provided for performing transfers in/out of bed and on/off chair.
- The help required for DLA is reported to be provided by the appellant's family and friends.

In her Notice of Appeal, the appellant provided the following written evidence:

- She stated that she has severe back pain daily because of discs detached from her spine and she takes 8 pills (pain killers) so she can function with daily duties. Her family doctor says she is unfit for work because of these medications and her pain.
- The appellant stated that it is hard for her to clean her home or to bathe because of the bending and reaching. She gets dizzy, light-headed, tired and sore each day.
- She also has an ulcer from stress for which she takes medications.
- The appellant stated that she gets help daily from friends and family. She does not drive so her way around is walking which she cannot do for very long without being in pain.

With the approval of the parties, the hearing proceeded on the basis of the written materials, in accordance with Section 22(3)(b) of the Employment and Assistance Act. The appellant did not provide any further submissions. 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 chronic back pain, together with her stress ulcer, and asthma.

The ministry's position is that although the appellant stated that she suffers from a stress ulcer and asthma, there is no diagnosis provided from a medical practitioner and these conditions were not noted by the physician in the PWD application. The ministry argues 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, to lift 5 to 15 lbs. and to sit for less than an hour. The general practitioner indicated that the appellant requires continuous assistance from another person with lifting and carrying and holding and the ministry argues this assistance would be for weights in excess of 5 to 15 lbs. Although the appellant has some functional skills limitations, the ministry argues that they are more in keeping with a moderate degree of 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 chronic back pain with a date of onset of 2012 and confirmed that this condition is likely to continue for 2 years as required by Section 2(2)(a) of the EAPWDA. The appellant stated that she suffers as well from a stress ulcer and asthma, for which she takes medications; however neither the diagnoses nor duration of these conditions has been confirmed by a medical practitioner. Accordingly, the panel will consider the reasonableness of the ministry's decision respecting severity of physical impairment based on the evidence respecting the appellant's chronic back pain.

Although the physician reported that it takes the appellant 3 times longer to complete tasks of mobility because of ongoing back pain, the appellant is nevertheless able to walk 1 to 2 blocks unaided and to climb 2 to 5 steps unaided, performing these tasks without the use of an assistive device or the assistance of another person. The appellant stated that she does not drive so she gets around by walking, which she cannot do for very long without being in pain. The appellant requires continuous assistance from another person with lifting and carrying and holding and she is also assessed as being able to lift between 5 to 15 lbs. The panel finds that the ministry reasonably concluded that this assistance would be required for weights in excess of this range. The physician reported that the appellant has significant pain to her back all the time which interferes with her ability to complete ADL's despite conservative treatment and medication. The restrictions identified to DLA

relate primarily to walking and lifting and the panel finds that the ministry reasonably concluded that the appellant's functional skills limitations currently show 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 did not expressly advance an argument with respect to severe mental impairment, though she wrote that she suffers from stress.

The ministry's position is that a severe mental impairment has not been established. The ministry points out that there is no mental health diagnosis. The ministry argues that although the appellant stated in her Request for Reconsideration that she suffers from stress, there was no diagnosis provided from a medical practitioner and this condition was not noted by the appellant's family physician in the PWD application.

Panel Decision

The panel finds that there is no diagnosis of a mental disorder by a medical practitioner. The appellant stated that she suffers from stress for which she takes medications; however neither the diagnosis nor duration of this condition has been confirmed by a medical practitioner. Further, the general practitioner indicated that there are no significant deficits with cognitive and emotional functioning and that the sections of the assessor report relating to an applicant with an identified mental impairment, which detail impacts to cognitive/ emotional and social functioning, are not applicable to the appellant. 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 assistance from her friends and family in various areas of DLA, including cleaning her home.

The ministry's position is that the evidence of the prescribed professionals establishes that although some tasks of some DLA take longer to carry out, the majority of the appellant's DLA are still performed independently. The ministry points out that the appellant is able to lift weights up to 15 lbs. and that continuous assistance is required for lifting and carrying portions of aspects of DLA for weights greater than that amount.

The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant takes 3 times longer than typical walking indoors and outdoors and she can independently manage distances of 1 to 2 blocks. Tasks which involve walking take the appellant significantly longer, such as going to and from stores and using public transit, and the appellant stated that she, nevertheless, gets around by walking without an assistive device. The general practitioner also assessed the appellant as requiring continuous assistance with laundry and basic housekeeping as well as carrying purchases home, and the panel finds that this assistance would be required for loads in excess of her limit of 5 to 15 lbs. Some other aspects of the DLA personal care also take longer than typical, including dressing, bathing, toileting, and transfers. The appellant stated that it is hard for her to clean her home or to bathe because of the bending and reaching. Although the general practitioner identified the use of assistive devices ("uses something to hold on") for transfers in/out of bed and on/off chair, the panel finds that this does not fall within the definition of an assistive device set out in the legislation, namely "...a device designed to enable a person to perform a DLA that, because of a severe mental or physical impairment, the person is unable to perform." All listed tasks for the DLA of managing meals,

paying rent and bills, and managing medications are performed independently with no noted restrictions. 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.

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.