

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated February 20, 2013 which found that the appellant did not meet four 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; however, the ministry was not satisfied that the evidence establishes that:

- in the opinion of a medical practitioner, her impairment is likely to continue for at least two years;
- 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 January 17, 2013 and the physician report and assessor report both completed by a general practitioner who has treated the appellant for 7 months and dated January 11, 2013; and,
- 2) Request for Reconsideration- Reasons.

Diagnoses

The appellant has been diagnosed by her general practitioner with Hepatitis C (chronic), grade 2 stage.

Duration

- In the physician report, in response to the question whether the impairment is likely to continue for 2 years or more, the general practitioner indicated "no". In an addendum dated February 15, 2013, the general practitioner commented that the "...antiviral treatment to last 1 year total; there may be significant side effects that last further than 1 year."

Physical Impairment

- In the physician report under health history, the general practitioner indicated that the appellant is starting treatment with pegylated Interferon and Ribavirin, followed by Telaprevir for a total of 14 weeks of treatment. There are potential debilitating side effects of these medications including nausea, insomnia, fatigue, and flu-like symptoms. In a February 15, 2013 addendum, the general practitioner noted that the appellant started her antiviral treatment and is having significant side effects, that "...she is having daily episodes of nausea and vomiting and is suffering from severe fatigue."
- Functional skills reported in the physician report indicated that the appellant can walk 4 or more blocks unaided, she can climb 5 or more steps unaided, and she has no limitations with lifting or remaining seated. In an addendum of February 15, 2013, the general practitioner indicated that the appellant is limited to lifting 15 to 35 lbs.
- The physician reported that the appellant has been prescribed medications that interfere with her ability to perform her daily living activities (DLA), with a comment that "...pegylated Interferon, Ribavirin, Telaprevir all have potential side effects" and that "...they could last the duration of the treatment (14 weeks)." In an addendum, the general practitioner indicated that the Telaprevir part of the treatment will be extended for 1 year total.
- The general practitioner reported that the appellant does not require any aids for her impairment. In the assessor report, the physician commented that there is "...no use of assisted devices at present (prior to anti-viral treatment)." There is no addendum to the assistive devices section of the report.
- The appellant is assessed as independent with walking indoors and walking outdoors and with climbing stairs and standing. The appellant is also assessed as independent with lifting and with carrying and holding, with a comment added by the general practitioner that this is prior to the anti-viral treatment. There is no addendum to the mobility and physical ability section of the report.

Mental Impairment

- The general practitioner reported that the appellant has no difficulties with communication and, in the assessor report, that she has a good ability to communicate in all areas, with a comment added that this is prior to anti-viral treatment. There is no addendum to the ability to communicate section of the assessor report.
- In the physician report, the general practitioner indicated that there are no significant deficits in the appellant's cognitive and emotional functioning. Despite indicating that there are no significant deficits

with the appellant's cognitive and emotional function, the general practitioner checked two areas where deficits are evident, namely emotional disturbance and motivation. In a February 15, 2013 addendum, the general practitioner wrote that "...fatigue is severe causing low mood, insomnia, also exacerbating low mood. Motivation is low, not interesting (sic) in doing activities previously enjoyed. Having to have supports for child care."

- In the assessor report, the general practitioner indicated that the section which relates to an applicant with an identified mental impairment or brain injury is not applicable to the appellant, and the general practitioner wrote that there is "...no mental impairment/ brain injury." Despite initially indicating that this section is not applicable to the appellant, the general practitioner noted by way of addendum on February 15, 2013 that there are moderate impacts with cognitive and emotional functioning in the areas of motivation and motor activity and minimal impacts in bodily functions and consciousness. The general practitioner wrote that the appellant is experiencing significant side effects from the treatment, including insomnia, resulting in day time drowsiness. The chronic fatigue is limiting the amount of activities the appellant is able to perform in a 24-hour period and this has "...exacerbated anxiety and depression symptoms; she has little motivation to complete daily tasks, little interest in doing previously enjoyed activities."
- The general practitioner indicated that the appellant independently manages all 5 listed aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.

DLA

- In the assessor report, in response to the request to describe the mental or physical impairments that impact the appellant's ability to manage her DLA, the general practitioner wrote that "...at present there are none, but there is a very high likelihood [the appellant] will be experiencing significant side effects due to anti-viral treatment."
- The appellant is assessed as independent with walking indoors and walking outdoors.
- The general practitioner reported that all listed tasks of the DLA personal care are performed independently without any noted restriction.
- The appellant was originally assessed as independent with all tasks of basic housekeeping and shopping; however, this was changed by the general practitioner as at February 15, 2013 to requiring periodic assistance from another person with laundry and with basic housework and for going to and from stores and carrying purchases home. The general practitioner wrote "...since treatment is now experiencing significant fatigue and daily episodes of nausea and vomiting. This is limiting her ability to complete household chores and especially activities requiring her to leave the house."
- All listed tasks for the DLA meals, paying rent and bills, medications and transportation were originally reported as being managed independently with no noted restrictions, and this assessment was changed as at February 15, 2013 to requiring periodic assistance from another person with meal planning, food preparation, cooking and filling/refilling prescriptions. The general practitioner wrote that "...due to significant fatigue, having hard time leaving house as well as completing daily chores including food preparation."
- The physician assessed the appellant as being independent in all areas of social functioning.
- In her Request for Reconsideration, the appellant stated that she had to quit her job due to significant side effects and she has family and friends helping her as well as full-time day care for her child. She gets help with household chores and she struggles to be out of her home for more than 2 to 3 hours.

Need for Help

- The general practitioner reported that the appellant lives alone and does not use an assistive device.
- The general practitioner indicated in the original assessment that there is "...no assistance provided at present time", which has been changed as at February 15, 2013 to indicate that the help required for

DLA is provided by family and friends. The general practitioner wrote that the appellant is now requiring support from friends and family for child care, household chores and for emotional support.

In her Notice of Appeal, the appellant expressed her intention to dispute the reconsideration decision. The appellant stated that, regarding duration, the full treatment is 1 year long but is no guarantee for a cure. The appellant stated she qualified previously for disability on just a diagnosis of Hepatitis C. The appellant stated that she is unable to work, to eat, walk very far, care for her child full time, or do her own housework or grocery shopping. The appellant stated that she is aching, nauseas, feverish, fluish and weak to the point of not being able to function daily and she requires assistance daily. The appellant stated that she has a full-time day care subsidy. The appellant stated that she has no social life, she is at home all the time sick unless she is able to pick up or drop off her daughter.

Prior to the hearing, the appellant provided an undated letter from a registered nurse, who acted as the appellant's advocate, which included the following :

- The appellant has had severe Hepatitis C for many years and is presently on a very potent drug regime which will last for about one year.
- The appellant is unable to prepare her own meals, manage her own finances, shop for herself, or do housework. At times she requires assistance, because she is so weak, to get out of the bath or out of bed.
- The nurse has been assisting the appellant with her medication regime daily, with household chores and with cooking. She and other friends and family of the appellant have cared for the appellant's daughter. The appellant's social life is non-existent as she is so sick and she stays home all the time.
- The nurse indicated that the appellant spends most of her days, when the nurse is there, in bed or soaking in a bath because her body is in such pain and she takes Tylenol and Graval on a regular basis.
- The nurse wrote that the appellant depends on others to prepare her high fat prescribed diet because she is so weak, nauseated and in pain. The nurse buys her groceries once a week.
- The nurse wrote that the appellant's doctor has put her off work due to weakness and fatigue and the appellant has deteriorated significantly in every aspect through this whole ordeal and requires the assistance of many people.
- The nurse wrote that the appellant sleeps 10 to 12 hours a night and "...naps all day long from her bed to her chesterfield and is still tired."
- The appellant's doctor has also signed the letter on February 28, 2013 and noted that she agrees with the contents.

At the hearing, the appellant's advocate, a registered nurse, provided the following oral evidence:

- The advocate stated that the appellant has deteriorated since the doctor's assessment and she is more debilitated. She now has a full body rash which is not controlled by cortisone cream.
- The advocate stated that the appellant is weaker than ever from the treatment regime and others must care for her daughter and prepare the meals.
- The advocate stated that she visits the appellant two times a day, picks up the appellant's medications for her and buys her groceries once a week.
- The advocate stated that the appellant runs fevers now, has body aches and hot flashes and constantly has diarrhea so she needs to be near a washroom at all times.
- The advocate stated that the appellant sleeps 10 to 12 hours per night but with the napping during the day, it is more like 16 to 18 hours per day.
- The advocate stated that either she or the appellant's friend does the housework.
- The advocate stated that the appellant is also experiencing emotional issues and she is looking at getting counseling.

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

- The appellant stated that she also has leg cramps and has no energy. She spends the day moving from her bed to the couch to the bathroom.
- The appellant stated that she drives her daughter to day care and picks her up, and that is all she does.
- The appellant stated that the duration of her treatment is not just the 12 to 14 weeks but actually lasts 48 weeks and she gets an Interferon shot every week. The treatment is not a definite cure for her Hepatitis C.
- The appellant stated that with the development of her body rash, she has had to call the nurse in the middle of the night to help her apply cream.
- In response to a question, the appellant stated that the Telaprevir will be completed in 2 week's time, whereas the Interferon treatment will continue for one year, and that the general practitioner seems to have got the medications confused in her reports. The appellant clarified that her treatment is being managed by a specialist physician at the hospital and not by the general practitioner.

The ministry did not object to the admissibility of the letter from the registered nurse, but objected to the oral evidence of new symptoms experienced by the appellant, such as body aches and rash, as being information not available to the ministry at the time of reconsideration. The panel admitted the letter from the registered nurse as well as the advocate and appellant's oral evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail of the symptoms and impacts of the appellant's diagnosed condition and treatment and being 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 that, in the opinion of a medical practitioner, is likely to continue for at least 2 years, 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;

- (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.

Duration

The appellant's position is that the full treatment for Hepatitis C is 1 year long but this is no guarantee for a cure of the underlying condition.

The ministry's position is that the general practitioner indicated that the anti-viral treatment will last 1 year total although there may be significant side effects that last longer than 1 year, and this does not confirm that the appellant's impairment will continue for 2 or more years.

Panel Decision

The legislation requires that, in the opinion of a medical practitioner, the impairment is likely to continue for at least two years. In the physician report, in response to the question whether the impairment is likely to continue for 2 years or more, the general practitioner indicated "no". In an addendum dated February 15, 2013, the general practitioner commented that the "...antiviral treatment to last 1 year total; there may be significant side effects that last further than 1 year." While the general practitioner indicated that there "may" be significant side effects that last more than 1 year, the legislation requires the definitive opinion of the medical practitioner that the duration of the impairment will likely continue for at least 2 years. The appellant argued that the treatment does not guarantee a cure of her underlying condition, the Hepatitis C. In the physician report, 'impairment' is defined by the ministry as the "...loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration," and the panel finds that there is insufficient evidence from a medical practitioner to establish that the restrictions in the appellant's ability to function, caused either by Hepatitis C or the required treatment for this condition, will likely continue for 2 years or more. Therefore, the panel finds that the ministry reasonably determined that the medical practitioner does not confirm that the appellant's impairment will likely continue for 2 years or more.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of her severe fatigue, weakness, pain and nausea due to the treatment for Hepatitis C.

The ministry's position is that prior to the start of treatment, the appellant was independently able to do all aspects of mobility and physical abilities and no assistive devices are routinely used. The ministry points out that since the appellant started treatment with various medications she is having significant side effects with daily episodes of nausea and vomiting and suffering from severe fatigue. The ministry argues that while the initial information reports that the side effects could last for the duration of the treatment, or 14 weeks, the amendment reports that the Telaprevir part of the treatment will be extended for one year total. The ministry

points out that Telaprevir is a pharmaceutical drug for the treatment of Hepatitis C and the most common adverse effect is rash. The ministry argues that the appellant's functional skill limitations are not significantly restricted, even considering the amendment to her lifting limitations with the side effects of treatment, and they are more in keeping with a mild degree of 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 medical practitioner or prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of 7 months, has diagnosed the appellant with chronic Hepatitis C, grade 2 stage. The general practitioner indicated that since the appellant started treatment with various medications she has been experiencing the debilitating side effects, including nausea, insomnia, fatigue, and flu-like symptoms. While the general practitioner initially reported that the total duration of the treatment would be 14 weeks, in an addendum dated February 15, 2013 the general practitioner indicated that the Telaprevir part of the treatment will be extended for 1 year total and the ministry commented that the most common adverse effect of this pharmaceutical drug is rash. However, the appellant stated that the Telaprevir is a 14-week treatment which will be completed in 2 week's time, whereas the Interferon and Ribavirin treatment will continue for one year. While the general practitioner, who is not administering the treatment, may have confused the medications, the general practitioner reported that the anti-viral treatment will last 1 year total and that the appellant will likely suffer from side effects for the course of her treatment.

In the PWD application, the general practitioner assessed the appellant during her treatment as able to walk 4 or more blocks and to climb 5 or more steps unaided, to lift 15 to 35 lbs., with no limitation with remaining seated. In the assessor report, the general practitioner indicated that the appellant is independent with walking indoors and outdoors, with climbing stairs, lifting and carrying and holding. While the general practitioner commented that this was prior to the anti-viral treatment, there is no change to these assessments by way of addendum. The general practitioner reported that the appellant does not require any aids for her impairment and there is no addendum to the assistive devices section of the report. The nurse stated in her letter that the appellant's doctor has put her off work due to weakness and fatigue and the appellant has deteriorated significantly in every aspect through this whole ordeal, and the appellant's doctor has endorsed the contents of the nurse's letter. At the hearing, the nurse stated that the appellant runs fevers now, has body aches and a rash, hot flashes and diarrhea so she needs to be near a washroom at all times. The appellant sleeps 10 to 12 hours per night but with the napping during the day, it is more like 16 to 18 hours per day. The panel finds that the evidence demonstrates that there has been an increase in the side effects from the treatment and a deterioration in the appellant's condition; however, the general practitioner reported that the appellant's functional skills are not significantly restricted and she remains independent in all areas of mobility and physical ability and the appellant stated that one treatment medication (Telaprevir) will soon be discontinued. The panel finds that the ministry reasonably concluded that there is insufficient evidence to establish a severe physical impairment as required under Section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position is that a severe mental impairment is established by the general practitioner's assessment of deficits with cognitive and emotional function in the areas of emotional disturbance and motivation.

The ministry's position is that there is no mental health diagnosis and therefore no evidence of a severe mental impairment.

Panel Decision

The panel finds that that medical practitioner did not diagnose a mental disorder and although deficits are identified in the area of emotional disturbance and motivation, the general practitioner also indicated that these are not significant deficits and there is no mental impairment or brain injury. The impacts identified to daily cognitive and emotional functioning relate to chronic fatigue experienced as a side effect of the appellant's treatment. The general practitioner indicated that the appellant independently manages all 5 listed aspects of social functioning, and she has good functioning with both her immediate and extended social networks. In her letter, the nurse stated that the appellant's social life is non-existent since she stay home all the time, and this letter has been endorsed by the general practitioner. The panel finds that the ministry reasonably concluded that the impacts described to the appellant's social life are not supportive of a mental health condition, but rather a reaction to the treatment which will be completed after approximately one year. 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 and she requires the assistance of another person to perform many DLA.

The ministry's position is that the evidence of the prescribed professionals establishes that many activities are performed independently. While amendments made on February 15, 2013 demonstrate that need for periodic assistance with some aspects of basic housekeeping, shopping, meals, filling prescriptions and support with child care due to fatigue, nausea, and vomiting related to anti-viral treatment, many DLA including social functioning are still performed independently. The ministry argues that as many aspects of DLA are performed independently and the symptoms the appellant is currently experiencing are expected to subside at the end of the anti-viral treatment, the information from the prescribed professional does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant is able to walk 4 or more blocks unaided and that she is independent with walking indoors and outdoors with no assistive device required. In the assessor report, the general practitioner reported that all listed tasks of the DLA personal care are performed independently. In the nurse's letter, she indicated that at times the appellant is so weak she requires assistance to get out of the bath or out of bed, although there is no detail of the frequency this occurs. The general practitioner indicated in the assessor report that the appellant requires periodic assistance with basic housekeeping and, at the hearing, the nurse stated that currently either she or another friend of the appellant does the housework. The appellant requires periodic assistance with going to and from stores and carrying purchases home, and the nurse stated that she currently does the appellant's shopping once a week. The appellant requires periodic assistance with meal planning, food preparation and cooking and the nurse stated that the appellant currently depends on others to prepare her high fat prescribed diet because she is so weak, nauseated and in pain. The nurse also picks up the appellant's medications due to the fatigue and the appellant's difficulty leaving the house. All listed tasks for the DLA paying rent and bills and transportation are managed independently with no noted restrictions.

In the assessor report, in response to the request to describe the mental or physical impairments that impact the appellant's ability to manage her DLA, the general practitioner wrote that "...at present there are none, but there is a very high likelihood [the appellant] will be experiencing significant side effects due to anti-viral treatment." Given that the treatment that is causing the side effects has a defined end date and the noted restrictions to DLA are considered within the context of functional skills assessed at the higher end of the spectrum along with independent mobility and physical ability, the panel finds that the ministry reasonably

concluded that there is not enough evidence to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, as required by Section 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 from other persons, and no assistive devices are required.

Panel Decision

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 or the significant help or supervision of another person or the services of an assistance animal in order to perform a DLA.

The panel finds that the evidence of the prescribed professional establishes that the appellant lives alone and receives assistance for DLA from family and friends and does not require an assistive device. The panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires the significant help or supervision of another person with DLA, as defined by Section 2(3)(b) of the EAPWDA.

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.