

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of December 17, 2012, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant's 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; or that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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

With the consent of the parties this appeal was conducted in writing in accordance with s. 22(3)(b) of the *Employment and Assistance Act* (EAA).

The information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a physician's report (PR) and an assessor's report (AR), both completed and signed by the appellant's physician of 3 months on August 28, 2012 and September 12, 2012 respectively. The application also included the appellant's self-report dated September 12, 2012.
- The appellant's Request for Reconsideration, including the appellant's brief written submission to the ministry's reconsideration officer dated December 7, 2012.

Admissibility of New Information

Neither party submitted new information for purposes of this appeal.

Physical Impairment

- In the PR the appellant's physician diagnosed her with fibromyalgia, iron deficiency anemia, hearing loss complete in the left ear and 50% in the right, and "impingement shoulder". She described the fibromyalgia as being chronic and intermittently relapsing, causing intermittent pain during flares. He described the shoulder impingement as causing pain interfering with range of motion. The anemia results in fatigue.
- In terms of physical functional skills the physician indicated the appellant can walk unaided more than 4 blocks on a level surface, but she is limited to 3 blocks when having a flare. He noted she can climb more than 5 steps, lift 2 to 7 kg, and has no limitations with remaining seated.
- In the AR the physician noted the appellant walks independently indoors, but takes significantly longer than typical walking outdoors, climbing stairs, and standing. He also noted she needs continuous assistance with lifting/carrying/holding. He commented that these restrictions are severe and arise when the appellant is having a flare of fibromyalgia.
- In her self-report the appellant said that when her fibromyalgia flares she is consumed by disabling pain and suffers from chronic fatigue. The pain interferes with her sleep. Walking is slow and painful. She can't lift more than 5 kg and can't carry that amount of weight. Her hearing impairment affects her ability to communicate with others and causes her to avoid social contact.
- In her Request for Reconsideration the appellant wrote that she is crippled by muscle spasms more than 20 days out of any given month, and said that she is unable to work.

Mental Impairment

- In the PR the physician reported that the appellant's ability to communicate is made more difficult by her hearing impairment. He also noted the appellant has a significant deficit in cognitive and emotional function with respect to emotional disturbance (e.g. depression/anxiety).

- In the AR the physician reported the appellant's ability to communicate as being good in all respects except for poor hearing.
- In the AR the physician completed section B.4, which is to be completed for an applicant with an identified mental impairment or brain injury. He noted major impacts to 7 of 14 categories of cognitive and emotional functioning, a moderate impact to 1 category, and no impact to 6 categories.
- The physician also completed the Social Functioning portion of the AR, which also is intended to be completed for an applicant with an identified mental impairment, including brain injury. He reported the appellant as being fully independent in all aspects of social functioning, and described her as having "good functioning" in terms of both immediate and extended social networks. His written narrative indicated that the appellant's functioning in these areas had been previously disrupted in 2010 but she is "learning to cope."
- In her self-report the appellant wrote that she suffers from depression coupled with anxiety, that her ability to learn new things is gone, that she has short term memory loss, and that even tying her shoelaces is almost an insurmountable task. She described this condition as "brain fog".
- In her Request for Reconsideration the appellant wrote that the "brain fog" or confusion that comes with fibromyalgia makes the simplest tasks, such as balancing a cheque book, impossible.

Daily Living Activities (DLA)

- In the PR the physician reported that the appellant's impairments cause no direct restriction to the appellant's ability to perform any DLA except for *decision-making*, for which DLA he commented that she requires periodic or "occasional" assistance from her sister with executive functioning.
- In the AR the physician indicated that the appellant is independent with respect to all aspects of personal care, basic housekeeping, meal preparation, paying rent and bills, and use of transportation. He noted that she takes significantly longer than typical to perform these tasks.
- The physician reported the appellant as being independent in all aspects of shopping, but taking significantly longer than typical in all aspects except paying for purchases.
- With respect to managing medications, the physician noted that the appellant independently manages their safe handling and storage, but that she needs periodic assistance in the form of reminders from her sister with respect to filling prescriptions and taking medications.

Help

- With respect to assistance provided by other people, the evidence is that the appellant's sister gives her reminders with respect to her limitations and remembering medications.
- In the PR the physician noted the appellant requires assistive devices in the form of hearing aids. In the AR he noted she is not currently using them.
- There is no evidence with respect to the appellant requiring other assistive devices or an assistance animal.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

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.

EAPWDR section 2(1):

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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Severe Physical Impairment

The appellant's position, as set out in her Request for Reconsideration, is that the chronic pain and fatigue resulting from her fibromyalgia are debilitating and prevent her from working. She wrote that even simple tasks such as tying her shoes are almost insurmountable. The appellant also argued that her hearing impairment affects her ability to communicate, causing her to avoid social contact.

The ministry's position, as set out in its reconsideration decision, is that while it acknowledges that the appellant's impairments may impact her physical functioning, there is not enough evidence to establish a severe physical impairment.

Panel Decision:

The diagnosis of a medical condition is not itself determinative of a severe impairment. One person with, say, diabetes may be significantly restricted from being able to manage DLA independently, while another person with diabetes may be entirely unrestricted. Accordingly, to assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage her DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach well when it defines the word "impairment" in the PR form as being "*a 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.*" Of course, this definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

The legislation makes it clear that the determination of severity is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, the professional evidence has to be weighed and assessed like any other evidence.

The physician's assessment of the appellant's physical functional skills generally puts the appellant at the higher end of the spectrum, though her functionality diminishes when she is having a flare-up of fibromyalgia. The physician's evidence in the PR and the AR, when read together, indicates that the appellant's impairment does result in direct restrictions in her ability to perform DLA in that she takes longer than typical when she is experiencing a flare, yet she still manages virtually all DLA independently.

As discussed in more detail below, the medical conditions diagnosed and confirmed by a medical practitioner as being likely to continue for at least 2 years do not translate into significant impacts with her physical functional skills, or into significant restrictions in the appellant's ability to perform DLA independently. Accordingly, the panel finds that the ministry reasonably concluded that there is insufficient evidence to establish a severe physical impairment.

Severe Mental Impairment

The appellant did not expressly advance an argument with respect to severe mental impairment, but argued that the "brain fog" or confusion that she says comes with fibromyalgia makes simple tasks such as balancing her cheque book impossible. She also noted that she suffers from depression, anxiety, and short-term memory loss.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to establish a severe mental impairment.

Panel Decision:

The physician referred to emotional disturbance while assessing cognitive and emotional function, but he did not diagnose it as an "impairment" and did not confirm that it would likely continue for at least 2 years as required by EAPWDA s. 2(2). Despite not having diagnosed a mental impairment the

physician did identify emotional disturbance in both the PR and the AR. The degree of cognitive and emotional impacts identified in the AR is significantly greater than that in the PR, but the physician has provided no explanation for the difference. The panel places more weight on the evidence of the PR because the degree of impact noted by the physician there is more in keeping with the restrictions on DLA for the two prescribed DLA – *social functioning* and *decision-making* - that are expressly tied to mental impairment. The evidence in the PR and AR indicates that the appellant has good social functioning, that she manages her own finances, pays for her own purchases when shopping, and manages her own medications except for “occasional” reminders from her sister to take her medications or refill her prescriptions.

In her self-report and Request for Reconsideration the appellant links her depression and “brain fog” to flare-ups of her fibromyalgia. On balance, the evidence indicates that the appellant is likely experiencing situational depression caused by her fibromyalgia. There is no diagnosis of depression from a medical practitioner or confirmation from a medical practitioner that the depression is likely to last for 2 years or more, and no evidence that the appellant is undergoing any treatment regime for depression.

Accordingly, the panel finds that the ministry reasonably concluded that there is insufficient evidence to establish a severe mental impairment.

Restrictions to DLA

The appellant’s position is that she is directly and significantly restricted in her ability to manage her DLA either continuously or periodically for extended periods. She says that she is crippled for 20 days out of every month, and that even minor tasks are either impossible or almost insurmountable.

The ministry’s position, as expressed in its reconsideration decision, is that there is not enough evidence to establish that the appellant’s impairments significantly restrict her ability to manage her DLA either continuously or periodically for extended periods.

Panel Decision:

The legislation requires that a severe impairment directly and significantly restricts the appellant’s ability to perform DLA either continuously or periodically for extended periods. The term “directly” means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week.

When her fibromyalgia flares up the appellant’s functionality is negatively impacted, but the physician has given no indication of how often this happens or the duration of the flares. The appellant attempted to fill this information gap when she wrote in her Request for Reconsideration that she is “crippled” for more than 20 days out of the month. She has substantially linked the 20 days to her ability to work which is not a legislated criterion for assessing eligibility for PWD designation. The 20 days is also not reflective of the physician’s comments where he uses the terms “occasional” and “intermittent” to describe the frequency of restrictions on her ability to perform DLA.

Viewing the PR, the AR and the appellant's evidence together, the evidence indicates that the appellant has limitations in most DLA by taking longer than typical to perform them, and she is more limited during times of increased pain. However, other than the appellant's assertion that she is crippled for more than 20 days per month, the panel has been presented with no evidence to indicate how much longer than typical it takes for the appellant to perform DLA, whether there are times when the appellant cannot perform DLA, how frequently those occasions occur, or how long those periods are. Accordingly, the panel cannot conclude that the restrictions to the appellant's ability to perform DLA are significant, as required by s. 2 of the EAPWDA.

Considering the evidence as a whole, the panel finds that the ministry reasonably concluded that there is not enough evidence to establish that the appellant's impairments significantly restrict her ability to manage her DLA either continuously or periodically for extended periods.

Help with DLA

The appellant did not expressly advance an argument regarding the degree of help she requires for managing her DLA, but she argued that she receives help from her sister and the evidence indicates that her physician recommends that she use an assistive device – a hearing aid.

The ministry's position, as set out in its reconsideration decision, 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. The ministry also notes that the appellant does not currently use an assistive device.

Panel Decision:

Insufficient evidence has been provided to the panel to demonstrate that the appellant requires the "significant help or supervision of another person" to manage her DLA. She "occasionally" gets help from her sister in the form of reminders to take and acquire medications and for any lifting/carrying/holding over 2- 7 kg. Other than that, there is no evidence to indicate that the appellant receives or requires help from anyone to perform DLA. The physician has indicated that the appellant's hearing impairment restricts her ability to communicate, and has recommended that the appellant obtain an assistive device in the form of a hearing aid, but the evidence indicates that the appellant does not currently use a hearing aid yet still maintains good social functioning despite her assertion that the hearing impairment causes her to avoid social contact. There is no evidence that the appellant requires the services of an assistance animal.

Accordingly, 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 help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant is suffering from medical conditions that affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation is reasonably supported by the evidence and is a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.