

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of January 4, 2013, which found that the appellant did not meet two 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 has a severe mental impairment that is likely to continue for at least two years. However, the ministry was not satisfied that:

- 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

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) completed and signed by the appellant's physician on August 20, 2012, and an assessor's report (AR) completed and signed by a registered nurse (RN) on September 28, 2012. The application also included a self-report signed by the appellant on September 24, 2012.
- The appellant's Request for Reconsideration, inclusive of the appellant's written submission to the ministry's reconsideration officer, dated December 4, 2012.
- A PWD Application Workbook (the "PWD Workbook") completed by the appellant, describing her impairment and its impact on her ability to manage DLA.
- Documentation showing that the appellant is a recipient of a grant for disabled students.

Admissibility of New Information

For purposes of the appeal hearing the appellant's advocate prepared a written submission. The panel has accepted the written submission as argument. At the appeal hearing the appellant gave oral testimony which provided more detail with respect to the restrictions she faces and the help she receives in managing DLA. She also submitted two letters and a written decision from the Crime Victim Assistance Program of the Ministry of Justice, all dated January 2, 2013 pertaining to an award of 24 one hour counselling sessions granted to the appellant in respect of an assault she experienced on March 24, 2007 (collectively "the CVAP Documents"). The CVAP Documents provide confirmation of the ongoing effects of the appellant's severe mental impairment – anxiety disorder. The ministry did not object to admission of the new information. The panel has admitted the appellant's oral testimony and the CVAP Documents into evidence as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information.

DLA

- The appellant has been the physician's patient for 5 years, and he has seen her once in the past 12 months. He provided diagnoses of anxiety disorder and Hepatitis C.
- The physician noted that the appellant has no limitations with respect to physical functional skills or with communication. He reported that the appellant has significant deficits with 5 of 11 categories of cognitive and emotional function: executive (*planning, organizing*), memory (*ability to learn and recall information*), emotional disturbance (*depression, anxiety*), motivation, and attention/sustained concentration.
- The appellant's physician indicated in the PR that the appellant's impairment directly restricts 4 of the 10 prescribed DLA (*daily shopping, use of transportation, social functioning, and decision-making*), and noted that these restrictions are continuous.
- In narrative, the physician wrote that the degree of restriction is "moderate", and that the appellant's social isolation occurs "at times".

- The physician indicated that the appellant is unrestricted in the remaining 6 of 10 prescribed DLA (*personal self-care, meal preparation, management of medications, basic housework, mobility inside and outside the home, and management of finances.*)
- The physician commented that the appellant has difficulty holding down a permanent job, but that she is in training as a care aide. (As detailed below, the appellant subsequently pointed out that the physician was incorrect in characterizing her training in this way.)
- In the AR the RN reported that the appellant's ability to communicate is good in all respects except for writing, which is "poor" as she writes slowly due to wrist pain from tendonitis.
- With respect to cognitive and emotional functioning, the registered nurse reported the appellant as having major impacts in 8 out of 14 categories, moderate impacts in 2 categories, and minimal or no impact in 4 categories.
- In narrative the RN wrote that the appellant suffers post-traumatic stress due an abusive relationship, and has been clean and sober for four years after having been addicted to cocaine, heroin and sleeping pills. She also wrote that the appellant currently only sleeps 4 hours per night, even with the aid of sleeping pills.
- The RN described the appellant as living alone and as being independent in 1 of the 10 prescribed DLA (*managing medications.*)
- The RN reported that the appellant: requires continuous assistance with 4 of 10 aspects of personal self-care because of lack of motivation and constipation/diarrhea; requires continuous assistance with basic housekeeping because of arm pain and lack of motivation; takes significantly longer with aspects of shopping because of anxiety and a tendency toward impulse-buying; requires continuous assistance with meal preparation because of inability to organize; requires continuous help with paying rent and bills because she is unable to budget; requires continuous help with using public transportation because of anxiety; requires periodic or continuous assistance with 4 of 5 categories of social functioning, and functions marginally with respect to her immediate and extended social networks.
- At the appeal hearing the appellant testified that physically she can do most things, but that because of her anxiety disorder she has little or no motivation, isolates a lot, has a hard time concentrating, and has difficulty sleeping. She said that she had had only a couple of hours sleep the previous night because of anxiety about the appeal hearing.
- The appellant said that she has anxiety over riding on public transit, though she lives in a rural area and drives her own vehicle. She reported that when she goes shopping she gets panicky and has a hard time deciding what to buy at the right price and often buys on impulse. She described going shopping for dinner the previous week and then getting home without having bought items for dinner.
- The appellant is taking a certificate course in human services. After her expected graduation in June 2013 she is hoping to be able to counsel and support people who have addictions. Because of her anxiety disorder she has been given an extended period of time to complete the course, and accommodation with respect to writing exams. She is supported in her studies by seeing a tutor. She noted that the physician was wrong in writing that the appellant is training to be a care aide.
- The appellant stated that she is good at accessing resources and that "If I want something I know how to get it."
- The appellant said that her telephone bill is the only regular bill that she has to pay, and she pays it every "cheque" day. She has arranged to have her rent paid directly by the ministry, since otherwise she would have a tendency to spend the rent money on other things such as drugs or alcohol. She struggles every day to stay clean and sober.

- The appellant reported that she gave her physician the completed PWD Workbook and he said that he would interview her when he was completing the PR, but he completed the PR without interviewing her.
- In response to a question about how often the isolating behaviour occurs, the appellant said that she has meetings and classes during the week which she has to attend, so the isolating behaviour mostly occurs on weekends.

Help

- The physician noted in the PR that the appellant does not require any prostheses or aids for her impairment.
- In response to a question in the PR asking the physician to describe the type of assistance the appellant needs with DLA, the physician responded by writing "Financial."
- In the AR, the RN wrote that the appellant receives assistance from health authority professionals, friends, her church, Alcoholics Anonymous (AA), Narcotics Anonymous (NA), the police department with respect to the counselling application, and the Integrated Health Network.
- In response to a question asking her to describe the type of assistance she gets with personal self-care, the appellant said that she gets encouragement from friends and members of her church. When she attends classes a couple of days a week her dress is casual and she seldom has the motivation to do her hair or apply makeup. She has to be prompted by friends to dress up and apply makeup for important meetings or occasions.
- The appellant said that she attends a couple of AA or NA meetings a week but probably wouldn't attend if fellow members didn't call to prompt her to attend.
- In the AR the RN indicated that appellant uses no assistive devices and has no 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, 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.

Restrictions to DLA

The appellant argues, through her advocate, that together the physician and the RN describe significant restrictions to DLA. She argues that the ministry was wrong to give more weight to the physician's evidence since the physician has only seen the appellant once in the past year whereas the RN had met with the appellant twice to fill out the AR, and the ministry wrongly assumed that the assessor was a social worker rather than an experienced registered nurse. The appellant states that the PR and AR should be given equal weight. She also argues that since section 8 of the *Interpretation Act* requires that "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object", therefore the appellant's impairments should be interpreted in a large and liberal manner rather than in a restrictive manner.

The ministry acknowledges that it erred in concluding that the assessor was a social worker rather than a registered nurse, and that it relied on incorrect information from the physician with respect to the appellant training as a care aide. Otherwise the ministry relies on its reconsideration decision and points out that the physician had described the restrictions to the appellant's ability to perform DLA as being "moderate".

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 – it must be more than trifling and more than merely an inconvenience. 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. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably "satisfy" the ministry that they have been met.

In the PR the physician indicated that the appellant's impairments directly and continuously restrict her management of 4 of the 10 prescribed DLA (*daily shopping, use of transportation, social functioning and decision making*), though he described these restrictions as being "moderate". Despite having described the restrictions to social functioning as being continuous, he commented that social isolation occurs periodically "at times."

With respect to *daily shopping*, the RN noted the appellant is independent except that she takes significantly longer than typical due to anxiety and impulse buying. The appellant herself did not identify any restrictions to shopping in the PWD Workbook, though she did identify anxiety and impulse buying in her oral testimony.

With respect to *use of transportation*, the RN noted the appellant experiences fear in using public transportation. The appellant does, however, drive her own vehicle.

With respect to *social functioning*, the evidence indicates that the appellant is regularly getting out into the community to support meetings and school, and that she expects to be in a position to counsel and support others when she graduates from her certificate program in June. She tends to self-isolate on weekends, but the RN noted that the appellant is functioning, if marginally, in this area. The evidence indicates that the appellant has a supportive network of friends from her church. The RN and physician note that the appellant's ability to communicate is good, though the RN indicated that she tends to write slowly.

Regarding *decision making*, the appellant receives phone calls from fellow members encouraging her to attend AA and NA meetings, and she has arranged for the ministry to pay her rent directly. Otherwise, the evidence indicates that the appellant makes her own decisions about her personal activities, her care and her finances.

The physician indicated that the appellant has no direct restrictions with respect to the remaining 6 of 10 prescribed DLA (*personal self-care, meal preparation, management of medications, basic housework, mobility inside and outside the home, and management of finances.*) The RN confirmed that the appellant manages her own medications. However, the RN indicates that the appellant is restricted with the other DLA. With respect to *personal self-care*, the RN's evidence in the AR is that the appellant requires continuous assistance in 4 out of 8 aspects, but there is no indication of what type of assistance is required. On being asked to describe the assistance required the appellant responded that she receives encouraging phone calls from others. In the panel's view this does not indicate a significant restriction to the appellant's ability to manage this DLA.

With respect to *mobility inside and outside the home*, the RN noted that the appellant manages this DLA independently, while indicating that she takes significantly longer than typical with respect to lifting/carrying/holding due to pain in her left arm and shoulder. The panel notes that there is no diagnosis from a medical practitioner that arm and shoulder pain are impairments, or that they have a duration of 2 years or more.

With respect to the remaining 3 prescribed DLA – *meal preparation, basic housework, and management of finances* - while the evidence indicates that the appellant is not highly motivated to prepare meals or to do housework, she does live alone and there is no evidence that she gets any outside help to perform these DLA, or that they are either performed to an inappropriate standard or not done at all.

Based on the foregoing analysis, the panel concludes that the ministry was reasonable in finding that the appellant's impairment does not significantly restrict her ability to perform DLA, either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that as a result of her restrictions the appellant requires significant help for most DLA. She points out that even the physician indicated that the appellant is continuously restricted with respect to 4 DLA, and that the PR form defines the term "continuous assistance" as "refers to needing significant help most or all of the time for an activity."

The ministry's position 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.

Panel Decision

The evidence indicates that the appellant receives assistance from others in the form of encouragement to participate in some social functions and to perform aspects of some DLA. There is also evidence that she receives support from various social agencies, but there is no direct link between those social agencies and the appellant's performance of DLA. In the panel's view there is simply insufficient evidence to show that the appellant relies upon the legislatively required "significant help or supervision of another person" to perform her DLA. The appellant does not use assistive devices or an assistance animal.

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. She has demonstrated significant effort and determination toward overcoming these difficulties. 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.