

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry) reconsideration decision dated February 12, 2013 which found that the appellant did not meet two of the 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, that the appellant's impairment was likely to continue for at least two or more years, and that the appellant has a severe mental impairment. However, the ministry was not satisfied that:

- The appellant has a severe physical 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 as a result of her severe mental impairment; and 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, 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 consisted of:

- 1) The appellant's Request for Reconsideration dated February 27, 2013 (RFR)
- 2) Mental Health and Addictions Referral 2013
- 3) Letter from the Ministry to the appellant dated January 3, 2013 advising that her request for PWD designation was denied
- 4) PWD Designation Decision Summary dated January 3, 2013
- 5) A PWD application comprised of a Self-report (SR) signed by the appellant on November 1, 2012; a Physician Report (PR) dated October 29, 2012 completed by the appellant's general practitioner of 9 years; and an Assessor Report (AR) also dated November 1, 2012 and completed by the appellant's general practitioner. On the AR the general practitioner reports that she has seen the appellant two to ten times in the past year

In her Notice of Appeal the appellant states that she is unable to work because she is absent-minded and has extreme depression. She also notes that she has been taking anti-depressant medication for more than 10 years and her family physician has recently increased the dosage.

Admissibility of New Information

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. Although the appellant's testimony that she has fibromyalgia, osteoporosis and daily back pain were not in the general practitioner's evidence, the panel has admitted the oral testimony into evidence as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*, as the appellant had previously provided evidence of back pain because of a spinal problem.

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

Physical Impairment

In the SR, the appellant states that she has high blood pressure, high cholesterol, thyroid gland problems and back pain because of a spinal problem. She states that because of her problems she is unable to work. She also states that when she was married her husband was wealthy and she did not have to work so she does not have any work skills or work experience. She also states that she does not have enough English language knowledge.

In the PR, the general practitioner reports that the appellant has depression and that she does not have any physical problems. Functional skills reported in the PR indicate that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, is limited to lifting under 2 kg (5 lbs) and has no limitations with sitting.

In the AR, the general practitioner reports that the appellant's ability to communicate in all four listed areas of speaking, reading, writing and hearing is good. The general practitioner indicates that the appellant is independent with walking indoors and outdoors, climbing stairs and standing. With respect to lifting and carrying and holding, the general practitioner notes that the appellant is independent with those tasks provided items are less than 2 kgs.

At the hearing, the appellant stated that she has fibromyalgia, osteoporosis and daily back pain. She reports

that her back pain is getting worse, that she takes pain medications and muscle relaxants and that two to three times per week she does not come out of her house, just takes pills and sleeps. She states that she has difficulty walking and she has difficulty with her hands as they get very stiff from her osteoarthritis.

The ministry representative stated that the appellant's evidence regarding her physical impairment is not reflected by the PR, and that the reconsideration decision is based on the PWD application.

DLA

In the RFR the appellant states that she is so depressed she cannot concentrate and find a job. She states that she has had depression for more than ten years, takes medication for her depression and has psychological problems.

In the PR, the general practitioner notes that personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, management of finances and social functioning are not restricted. The general practitioner adds that the appellant's social functioning is limited, that she needs to have her own place to live and currently lives either with her children or friends.

In the AR, the general practitioner reports that the appellant is independent with the following tasks: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed), transfers (on/off of chair), laundry, basic housekeeping, going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling medications, taking medications as directed, safe handling and storage of medications, getting in and out of a vehicle, using public transit, using transit schedules and arranging transportation arrangements, interacting appropriately with other, and securing assistance from others. The general practitioner reports that the appellant requires continuous assistance with carrying purchases home.

With respect to her mental impairment, the general practitioner reports that the appellant requires periodic assistance with dealing appropriately with unexpected demands and continuous assistance with making appropriate social decisions, and developing and maintaining relationships. The general practitioner also notes that the appellant has marginal functioning in relationships with her immediate social network and extended social networks.

In the RFR, the appellant states that she is so depressed that she cannot concentrate in her life and has psychological problems.

At the hearing, the appellant stated that sometimes she is able to cook but sometimes she gets help from friends or friends bring over food for her. She forgets to eat because of her depression and concentration problems. The appellant stated that she is able to pay her rent and most of the time she is able to manage her bank account. She is able to shop and pick up her medications. She is able to vacuum although sometimes she will vacuum sitting down due to her back pain. She is able to clean her bathroom and she is able to manage all aspects of personal hygiene such as dressing, undressing, showering and washing her hair. The appellant stated that sometimes she has trouble washing dishes due to her osteoarthritis. She is able to walk to and from stores close to her and is able to use public transit when she wants to.

The appellant stated that her social functioning has decreased because her depression has increased. She stated that she used to volunteer at a seniors centre two to three times per week but now only volunteers once per week. The appellant stated that friends come to visit her once in a while but she does not go out with them. In particular, she does not go and eat at restaurants as the food bothers her stomach.

Need for Help

In the PR, the general practitioner reports that the appellant needs to have her own place.

In the AR, the general practitioner states that the only help the appellant needs is to have her own place and be able to support herself as she has no money and always depends on others. The general practitioner notes that the appellant has no financial support and has never worked in her life. The general practitioner notes that she receives assistance from friends but does not provide any indication of the amount of assistance. The general practitioner does not indicate that the appellant requires help through the use of assistive devices or an assistance animal.

In the RFR, the appellant states that she cannot concentrate because of her depression, cannot work.

At the hearing, the appellant stated that because of her depression she sometimes wishes she were dead and thinks about where she can go to die, or driving herself off the road. She also stated that she often has arguments in her head, with her ex-husband and has difficulty concentrating. On the AR, the appellant also added that if she goes out by herself, she forgets where she is and sometimes does not know how to get back home.

The appellant also stated that she used to have a gambling problem but had stopped for several years. However, due to her increased depression she had returned to gambling but on February 23, 2013 she signed a voluntary self-exclusion agreement. The appellant has also been referred to a community resource to assist her with depression and gambling, has attended for one appointment and is waiting for a call to determine if she can get any further assistance with her psychological problems.

PART F – Reasons for Panel Decision

The issue on the 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 impairment;
- that the appellant's DLA's 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, the appellant does not require the significant help or supervision of another person, 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.

Severe physical impairment:

The appellant states that she has ongoing back pain, fibromyalgia and osteoarthritis that is getting worse. She states that she has some difficulties with cooking and doing dishes and sometimes has to sit when she vacuums. In response to a question, the appellant stated that she does not know why her general practitioner indicated that she does not have any physical problems.

The ministry argues that the functional skills limitations described by the general practitioner do not establish that the appellant has a severe 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 prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with depression and reports that the appellant does not have any physical problems. Although the appellant and her general practitioner note that she is unable to work, the panel notes that employability is not a criterion for designation as PWD.

The panel notes that although the appellant's oral evidence is not consistent with the evidence provided by her general practitioner, the panel accepts the appellant's reports of her physical limitations with respect to cooking, dishes and vacuuming. However, the panel finds that the appellant's functional limitations are at most, in the moderate range, and do not establish that the appellant has a severe physical impairment.

Section 2(2)(a) of the EAPWDR requires that the minister be satisfied that the appellant has a severe impairment that in the opinion of the medical practitioner is likely to continue for at least two years and in this case the appellant's general practitioner has indicated that the appellant does not have any physical impairment. The general practitioner has not provided any information to support the appellant's evidence that she has fibromyalgia, osteoporosis or a spinal problem, that either of those conditions are severe, or that they are likely to continue for at least two years or more.

The panel concludes that the ministry reasonably determined that the appellant's level of physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe physical impairment under section 2(2) of the EAPWDA, was reasonable.

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 that she needs financial assistance to have her own home and help with cooking and reminding her to eat.

The ministry's position is that the evidence of the prescribed professional indicates that the appellant requires continuous assistance with carrying purchases home but is independent with most DLA and there is no information to indicate that the appellant takes significantly longer to perform her DLA. The ministry notes that while the prescribed professional reports that the appellant needs continuous assistance with making appropriate social decisions and to develop and maintain relationships and that she requires periodic assistance to deal appropriately with unexpected demands, there is no information provided on how often or the duration of assistance needed. The ministry also notes although the prescribed professional indicates that the appellant is functioning marginally with her immediate and extended social networks, the explanation provided only indicates that she needs her own place and to be able to support herself as she has no money and always depends on others. The ministry's position is that there is not enough evidence to establish that the appellant's impairments significantly restrict her ability to manage DLA's, 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 – 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, an 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 general practitioner initially indicated that the appellant's impairments directly restricted her ability to perform all DLA but subsequently changed the report to indicate that the appellant was not restricted except with respect to her social functioning. The general practitioner notes that the appellant has limited socializing. For additional comments regarding the degree of restriction, the general practitioner reports that the appellant does not have her own place to live and lives either with her sons, daughter or friends. The general practitioner further indicates that the appellant needs to have her own place and has never worked.

In the AR, the general practitioner reports that the appellant requires continuous assistance carrying purchases home, making appropriate social decisions, and developing and maintaining relationships, periodic assistance with dealing appropriately with unexpected demands, but is independent with all other listed tasks.

The majority of the listed tasks for DLA are managed independently, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed, and on/off chair), laundry, basic housekeeping, going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking medications as directed, safe handling and storage of medications, getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.

Although the general practitioner reports that the appellant is independent with cooking, the panel accepts the

appellant's evidence that she does requires some periodic assistance with cooking and encouragement to remember to eat. However, the panel finds that the information provided indicates that the appellant is independent with the majority of prescribed DLA and that the medical evidence provided is not sufficient to establish that there is a direct and significant restriction of the appellant's ability to perform DLA either continuously or periodically for extended periods. In addition, the panel notes that the legislation requires the opinion of a prescribed professional with respect to restrictions to the appellant's DLA and in this case, the general practitioner has not provided information to support the appellant's statement that she requires periodic assistance with cooking. As the required information from the prescribed professional has not been provided to support the appellant's statement regarding her restrictions with respect to her need for periodic assistance with cooking, the panel gives this evidence little weight.

Therefore, the panel finds that the ministry's decision that the noted restrictions in the appellant's ability to perform some aspects of some DLA did not constitute 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 criteria of section 2(2)(b)(i) of the EAPWDA, was reasonable.

Help with DLA

The appellant states that she needs some help with cooking and psychological support.

In the AR, the general practitioner reports that the only help the appellant needs is to have her own place and be able to support herself as she has no money and always depends on others.

The ministry's position is that as it has not been established that DLA's are significantly restricted, it cannot be determined that significant help is required from other persons, and no assistive devices are 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) of 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 a 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 which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence and a reasonable application of the applicable legislation in the circumstances of the appellant, and therefore confirms the decision.