

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of January 9, 2013, 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

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 general practitioner, and an assessor's report (AR) completed and signed by a social worker on August 10, 2012. The application also included a self-report signed by the appellant on August 10, 2012. There is some uncertainty with respect to the date the physician signed the PR – the physician wrote the date as a scrawl which the ministry interpreted as November 11, 2012 but which appears to the panel to be October, 2012. In the panel's view the discrepancy is immaterial.
- The appellant's Request for Reconsideration, inclusive of the appellant's written submission to the ministry's reconsideration officer, dated December 24, 2012.
- A letter from an oral and maxillofacial surgeon (the oral surgeon) dated October 7, 2010, reporting to the appellant's general practitioner on referral.

Admissibility of New Information

For purposes of the appeal hearing the appellant's advocate prepared a four page written submission. The panel has accepted the written submission as argument. During the appeal hearing the appellant and her witness provided oral testimony that included additional detail with respect to the appellant's diagnosed impairments, the impacts they have on her ability to perform DLA, and the assistance she requires. The ministry stated no position on admissibility of the new information. The panel has admitted this oral testimony 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.

Physical Impairment

- In the PR the appellant's physician of over 7 years diagnosed menopause, migraine, skin problems, B12 deficiency, and irritable bowel syndrome (IBS). In the health history portion of the PR form the physician wrote "these are normal findings, they are not stopping the patient to seek employment."
- In a medical report dated October 12, 2012, prepared by the appellant's physician for the ministry's employment contractor, the physician described menopause as the primary diagnosis and the IBS, migraine, B12 deficiency (and one other which was indecipherable – possibly tinnitus) as being secondary diagnoses.
- The physician indicated the appellant has no functional limitations to her ability to climb stairs or to walk on a flat surface. He indicated he did not know if the appellant was restricted in the amount she could lift or remain seated.
- The oral surgeon identified jaw joint dysfunction caused by malocclusion and a habit of tooth grinding both day and night. The appellant has arthritic changes to both sides of the jaw and experiences jaw pain. As part of his physical examination of the appellant the oral surgeon also identified other medical conditions - a rash (which he noted may be the subject of a "workup" for lupus or another autoimmune condition), periodontal disease, and allergies.

- The oral surgeon described the appellant as being thin and frail, and as looking older than her age.
- The oral surgeon concluded that the appellant did not have a surgical problem with her jaw, and recommended that her jaw conditions could be dealt with through conventional therapy – use of a splint, habit management, anti-inflammatories, and soft diet. He said that the appellant needed to “take some ownership of this problem” and that she needs a “concentrated coordinated effort” to try to break her “cycle of pain”.
- A medical history summary dated October 6, 2012 indicated that the appellant had seen specialists for consultations related to idiopathic osteoporosis, alopecia (hair loss), tinnitus, gallstones, menopause, and a rash.
- The social worker, who had known the appellant for 1 week at the time of completing the AR, identified additional medical conditions: sun allergy, arthritis in hands and feet, sleeplessness and anemia.
- The social worker indicated that the appellant needs periodic assistance with walking indoors and out, climbing stairs, and standing primarily due to pain from arthritis. She also indicated the appellant can lift/hold/carry only small weights for short periods of time – again due to arthritic pain.
- In a written submission to the ministry on reconsideration, the appellant’s advocate – who is also a registered nurse – reported that the appellant “is unable to lift, carry and hold items greater than a sheet of paper.” She also wrote that “I have met [the appellant] 3 times over the past month and confirm the report of the [social worker].”
- In a letter dated December 20, 2012 the appellant’s caseworker at the ministry’s employment contractor indicated that the appellant suffers from low blood pressure. In oral testimony at the appeal hearing the caseworker expressed her opinion that the appellant’s medical conditions make her unemployable.
- In response to a question from the panel, the caseworker said that she has never personally observed any indications of the appellant’s tinnitus.
- In her self-report the appellant said that she is tired all the time, wakes up sore from arthritis, and doesn’t go out much because she never knows when diarrhea will hit. She wrote that she has “...been to many specialists and yet nothing has ever been resolved.”
- She wrote that her physician believes that she should “just get over it.”

Mental Impairment

- The physician indicated that the appellant has significant deficits with 2 of 12 aspects of cognitive and emotional function: emotional disturbance (*e.g. depression/anxiety*) and “other” (*familial conflict*). She has no difficulties with communication.
- The social worker wrote in the AR that the appellant suffers from a major depressive disorder and anxiety disorder. She identified the appellant as having major impacts in 7 out of 14 categories of cognitive and emotional function, moderate impacts in 4 categories, and minimal or no impact in 4 categories.
- The employment contractor caseworker wrote that the appellant struggles with depression on a daily basis and has no emotional support in her life.
- In a Disability Related Employability Needs Assessment prepared by the appellant for the employment contractor on October 3, 2012, the appellant indicated that “Usually I am in a happy mood, but have been stressed lately due to family issues.” She identified as strengths

that she has "Good organizational skills" and that she is "task oriented, good with numbers."

- In her self-report the appellant wrote that she is "...depressed and disillusioned, I didn't think this is how my life would be at 50."
- The appellant has apparently been referred for a mental health evaluation but the timeline does not allow the results to be available for this appeal.

DLA

- The appellant's physician indicated that the appellant's ability to perform DLA is not directly restricted by her medical conditions. She has not been prescribed any medications that interfere with her ability to perform DLA.
- With respect to communication, the social worker indicated that the appellant has poor hearing because of tinnitus.
- The social worker wrote that the appellant is fully independent in terms of 4 of the 10 prescribed DLA (*manage personal finances (pay rent and bills); manage medications; prepare meals and personal self-care*), though the appellant takes significantly longer with some aspects of meal preparation and self-care due to depression, IBS and arthritis.
- With respect to 4 other DLA (*moving about indoors and outdoors, shopping, basic housework and use of transportation facilities*) the social worker reported that the appellant requires periodic assistance with some aspects due primarily to depression/anxiety, IBS and arthritis.
- With respect to the final 2 DLA (*decision making and social functioning*) the social worker indicated that the appellant has very disrupted functioning due to depression/anxiety and learned helplessness due to an abusive relationship with her husband. She isolates herself socially because of depression and because of the frequent and unpredictable bowel movements and diarrhea resulting from her IBS.
- In her oral testimony the appellant stated that she drives her father's vehicle when he lends it to her.

Help

- The appellant's physician reported that she does not require any prostheses or aids for her impairment.
- The social worker indicated that the appellant uses an assistive device – a mouth guard or splint for her tooth grinding problem. She indicated that the appellant does not have an assistance animal.
- The social worker also indicated that the appellant receives assistance from family, and commented "[The appellant] has very minimal support."
- In response to a question from her advocate inquiring as to how much help she receives from her husband, the appellant said that it's a good day when he doesn't complain when something isn't done, and that he will make his own meals if the appellant isn't around to do it for him. Her father moved nearby and helps her out by lending her his phone and his car, but he is too elderly to do much more. No friends or neighbors help out. Nobody comes to visit or to check on her except her father.

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 expressed by her advocate, is that her IBS and arthritis are severe impairments that significantly restrict her ability to perform DLA. The IBS causes severe impairment to her social functioning and causes her to sit at home in isolation for fear of having an unexpected bowel accident. The appellant acknowledged that the arthritis of the hands and feet has been identified by the social worker and the registered nurse rather than a medical practitioner, but stated that arthritis of the jaw has been diagnosed by the oral surgeon and that it will certainly be "throughout her body." The appellant argued that since the oral surgeon's letter - which predates the PR - indicates medical conditions to which the physician did not refer in the AR, the ministry was wrong to give more weight to the physician's evidence. The appellant said that her physician has not taken her seriously and implied that he has failed her because the "coordinated approach" referred to

by the oral surgeon has not occurred.

The ministry acknowledged that it had been mistaken in not recognizing that some of the appellant's medical conditions such as the alopecia and tinnitus had been confirmed by a medical practitioner rather than solely by the social worker. Otherwise the ministry relied on its reconsideration decision, which found that there was not enough "collaborative" 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.

In the appellant's case the physician chose not to include some of the appellant's medical conditions – for example alopecia and tinnitus – in his list of impairments in the PR. The appellant says that this shows the physician is not taking her seriously, so his evidence should be given less weight. However, medical conditions can only be called "impairments" if they significantly impact the appellant's functional skills and directly and significantly restrict the appellant from performing DLA independently either continuously or periodically for extended periods. With respect to the alopecia the appellant said that it contributes to her self-isolating behaviour. The evidence of the case worker indicates that any restrictions caused by the tinnitus are not significant.

In the instant case, the physician has indicated that the appellant's impairments cause no direct restrictions to her ability to perform DLA. For the DLA the social worker describes as being restricted, those restrictions apparently arise in great part from at least two medical conditions that have not been diagnosed by a medical practitioner as being likely to continue for at least 2 years – arthritis of the hands and feet, and depression/anxiety. The appellant acknowledges that arthritis of hands and feet has not been confirmed by a medical practitioner, but says that the panel should assume that since the appellant has arthritis in her jaw joints, it will also occur throughout her body to an extent sufficient to directly and significantly restrict her ability to perform DLA. The panel cannot make this assumption. The legislation specifically requires impairments and their duration of 2 years to be

confirmed by a medical practitioner.

The evidence indicates that the appellant has a number of medical conditions. However, 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 direct, significant restrictions in the appellant's ability to perform DLA independently. Accordingly, the panel finds that despite its error in failing to acknowledge some of the appellant's medical conditions, the ministry reasonably concluded that the appellant does not have a severe physical impairment.

Severe Mental Impairment

The appellant's position is that the physician has indicated the appellant has significant deficits to cognitive and emotional functioning, including depression and anxiety, and he has indicated that her impairment will continue for at least 2 years. These conditions are confirmed by the social worker and the employment caseworker. She also says that some of her physical conditions - for example, alopecia and IBS, exacerbate her anxiety and cause her to isolate herself.

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. He indicated "familial conflict" as a source of cognitive and emotional deficit. The appellant's evidence was that she is on a prescription antidepressant, though in her oral testimony she described it as "for sleeping" and her advocate described it as an antidepressant. In her Disability Related Employability Needs Assessment the appellant noted that she is usually in a happy mood but has been stressed lately due to family strife. On balance, the evidence indicates that the appellant is experiencing situational anxiety and depression caused by her situation at home. On the appellant's evidence these conditions have occurred "lately". There is no diagnosis of depression from a medical practitioner or confirmation from a medical practitioner that the depression or anxiety is likely to last for 2 years or more.

Accordingly, the panel finds that the ministry reasonably concluded that the appellant does not have a severe mental impairment.

Restrictions to DLA

The appellant's position is that the medical evidence is sufficient to demonstrate that this legislated criterion is satisfied. Toileting associated with the IBS takes many hours of her day and makes shopping next to impossible due to fear she will have an unexpected bowel accident. She lacks motivation, isolates herself socially, and has trouble concentrating. Aching, painful muscles and joints extend beyond her jaw to her body and affect her DLA.

The ministry's position, as expressed in its reconsideration decision, is that there was not enough evidence to determine that her impairments directly and significantly restrict daily living activities continuously or periodically for extended periods.

Panel Decision

Even though there are significant differences between the evidence of the physician and that of the social worker, the panel finds that they are both reasonably consistent with each other in showing that the appellant is not significantly restricted in the 4 DLA of *manage personal finances* (pay rent and bills); *manage medications*; *prepare meals* and *personal self-care*.

With respect to the 4 DLA of *moving about indoors and outdoors, shopping, basic housework and use of transportation facilities*, the physician indicates the appellant is not directly or significantly restricted, while the social worker indicates these DLA are either continuously or periodically restricted by a combination of depression, IBS and arthritis. As discussed above, two of these three conditions – the depression and the arthritis of hands and feet – are not corroborated by a medical practitioner and in the panel's view the restrictions to DLA imposed by IBS cannot be described as "significant". The registered nurse/advocate supports the social worker's assessment; however the panel cannot give her endorsement significant weight. Her role is as an advocate rather than reflecting an independent assessment. This is shown, for example, by her use of exaggeration in writing that the appellant cannot lift or carry anything heavier than a sheet of paper, when it is clear from the appellant's and social worker's evidence that the appellant has enough lifting and carrying capacity to do housework and prepare meals. Neither can the panel accord significant weight to the evidence of the employment case worker. The case worker is not a prescribed professional, and she is viewing the appellant through the lens of employability. Employability is not a statutory criterion relevant to PWD designation.

There is also a significant difference between the evidence of the physician and the social worker regarding the restrictions to the last 2 DLA – *decision making* and *social functioning*. The physician expresses the opinion that the appellant is not directly restricted in either DLA. The social worker indicates that the appellant has "very disrupted functioning" with both her immediate and extended social networks. The social worker associates most of the dysfunction to the appellant's abusive relationship with her husband, while acknowledging that the appellant interacts appropriately with others – e.g. understanding and responding to social cues, and problem solving in a social context. Given this observation by the social worker with respect to problem solving in a social context, the appellant's abilities with respect to managing her own finances and medications, and the appellant's observation that she has good organizational skills, the panel finds that the appellant cannot be said to be directly and significantly restricted in her ability to *make decisions about personal activities, care or finances*. The impacts to *social functioning* noted by the social worker appear to be situational and are not directly caused by an impairment that has been confirmed by a medical practitioner as likely to continue for at least 2 years.

Based on this analysis, the panel finds that the ministry reasonably concluded that the evidence does not demonstrate that the appellant's ability to perform DLA is directly and significantly restricted continuously or periodically for extended periods.

Help with DLA

The appellant's position is that as a result of her restrictions she requires help for most DLA. She

argues that a person can require help as defined by the legislation even if she is not currently receiving that help. The appellant also argues that she relies on an assistive device – the splint for her teeth.

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 a degree of emotional support from her father. Otherwise, the evidence of the appellant and the social worker is that she receives "very minimal support."

The panel notes that there may be situations in which a person may "require" help but not be receiving it. In the panel's view the word "require" indicates a degree of necessity so that it is something that a person cannot reasonably do without. If the person does not get the help she requires, the DLA goes undone either continuously or periodically for extended periods. In the panel's view there is simply insufficient evidence to show that the appellant relies upon "the significant help or supervision of another person." The evidence shows that the appellant performs all of her DLA for herself and her family unit independently.

The dental splint or mouth guard does not meet the definition of "assistive device" set out in s. 2 of the EAPWDA, as it is not a device designed to enable a person to perform a DLA. The panel finds that there is no evidence to indicate that the appellant uses assistive devices or that she has 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.