

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated December 21, 2012 which found that the appellant did not meet four of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement; however, the ministry was not satisfied that the evidence establishes that:

- in the opinion of a medical practitioner, her impairment is likely to continue for at least two years;
- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – Summary of Facts

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 evidence before the ministry at the time of the reconsideration decision included the following:

- 1) Person With Disabilities (PWD) Application comprised of the applicant information dated June 19, 2012 in which the appellant did not respond to a request to describe her disability or the impact it has on her life, the physician report and assessor report both completed by a general practitioner who has treated the appellant for 2 years and dated July 21, 2012;
- 2) Ministry telephone Log dated September 11, 2012 seeking clarification regarding the duration response and notes and more information with respect to social functioning; messages were left as the physician was not available;
- 3) Facsimile Cover Sheet dated September 17, 2012 from the ministry to the appellant's physician requesting that he confirm whether the impairment is expected to last 2 or more years and provide further information/narrative regarding social functioning; and,
- 4) Request for Reconsideration- Reasons prepared by an advocate on behalf of the appellant.

Diagnoses

The appellant has been diagnosed by her general practitioner with chronic cervical strain with a date of onset of July 2010 and mood disorder- depression with an onset of April 2012.

Duration

- In the physician report, in response to the question whether the impairment is likely to continue for 2 years or more, the general practitioner indicated "no," with an explanation that the impairment is "...unlikely to improve, no counseling available in her language."

Physical Impairment

- In the physician report under health history, the general practitioner wrote that chronic neck pain restricts the appellant's ability to perform ADL's [activities of daily living].
- Functional skills reported in the physician report indicated that the appellant can walk 1 to 2 blocks unaided, she can climb 5 or more steps unaided, she can lift 5 to 15 lbs. and remain seated 1 to 2 hours.
- The physician reported that the appellant has not been prescribed medications that interfere with her ability to perform her daily living activities (DLA), and she does not require any aids for her impairment. In the assessor report, the physician did not identify any assistive devices routinely used by the appellant to help compensate for her impairment.
- The appellant is assessed as requiring periodic assistance from another person with walking indoors and walking outdoors and with climbing stairs and with lifting and with carrying and holding. The general practitioner wrote that the appellant "...needs help with longer distances and heavier loads."

Mental Impairment

- In the physician report, the general practitioner wrote that the appellant is a new immigrant from a named country, her husband was killed and she lives with a son with mental illness, with "...fatigue, amotivational, ahhedonia, and adjustment disorder to new country; difficulty adapting- PTSD symptoms."
- The general practitioner reported that the appellant has no difficulties with communication and has a good ability to communicate in speaking and hearing and poor reading and writing (only in her original language).

- In the physician report, the general practitioner indicated that there are significant deficits in the appellant's cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation, attention or sustained concentration and other ("insomnia, nightmares"), with no other comment provided by the general practitioner.
- In the additional comments, the general practitioner wrote that the appellant "...ruminates over loss of husband in war, stress with having to live with son with mental illness."
- In the assessor report, the general practitioner indicated there are major impacts with cognitive and emotional functioning in the areas of emotion, attention/concentration, executive, memory and motivation, as well as moderate impacts in bodily functions, consciousness, insight and judgement and other emotional or mental problems. There is no impact in the remaining 5 areas of functioning. The general practitioner wrote that "...pseudo-dementia and maladaptive behaviour makes learning difficult."
- The physician assessed the appellant as requiring support/supervision in 4 out of 5 aspects of social functioning.
- The appellant is assessed as having marginal functioning in both her immediate and extended social networks. The general practitioner wrote that there is "...little contact outside of family- despondent over son and loss of husband."

Daily Living Activities (DLA)

- In the assessor report, the appellant is assessed as requiring periodic assistance from another person with walking indoors and walking outdoors ("needs help with longer distances").
- The general practitioner reported that 7 out of 8 listed tasks of the DLA personal care are performed independently, with periodic assistance required to regulate her diet. For this task, the example given in the form is issues related to eating disorders characterized by major disturbances in eating behaviour. For the tasks of dressing, grooming and bathing, the general practitioner wrote "needs prompting."
- The general practitioner assessed the appellant as requiring continuous assistance from another person with doing laundry and basic housekeeping, with the comment that she "depends on family."
- For the DLA shopping, the appellant requires periodic assistance from another person with going to and from stores, making appropriate choices and carrying purchases home, as well as continuous assistance with reading prices and labels and paying for purchases. No further comment is provided but the general practitioner indicated that the appellant also takes significantly longer than typical with going to and from stores and carrying purchases home.
- For the DLA meals, the appellant requires periodic assistance from another person with the tasks of meal planning, food preparation, and cooking while being independent with safe storage of food, with the note that "family helps."
- The general practitioner assessed the appellant as requiring continuous assistance from another person with all tasks of paying rent and bills, with the comment that the appellant "...lacks English and cognitive skills."
- For the DLA medications, the appellant requires periodic assistance with 2 of 3 tasks, namely filling/refilling prescriptions and taking as directed, with no further narrative provided by the general practitioner.
- The general practitioner indicated that the appellant requires periodic assistance with using public transit and using transit schedules and arranging transportation ("no cognition for this"), while being independent with getting in and out of a vehicle.
- The general practitioner indicated that the appellant requires periodic support or supervision with several aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, and dealing appropriately with unexpected demands. She requires continuous support and supervision with interacting appropriately with others while she is independently able to secure assistance from others. The general practitioner did not provide further explanation or a description of the degree and duration of the support/supervision required.

Need for Help

- The general practitioner reported that the appellant lives with family and does not use an assistive device.
- The general practitioner indicated that the help required for DLA is provided by family.

In her Notice of Appeal, the appellant expressed her intention to dispute the reconsideration decision.

Prior to the hearing, the appellant provided a letter from the general practitioner dated February 23, 2013 which included the following :

- In response to the question whether the appellant, when considering the impact of her medical conditions on her daily life, has a severe physical or mental impairment, or both, the general practitioner wrote: "Yes. Physical and mental impairment- neck and back pain. Limited ability to walk, bend lift, (illegible) insomnia and nightmares."
- As to whether the appellant's impairment is likely to continue for 2 more years, the general practitioner wrote "yes."
- The general practitioner agree that it takes the appellant significantly longer than typical to perform many DLA or she puts tasks off as a direct result of her health-related limitations.
- The general practitioner agrees that the appellant's level of activity is significantly reduced due to her impairment and she is significantly restricted in performing DLA "daily.
- In response to the question whether the appellant's impairment significantly restricts her ability to perform a range of DLA continuously or periodically for extended periods, the general practitioner wrote "Yes, continuous with personal care and ADL's walking, transport, finances."
- Asked whether he can confirm that the appellant requires significant help with DLA either by taking much longer than typical to complete routine tasks or needing other people for ongoing help and support, the general practitioner wrote "yes, relies on family."

Prior to the hearing, the appellant's advocate provided a written submission which included additional evidence that the appellant lives with her son with mental illness as well as with two other adult sons.

The ministry did not raise an objection to the admissibility of the letter or the submission. The panel admitted both documents, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail of the impacts of the appellant's diagnosed condition and circumstances and being in support of information that was before the ministry on reconsideration.

The ministry relied on its reconsideration decision as its submission.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, that the appellant is not eligible for designation as a person with disabilities (PWD) as she does not meet all the criteria in Section 2 of the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years, that her daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2 of the EAPWDR provides the following definitions:

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.
- (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.

The panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

Duration

The appellant's position is that although in the physician report the doctor ticked that the condition is not likely to last for more than 2 years, he has gone on to say that it is unlikely to improve and in a number of places in the application noted that the appellant has significant barriers to adapting and learning new behaviours. The advocate argues that in the doctor's most recent letter dated February 23, 2013, he amended his opinion to say that he thinks that the condition is likely to continue for 2 more years.

The ministry's position is that the general practitioner has not confirmed the duration of impairment. The ministry argues that while the general practitioner says "unlikely to improve, no counseling available in her language", the ministry maintains that there are counselors available in the area in another language. The ministry argues that efforts were made to contact the general practitioner to clarify the issue and there was no reply.

Panel Decision

The legislation requires that, in the opinion of a medical practitioner, the impairment is likely to continue for at least two years. In the physician report, in response to the question whether the impairment is likely to continue for 2 years or more, the general practitioner indicated "no". The explanation provided by the general practitioner is: "...unlikely to improve, no counseling available in her language." Although the advocate argues that the general practitioner appears to have made an error when he ticked the "no" box to the duration question, the panel notes that the explanation relates specifically to the appellant's mental impairment only. The response is inconclusive as being dependent on counseling being available in the appellant's language, and the legislation requires the definitive opinion of the medical practitioner that the duration of the impairment will continue for at least 2 years. However, in the letter dated February 23, 2013, the general practitioner

referenced both the physical and mental impairment and wrote "yes" in response to the question whether her impairment is likely to continue for 2 more years. Therefore, the panel finds that the ministry's conclusion that the medical practitioner does not confirm that the appellant's impairment will likely continue for 2 years or more was not reasonable.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of her pain due to chronic cervical strain. The advocate argues that in the doctor's most recent letter dated February 23, 2013, he confirmed that the appellant has a severe physical impairment and that due to neck and back pain she has limited ability to walk, bend and lift.

The ministry's position is that the appellant's functional skill limitations are not significantly restricted and are more in keeping with a moderate degree of impairment. The ministry argues that, in terms of physical functioning, the general practitioner indicates that the appellant is able to walk 1 to 2 blocks and to climb 5 or more steps unaided, to lift 5 to 15 lbs. and to sit for 1 to 2 hours. The ministry argues that while periodic help is reported with most aspects of mobility and physical abilities, it is unclear how the reported skill limitations to walking and sitting are related to chronic cervical strain. The ministry argues that no assistive devices are routinely used to help compensate for impairment. The ministry also argues that remedial measures in the form of analgesics are available to ameliorate neck pain and to allow better functionality.

Panel Decision

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of 2 years, has diagnosed the appellant with chronic cervical strain. In the PWD application, the general practitioner assessed the appellant as able to walk 1 to 2 blocks and to climb 5 or more steps unaided, to lift 5 to 15 lbs., and to remain seated for 1 to 2 hours. Although the general practitioner assessed the appellant as requiring periodic assistance with walking indoors and outdoors, with climbing stairs, and with lifting and carrying and holding, this is explained as needing help with "longer distances" and "heavier loads." The general practitioner reported that the appellant does not require any aids for her impairment. In the letter dated February 23, 2013, the general practitioner agrees that the appellant has a severe physical impairment (neck and back pain) with limited ability to walk, bend and lift. Given that the appellant is independently able to walk 1 to 2 blocks, to climb 5 or more steps, and to lift 5 to 15 lbs., the panel finds that the ministry reasonably determined that her functional skills, while limited, remain in a moderate range. The ministry also argues that there are remedial measures available in the form of analgesics; however, information regarding medications trialed is not required as part of the application and was not discussed by the general practitioner. However, the panel finds that the ministry reasonably concluded that the information provided by the general practitioner does not explain how the limitations, particularly with respect to remaining seated, are related to cervical strain, even though he was given an opportunity to do so in the February 23, 2013 letter. The panel finds that the ministry reasonably concluded that there is insufficient evidence to establish a severe physical impairment as required under Section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position is that a severe mental impairment is established by the general practitioner's diagnosis of mood disorder-depression and post traumatic stress disorder (PTSD). The advocate argues that the general practitioner identified major impacts in a number of mental functions and stated that her pseudo-

dementia and maladaptive behaviour make learning difficult. The advocate argues that the doctor indicated in his February 23, 2013 letter that the appellant has a severe mental impairment with insomnia and nightmares.

The ministry's position is that the general practitioner reports several deficits to cognitive and emotional functioning; however the narrative describes the difficulties experienced by the appellant in her past and present circumstances, with the loss of her husband and being a recent immigrant living with a mentally ill son, and remedial measures are available such as counseling and medication to reduce and manage the appellant's symptoms. The ministry argues that fluency in English is not a factor in determining communication skills.

Panel Decision

The medical practitioner diagnosed mood disorder- depression and wrote in the physician report that the appellant is a new immigrant from a named country, her husband was killed and she lives with a son with mental illness, with "...fatigue, amotivational, anhedonia, and adjustment disorder to new country; difficulty adapting- PTSD symptoms." While the general practitioner reported that the appellant's ability to communicate in reading and writing is poor because it is only in her original language, the panel finds that the ministry reasonably concluded that lack of fluency in English is not a factor in assessing communication skills for the purposes of the PWD application. In the physician report, the general practitioner indicated that there are significant deficits in the appellant's cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation, attention or sustained concentration and other ("insomnia, nightmares"), with no further comment provided. In the assessor report, the general practitioner indicated there are major impacts in the appellant's daily functioning in the areas of emotion, attention/concentration, executive, memory and motivation, as well as moderate impacts in bodily functions, consciousness, insight and judgement and other emotional or mental problems. There was no impact indicated in the remaining 5 areas of functioning. The general practitioner wrote that "...pseudo-dementia and maladaptive behaviour makes learning difficult." The general practitioner did not provide an explanation of how pseudo-dementia relates to the diagnosed mental disorder of depression and he did not describe the resulting symptoms of this condition. In the additional comments, the general practitioner wrote that the appellant "...ruminates over loss of husband in war, stress with having to live with son with mental illness." The panel finds that ministry reasonably concluded that the general practitioner's description relates to situational grief and stress experienced by the appellant rather than to symptoms of a mental disorder.

The general practitioner indicated that the appellant requires periodic support or supervision with several aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, and dealing appropriately with unexpected demands. The general practitioner did not provide further explanation or a description of the degree and duration of the support/supervision required in the assessor report, and did not provide further detail in his updated letter of February 23, 2013 despite this information having been previously requested by the ministry via telephone and fax. While the appellant is assessed as having marginal functioning in both her immediate and extended social networks, the general practitioner related this to the appellant being "...despondent over son and loss of husband." The ministry also argues that there are remedial measures available such as counseling and medication; however, information regarding medications trialed is not required as part of the application and was not discussed by the general practitioner. The general practitioner indicated that counseling is not available in the appellant's language and although the ministry found counseling is available in a language that is not the appellant's original language, there is no evidence from the ministry that the appellant speaks this language. On the other hand, the general practitioner has not provided any information as to why or to what extent the lack of counseling is relevant or critical. Overall, the panel finds that there is insufficient evidence to establish that the appellant's symptoms of difficulty adjusting and adapting are related to her diagnosed mental disorder rather than a result of her other identified challenges, including a lack of English language skills and her reaction to situational stresses. For these reasons, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that her physical and mental impairments directly and significantly restrict her ability to perform DLA and she requires the assistance of another person to perform many DLA.

The position of the ministry is that the information provided does not demonstrate that a significant degree of assistance from other people is required to perform DLA. The information from the appellant's prescribed professional, her general practitioner, does not establish that her impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant is able to walk 1 to 2 blocks unaided and that she requires periodic assistance with walking "longer distances." In the assessor report, the general practitioner reported that all listed tasks of the DLA personal care are performed independently with the exception of regulating diet. The panel finds that the ministry reasonably determined that, based on the instructions in the PWD application, this applies to those with major disturbances in eating behaviour and that, therefore, it does not apply in the appellant's circumstances. The appellant is assessed as requiring continuous assistance with basic housekeeping. For the DLA shopping, the panel finds that the ministry reasonably determined that it is not clear from the evidence that the assistance needed for several tasks, namely reading prices and labels, making appropriate choices and paying for purchases, is as a result of a mental or physical impairment and not as a result of a lack of English language skills. The general practitioner did not provide an explanation or description of the requirement for assistance. The appellant requires periodic assistance with meal planning, food preparation and cooking and the general practitioner wrote "family helps," with no further explanation in the assessor report or the February 23, 2013 letter of why help is required or the frequency or duration of help from others.

While continuous assistance from another person is indicated for all tasks of paying rent and bills, the panel finds that the ministry reasonably concluded that the comment that the appellant "lacks English and cognitive skills" suggests that the restriction may be related to other than a medical condition. Likewise, the assessment of periodic assistance required for tasks of managing medications is not accompanied by notes to describe the frequency or duration of the help. For the DLA transportation, the general practitioner reported that the appellant requires continuous assistance for using public transit and using transit schedules and arranging transportation with an explanation that she has "no cognition for this" and there is no further detail of the connection to a diagnosed mental disorder. In the February 23, 2013 letter, the general practitioner wrote that the appellant has continuous restrictions with personal care, walking, transport and finances but does not provide any further detail to demonstrate a significant degree of restriction as a result of a physical or mental impairment.

For those DLA related to a mental impairment, the general practitioner indicated that the appellant requires periodic support or supervision with making appropriate social decisions; however, the general practitioner did not provide further explanation or a description of the degree and duration of the support/supervision required in his updated letter of February 23, 2013, despite a request for this information having been made previously by the ministry. For relating, communicating and interacting with others effectively, the general practitioner identified a poor ability to communicate in reading and writing as a result of a lack of English language skills and not as a result of a mental disorder. The appellant requires continuous support and supervision with interacting appropriately with others while, on the other hand, being independently able to secure assistance from others. The panel finds that the ministry reasonably concluded that there is not enough evidence to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the significant assistance of another person to perform DLA, namely her two adult sons with whom she lives.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device or the significant help or supervision of another person or the services of an assistance animal in order to perform a DLA.

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

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.