

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (“the ministry”) dated October 19, 2012 which held that the appellant did not meet 4 of the 5 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 but not that:

- a medical practitioner has confirmed that the appellant has an impairment that is likely to continue for at least 2 years.
- 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; and that
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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 reconsideration included the following.

- A PWD application comprised of a Self-report (SR) dated June 5, 2012 consisting of an attached checklist regarding DLA and the appellant's limitations. Two Physician Reports (PR), one completed, unsigned, undated and marked 'Draft Only.' The second, completed, signed and dated June 7, 2012 which was completed by the appellant's general practitioner (GP). The GP has treated the appellant for a year prior to the application and had seen her 11 or more times in the previous year. An Assessor Report (AR) dated July 4, 2012 and completed by a social worker who works in the offices of a disability advocacy group. The assessor met the appellant on the day the AR was completed.
- A note to file from the ministry reconsideration officer regarding the PR marked 'Draft Only,' indicating the ministry would not be using this PR in its adjudication.
- The self-report checklist, completed June 5, 2012, provided the following information:
 - Her disabilities are depression, anxiety, kidney stones.
 - The appellant checked that her disability makes it difficult for her to:
 - Personal hygiene and self care
 - Get up and out of bed in the morning
 - Get in and out of the bathtub
 - Stand in the shower without being dizzy or off balance
 - Do up buttons, pull on clothing, put on socks and shoes
 - Remember or be motivated to perform daily hygiene
 - Preparing food and eating meals
 - Standing at the sink counter and stove long enough to make a meal
 - Moving food from shelves to counters to stoves
 - Chopping, peeling, mixing food
 - Opening cans and jars, opening and resealing bags
 - Understanding recipes and labels
 - Taking medications
 - Remembering to take the right doses of the medications at the right times
 - Getting prescriptions filled and remembering to get them re-filled on time
 - Keeping the home clean
 - Doing dishes, putting them away, cleaning counters and sink
 - Scrubbing the bathtub, toilet and sink
 - Mopping and vacuuming floors
 - Dusting, wiping down surfaces, cleaning dust off the ceiling
 - Cleaning windows
 - Carrying and folding laundry, putting it away

- Remembering or having the motivation to keep my home clean

Shopping for personal needs

- Walking around stores, standing long enough to make good choices from the shelves and managing cash register line ups
- Picking up items from shelves, loading in basket, taking out of basket and onto cashier's desk
- Being able to ask for help if I need it in a store
- Reading and understanding labels on items and signs in the store
- Taking groceries home (carrying them onto transportation, loading and unloading)

Moving about indoors

- Moving about without restrictions such as pain, fatigue or shortness of breath
- Going up and down stairs or ramps
- Kneeling and getting up from kneeling position

Moving about outdoors

- Walking on flat ground
- Walking on uneven ground; gravel, grass
- Going up or down stairs or ramps

Using public transit or personal transportation

- Walking to or standing at the bus stop
- Getting on or off the bus or train

Because of her mental health disability, the appellant checked boxes indicating "1":

- Experience a lot of anxiety, agitation and stress or depression
- Experience confusion a lot of the time
- Have a poor memory
- Have difficulty remembering information and appointments
- Have difficulty asking for help when I need it
- Isolate myself from others and rarely leave the house
- Have difficulty sleeping
- Have difficulty socializing without becoming anxious or scared
- Have difficulty interacting with family, friends and/or my partner
- Experience difficulties being able to deal with unexpected situations

Communication

- I have difficulty making myself understood by others when I speak or write
- Have difficulty understanding what others say to me
- Have difficulty understanding what I read

Assistance required

- I need more help than I am currently getting
- I need assistance from others to complete my daily living activities

The appellant indicated that she receives help from family members.

The PR, completed June 7, 2012 by the GP provides the following information:

- Diagnoses:
 - depression/anxiety since 2012
 - renal calculi/recent urinary tract infection and hospitalization since 2009
 - gestational diabetes since 2012
 - iron deficiency anemia since 2011
- under health history the GP states:
 - 'Feels she is under lots of pressure
can't sleep at night/lack of energy/ lots of worries.
complicated pregnancy/ recent hospitalization for recent UTI [unreadable] admitted
MAR-9/ MAR-14 and re-admitted MAR-15 to complete two-weeks of IV therapy. Also
developed gestational DM.
doesn't think she would be able to raise care for herself or her baby in the future
Lost her interest
As an addendum, the GP stated: patient was recently hospitalized, had chorioamnionitis
after delivery.
Was transferred to psychiatric ward and 4 days [unreadable] on Seroquel 37.5 at night.
Had some hallucinations which resolved.'
- The GP stated that the Seroquel interferes with the appellant's ability to perform DLA as it makes her drowsy.
- The GP could not estimate whether her condition would last for two or more years as her renal calculi were to be addressed after delivery and the prognosis depends on the outcome of the procedure to address it. Her depression is more chronic.
- Physical functional skills were not addressed due to her pregnancy.
- The GP found five significant deficits with cognitive and emotional functioning: memory, emotional disturbance, motivation, impulse control and attention or sustained concentration.
- In terms of DLA the GP found her restricted with use of transportation and social functioning, although the GP did not indicate the type of restriction. The remaining eight were 'no' or 'unknown' restriction. The GP stated the appellant has difficulty interacting and communicating with people.

The AR was completed on July 4, 2012 by a social worker who met the appellant on the day the report was completed. The AR notes the following about the appellant:

- Poor speaking, reading and writing ("poor concentration & memory")
- Takes significantly longer than typical walking indoors/outdoors, climbing stairs, standing, lifting, carrying and holding. She also uses an assistive device to climb stairs and requires periodic assistance from another person with lifting, carrying and holding.
- In terms of cognitive and emotional functioning the AR finds a major impact on daily functioning with bodily functions, emotion, attention/concentration, executive, memory and motivation. It notes severe mental health issues, including recent hospitalization for post-partum psychosis and that she needs constant support, treatment and supervision.

- Regarding personal care she takes significantly longer than typical with dressing, grooming, bathing and transfers in/out of bed and chairs.
- She requires continuous assistance and takes significantly longer than typical with laundry and basic housekeeping ('often not done – needs help')
- With shopping she takes significantly longer than typical with going to and from stores ('often not done – needs help'), reading prices and labels for which she also requires periodic assistance ('needs some help'), making appropriate choices ('needs some help'), paying for purchases and carrying purchases home for which she also requires periodic assistance ('needs help over 5-10 lbs).
- The AR notes that the appellant requires assistance with all household DLA, executive functions and social-emotional functions.
- With meals she needs continuous assistance and takes significantly longer than typical with food preparation and cooking ('always requires help'), continuous assistance with meal planning and takes significantly longer than typical ('not done by client') and safe storage of food ('requires help').
- With paying rent and bills the appellant requires continuous assistance and takes significantly longer than typical with banking, budgeting and paying rent and bills ('poor executive functions').
- With medications she requires continuous assistance and takes significantly longer than typical with filling/refilling prescriptions and taking as directed ('needs help/reminders').
- With transportation she takes significantly longer than typical with getting in/out of a vehicle, using public transit and using transit schedules for which she also requires periodic assistance.
- With social functioning, she requires continuous assistance relating to appropriate social decisions ('needs support/supervision'), able to develop and maintain relationships ('depressed, withdrawn and isolated'), interacts appropriately with others ('unable to cope in social situations'), able to deal appropriately with unexpected demands ('highly stressed and overwhelmed') and able to secure assistance from others ('relies on sister and professional')
- She has very disrupted functioning with her immediate social functioning as well as with extended social networks.
- The AR states: 'needs ongoing mental health supervision, support, counselling and treatment' and 'recent hospitalization for psychosis following birth of her child.'
- Help is required for DLA from family and health authority professionals.
- Under additional information the AR describes a recent admission to the psychiatric unit and a history of similar hospitalization in Europe.

- A report dated July 19, 2012 from a psychiatrist, who noted the following regarding the appellant:
 - She has a six week old daughter.
 - She gets regular sleep of '12 hours a day in chunks.'
 - She feels her mood is good.
 - She denies hypomanic symptoms and 'her energy is fine.'
 - Her appetite is normal, not increasing and her weight is 'steady.'
 - Her concentration is improving and her interest good.
 - She gets out regularly and feels confident in transitioning to motherhood and feels a good bond with her child.

- She denied psychotic symptoms including no auditory hallucinations.
 - She is separated from her husband.
 - She was pleasant and cooperative, casually dressed with good hygiene and grooming.
 - She made good eye contact and her speech was normal in rate and tone.
 - Her mood was euthymic and her affect showed in good range
 - Her thought form was normal and her insight and judgement were good.
 - The psychiatrist concluded that the appellant 'is euthymic and not showing any signs of evolving mental health problems and specifically no hypomania and no psychosis. She recommended her medication be lowered. She recommended follow-up in four to eight weeks or as needed.
- A note dated September 27, 2012 from another doctor indicating that that he is treating the appellant for recurrent kidney stones and 'associated flank pain.'
 - A letter dated October 4, 2012 from the psychiatrist which responds to the following questions posed by a disability advocacy group on behalf of the appellant:
 - When the impact of your patient's medical conditions on her daily life is considered, does she have a severe physical impairment or severe mental impairment or both? If so, please explain:

'[The appellant] likely has a recurrent major depressive disorder and is currently post-partum 4 months. She currently meets criteria for a major depressive episode which is severe enough to impair function – she requires both her sister and mother's help to do child care, cooking and regular household chores. She has had a brief psychiatric hospitalization post-partem. She now requires medication management. In addition she has physical pain due to recurrent kidney stones requiring treatment/surgery (followed by nephrology).'
 - Is the impairment likely to continue for 2 years or more?

'history of recurrent depressive episodes – so yes, episodically.'
 - Does it take your patient significantly longer than normal to perform many daily activities – or does she put tasks off – as a direct result of her health related limitations?

'Currently yes – see above.'
 - Is her level of activity significantly reduced due to her impairment?

'Currently yes – see above.'
 - Is her ability to cope with the stresses of daily life, make timely decisions, and interact with other people significantly restricted by her mental impairment?

'Currently yes – see above.'
 - How often is she significantly restricted in performing daily living activities by one or more of her medical conditions?

'Currently continuous. Over years, intermittent with depressive episodes.'
 - Overall, does her impairment significantly restrict her ability to perform a range of daily

living activities continuously (or periodically for extended periods)? Please comment and give examples of the difficulties she has in performing daily living activities.

'Yes – see question #1. This is current and periodically over time with depressive episodes which she reports to me last for months at a time.

e.g. cooking/meal prep, chores at home, caring for newborn (all requires family help a lot)

+ physical pain – I have not assessed'

- As a result of her health restrictions, can you confirm that your patient requires significant help with daily living activities – either by taking much longer than typical to complete routine tasks or needing other people for ongoing help and support?

'Currently yes, as per #1 + #7.'

Evidence submitted subsequent to the reconsideration but prior to the hearing:

- A letter from the appellant's GP, in reply to similar questions posed to the psychiatrist:
 - When the impact of your patient's medical conditions on her daily life is considered, does she have a severe physical impairment or severe mental impairment or both? If so, please explain:

'Her severe depression affecting her sleep, concentration, and memory. Her fatigue, affecting her ability to care of her new baby. Has had hallucinations and has had an admission to psychiatric ward. Also has kidney stone and had a few procedures. Had complications during pregnancy, which affected her mood as well.
 - Is the impairment likely to continue for 2 years or more?

'Yes'
 - Does it take your patient significantly longer than normal to perform many daily activities – or does she put tasks off – as a direct result of her health related limitations?

'Yes'
 - Is her level of activity significantly reduced due to her impairment?

'Yes'
 - + 6. How often is she significantly restricted in performing daily living activities by one or more of her medical conditions?

'Yes. Often isolated herself from others.' Ongoing, every day.'
 - 7. Overall, does her impairment significantly restrict her ability to perform a range of daily living activities continuously (or periodically for extended periods)? Please comment and give examples of the difficulties she has in performing daily living activities.

'Yes – she has significant and continuous restrictions as a direct result of her impairment. She takes longer to complete daily personal care routines, needs help with housework, meal preparation, shopping, needs support managing

medication and finances.

Takes longer to walk short distances.

Her decision making and social functioning is very disrupted.'

8. As a result of her health restrictions, can you confirm that your patient requires significant help with daily living activities – either by taking much longer than typical to complete routine tasks or needing other people for ongoing help and support?
'Relies on daily help from her sister – gets help from her mother.
Her regular health care appointments.'

Evidence provided at the hearing:

The appellant provided the following information:

- She is on income assistance.
- Her baby was born on June 10, 2012, which is when she applied for PWD status.
- She has had depression prior to the baby. When she was twelve she was hospitalized for two days. She was previously advised by her doctor to see a counsellor for her depression but she didn't follow through with it.
- She took medications previously, when she lived in Another province.
- She has seen her psychiatrist every month since the baby was born and her depression medication dosage has increased.
- Her sister lives with her and helps with the house and baby.
- Her mother helps with shopping and other chores.
- If her sister didn't live with her she couldn't do housework.
- She is very tired and won't go outside.
- Her main problem is depression as opposed to a physical problem although the pain from kidney stones and her back pain keep coming back.
- Her main focus is to be well for her child.

At the hearing, the ministry questioned whether the appellant had a history of treatment for depression prior to the birth of her child. The appellant replied that she was previously advised by her doctor to see a counsellor for her depression but she didn't follow through with it. She took medications previously, when she lived in Another province and was hospitalized as a young girl in Europe for depression.

Evidentiary weight

In its decision the ministry commented that the AR was problematic as the assessor, a social worker, had not known the appellant previously, nor substantiated her findings with additional medical or psychiatric reports. Rather it appears to have been completed based on the appellant's self-report and what was provided by the GP in the PWD application. The panel finds this a reasonable conclusion and notes also that the social worker is co-located with the advocacy group assisting the appellant, which raises an appearance of a lack of objectivity.

The panel also notes that the self-report is not a written description of the appellant's difficulties but a checklist of problems from which the appellant can select. The panel gives little weight to this type of reporting, as opposed to written descriptions or oral evidence.

That being said, the panel does give weight to the appellant's *viva voce* evidence presented at the hearing, which was subject to cross-examination by the ministry. To the extent the panel relies on the appellant's self-report, it is from this source.

PART F – Reasons for Panel Decision

The issue on 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 that, in the opinion of a prescribed professional, directly and significantly restricts him from performing DLA either continuously or periodically for extended periods thus necessitating the need for help with 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.

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

EAPWDR

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 EAPWDA requires that the severe physical or mental impairment 'in the opinion of a medical practitioner is likely to continue for at least 2 years.'

The diagnoses are:

- depression/anxiety since 2012
- renal calculi/recent urinary tract infection and hospitalization since 2009
- gestational diabetes since 2012
- iron deficiency anemia since 2011

The PR states 'cannot estimate' and notes a forthcoming procedure to deal with her renal calculi (kidney stones). No evidence is on file regarding the duration of her other physical problems (urinary tract infection, gestational diabetes and iron deficiency anemia).

With respect to her depression/anxiety the GP replied 'Her depression is more chronic' and 'Yes' in reply to the subsequent question 'Is the impairment likely to continue for 2 years or more?' The psychiatrist found a history of recurrent depressive periods and opined 'Yes, episodically' in reply to the same question.

The panel finds that this evidence shows that the ministry was unreasonable not to accept that the appellant's mental impairment in the opinion of a medical practitioner is likely to continue for at least 2 years in accordance with s. 2(2)(a) of the EAPWDA.

Severe Physical Impairment

The appellant's position is that she has kidney problems and associated back pain. No submissions were made regarding her other physical diagnoses. The ministry argues that the PR and AR do not substantiate 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, Dr M, has diagnosed the appellant with depression/anxiety, kidney stones, UTI, gestational diabetes and iron deficiency anemia. In the hearing the appellant stated 'Her main problem is depression as opposed to a physical problem although the pain from kidney stones and her back pain keep coming back.' The limitations on her DLA arise mainly because of her mental impairment, not physical. As well, the GP discussed a post-natal procedure to deal with her kidney stones. Nor is there evidence of an impact on her DLA from her other physical conditions. Therefore the panel finds the ministry was reasonable in finding a severe physical impairment does not exist.

Severe Mental Impairment

The appellant, through her advocate, points to the fact that

- She has required hospitalization for depression/anxiety.
- The psychiatrist stated she meets the criteria for major depressive disorder which severely impairs her daily functioning.
- Her GP stated that she has severe depression which affects her sleep, concentration and memory.

The ministry relied on the psychiatrist's July 19, 2012 letter which indicated an improvement in the appellant's state of mind. The ministry concluded that the appellant's condition was related to post-partum depression which was successfully managed by medication. Regarding the psychiatrist's October 4, 2012 letter the ministry found that the description of intermittent episodes of depression did not meet the legislative test of a severe ongoing mental impairment that will significantly restrict your ability to perform daily living activities either continuously or periodically for extended periods.

Panel Decision

The panel notes the different impressions provided by the psychiatrist's letters. The first paints a picture of an improving condition and a reduction in medication. The second states she meets the criteria for a major depressive disorder which impacts her ability to perform DLA, existing beyond the four month window of a diagnosis of postpartum depression. She is restricted continuously and over years, intermittent with depressive episodes. The GP's subsequent letter (which was not before the ministry at reconsideration) agrees with this opinion and notes impacts on sleep, concentration and memory and hallucinations. She isolates herself socially, and has disrupted decision making and social functioning. She needs help with daily personal care routines, housework, meal preparation, shopping, medications and finances.

Regarding the ministry's observation that the condition is related to post-partum depression (with the assumption that it will resolve with time) the panel notes the fact that prior to her pregnancy she was

hospitalized in the past for depression and referred to a counselor. As well, she continues to see the psychiatrist and has had her medication increased.

This evidence satisfies the panel that the ministry was not reasonable in finding a lack of a severe mental impairment pursuant to s. 2(2) EAPWDA.

Restrictions in the ability to perform DLA

The appellant argues that she has significant restrictions in DLA due to her mental and physical impairment. She is restricted in activities such as meal preparation, housework, management of medications, and social functioning.

The ministry relies on the psychiatrist's first letter, which described the good spirits, mental condition and appearance of the appellant, as well as the improvement in her mental state.

Panel decision

In the PR, the GP notes restrictions with use of transportation and social functioning but 'unknown' for personal self-care, basic housework, daily shopping and management of finances.

The psychiatrist's first letter did not address DLA specifically, although it did indicate good grooming, appearance and mental state, as noted by the ministry. The psychiatrist's second letter did address DLA specifically, noting, in reply to the question: 'Overall, does her impairment significantly restrict her ability to perform a range of daily living activities continuously (or periodically for extended periods)? Please comment and give examples of the difficulties she has in performing daily living activities.'

'Yes – see question #1. This is current and periodically over time with depressive episodes which she reports to me last for months at a time.

e.g. cooking/meal prep, chores at home, caring for newborn (all requires family help a lot)

The GP replied to the same question:

'Yes – she has significant and continuous restrictions as a direct result of her impairment. She takes longer to complete daily personal care routines, needs help with housework, meal preparation, shopping, needs support managing medication and finances.

Takes longer to walk short distances.

Her decision making and social functioning is very disrupted.'

In her oral evidence, the appellant noted:

- Her sister lives with her and helps with the house and baby.
- Her mother helps with shopping and other chores.
- If her sister didn't live with her she couldn't do housework.
- She is very tired and won't go outside.

Despite the lack of helpful evidence provided by in the AR and the initial SR, the panel is satisfied that the above evidence indicates that the severe mental impairment in the opinion of a prescribed professional directly and significantly restricts the appellant's ability to perform daily living activities either continuously, or periodically for extended periods in accordance with s. 2(2)(b)(i) of the EAPWDA.

The ministry was not reasonable finding otherwise.

Help to perform DLA

The appellant's position is that she requires the continuous help of her sister and often of her mother to perform DLA.

The ministry did not address this question, having earlier found that the appellant was not restricted with her DLA.

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, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The panel found that the evidence of the prescribed professional establishes that the appellant requires assistance her DLA. This evidence shows that this help is provided by her family members.

The ministry was not reasonable finding that help was not required.

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 not reasonably supported by the evidence, and therefore rescinds the decision.