

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 11 July 2013 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that, while a severe mental and physical impairment had been established, the information provided did not establish that the appellant's impairment in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

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

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 appellant did not appear at the hearing. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 22 October 2013 (*sic*). The Application contained:
 - A Physician Report (PR) dated 06 May 2013 completed by the appellant's general practitioner (GP) who has known the appellant for 12 years and has seen her 11 or more times in the past year.
 - An Assessor Report (AR) of the same date, completed by the same GP.
 - A Self Report (SR) completed by the appellant.
 - Several medical reports (see below)
2. The appellant's Request for Reconsideration, dated 08 July 2013, to which was attached a letter from the appellant dated 06 July 2013 and a medical imaging report dated 13 April 2013.

In the PR, the GP diagnoses the appellant's impairment as rheumatoid arthritis (for years), WCB-related injuries to face and back (~20 years ago), Graves' disease (for years), peptic ulcer disease (for years), scoliosis lumbrosacral spine (for years), and degenerative disc disease - lumbrosacral spine. The GP adds that the appellant has been treated for breast cancer and cervical cancer.

The panel will first summarize the evidence from the PR and AR relating to the appellant's impairments as it relates to the PWD criteria at issue.

Severity/health history

Physical impairment

PR:

The GP reports that the appellant deals with daily pain and stiffness in her back, radiating to the legs. She has been seen extensively regarding her past injury, scoliosis and degenerative disc disease and no surgical intervention is possible. She takes daily pain medication for this condition and has had facet joint injections with no relief. She has Graves' disease which causes significant daily fatigue and rapid changes in weight, with brittle hair and nails. She has suffered from peptic ulcer disease which limits the ability to treat her back (cannot use NSAIDs). All her joints are stiff and sore from her rheumatoid arthritis. She has daily headaches.

The GP indicates that the appellant's impairment is likely to continue for two years or more.

Functional skills: The GP reports that the appellant is able to walk less than 1 block unaided, can climb no steps unaided, lifting is limited to under 5 pounds, and she can remain seated for less than 1 hour.

The GP reports that the appellant has no difficulties with communication.

Under additional comments, the GP writes that the appellant has been seen by a pain clinic and is left with daily intractable pain. Fatigue is ongoing due to Graves' disease. The stress from dementia of her partner also contributes to exacerbation of her condition.

Mental impairment

PR:

Although the GP has not diagnosed any mental health condition, she reports that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration. The GP comments that chronic pain and the appellant's husband's dementia cause depression and anxiety, which impair concentration and short-term memory.

AR:

The GP reports that, with respect to cognitive and emotional functioning, the appellant's mental impairment has a major impact in the following areas: emotion, attention/concentration, executive, and memory. The GP provides the same comment as in the PR (see above). No impact is reported in the other 10 listed areas.

Ability to perform DLA

AR:

Mobility and physical ability: the GP assessed the appellant as taking significantly longer than typical for all listed activities: walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding. The GP comments: "all affected by scoliosis & degenerative disc disease."

The GP made the following assessments regarding other DLA::

- Personal self care: takes significantly longer than typical for dressing, grooming, bathing, toileting, feeding self, transfers in/out of bed, transfers on/off chair (comment: all affected by fatigue and chronic pain).
- Basic housekeeping: no assessment, with the same comment as above.
- Shopping: takes significantly longer than typical for going to and from stores and carrying purchases home (affected by pain and fatigue); independent for reading prices and labels, making appropriate choices, and paying for purchases.
- Meals: takes significantly longer than typical for food preparation and cooking (affected by pain and fatigue); independent for meal planning and safe storage of food.
- Pay rent and bills: independent in all aspects.
- Medications: independent in all aspects.
- Transportation: independent in all aspects.
- Social functioning: independent in all aspects
- The GP describes the impact of the appellant's impairment on her immediate and extended social networks as good functioning.

Assistance required/provided

PR:

The appellant printed "at present cane, extension/arm to pick up and TENS [transcutaneous electrical nerve stimulation] machine." The GP initialed her comment that her patient filled this in and she agrees.

AR:

The GP reports that help is provided by friends

The GP indicates that the appellant routinely uses a cane, a walker and a TENS machine.

Self Report

The appellant writes that she worked up until March 2010 as an interior designer and real estate agent. Since then, she is unable to walk up stairs. Walking any distance now she needs assistance (cane, walker, etc.) The pain is so bad, all where her accident happened – face, back and right shoulder. She also has migraines. She has a hard time dressing, housecleaning, sitting or standing for any length of time. She is off all "heavy pain meds," listing several she used to take.

As to how her disability affects her life and her ability to take care of herself, the appellant writes that she:

- can't walk without assistance,
- can't climb stairs and do general housework,
- can't sit or stand for long periods,
- can't manage pain right now,
- can't work.

Medical reports

Of the medical reports submitted, most deal with medical findings related to the appellant's back condition, with recommendations for pain relief medications or therapies. While these reports are relevant to the issue of the severity of the appellant's impairment, the following reports contain comments relevant to the DLA and assistance required issues under appeal:

- A health authority outpatient clinic report dated 09 August 2010. This consulting physicians write: "... She is married and relies on her husband for the cooking and cleaning and general well-being of their household." The physicians note that the appellant has been referred to a pain clinic. They also suggest evaluation by occupational therapy as well as physiotherapy.
- A health authority outpatient clinic report dated 25 January 2012. The consulting physician, a specialist in physical medicine and rehabilitation, writes: "... she remains independent with her ADLs [activities of daily living], and can do her personal care slowly but independently. She has lots of difficulty with the IADLs [instrumental activities of daily living]. She is able to keep driving, with her medications."

In her letter attached to her Request for Reconsideration, the appellant provides the following information:

Everything changed in 2011. Her GP ordered an extension apparatus, a cane and a walker and her daily living activity was drastically modified. She can no longer do any housework, shopping, prepare cooked meals and any other day-to-day functions such as banking. She

relies on friends and family members for the most part and her computer for the rest.

It is impossible for her to vacuum or make a bed, stand over a sink to prepare meals or go shopping without the assistance of a motorized shopping cart. She notes that she had already stated in her application that she is unable to do stairs, stand or walk any distances. She walks with the aid of her cane or walker. She relies on family or friends to do housework for her and do the shopping that she cannot do herself. She uses the Internet to do all bill paying, banking or ordering things. She even had to change vehicles so that she could get in and out and to be able to at least drive a vehicle. Her right shoulder and arm are not usable. She can no longer hold anything of any weight – for instance a cup of tea. That is why the extension apparatus was prescribed by her GP in 2011.

The specialist doctors have told her from her first MRI to her latest MRI that she has deteriorated significantly. She likes to do as much as she can for herself and maintain some degree of independence. She lives in constant excruciating pain which in itself is debilitating and limits almost all of her daily functions.

The balance of the letter goes to argument (see Part F, Reasons for panel decision, below).

The appellant attached an MRI report dated 19 April 2013 showing abnormalities in her lumbar region.

In her Notice of Appeal dated 17 July 2013, the appellant writes that she disagrees with the ministry's reconsideration.

At the hearing, the ministry stood by its position at reconsideration.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA. Specifically the ministry determined that, while a severe mental and physical impairment had been established, the information provided did not establish that the appellant's impairment in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions she requires help to perform those activities.

The ministry determined that she met the 2 other criteria in *EAPWDA* section 2(2) set out below.

The following section of the *EAPWDA* applies to this appeal:

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.

The following section of the *EAPWDR* applies to this appeal:

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.

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.

Significant restrictions in the ability to perform DLA.

The position of the ministry is that, based the information provided in the appellant's PWD application and her Request for Reconsideration, the ministry is not satisfied that the appellant's GP has provided enough evidence for the ministry to determine that the appellant's impairments directly and significantly restrict her DLA, either continuously or periodically for extended periods. In the reconsideration decision, the ministry noted that the appellant's GP indicated that she can independently manage most aspects of shopping, meal planning and safe storage of food as well as the paying of rent and bills, medications and transportation. The GP indicated that it takes the appellant significantly longer to complete most aspects of personal care, going to and from stores, carrying purchases home, meal preparation and cooking, but the GP does not describe how much longer it takes the appellant to complete these tasks. The ministry noted that although the GP reports that "all affected by fatigue and chronic pain," she does not indicate that the appellant requires any periodic or continuous assistance from another person with any of her DLA, nor does the GP include a description of the type and amount of assistance required or identify any safety issues. The ministry further notes that the GP indicated that the appellant can independently manage all of her social functioning and that she has good functioning with her immediate and extended social networks, even though the GP has provided evidence that the appellant has a severe mental impairment.

At the hearing, the ministry representative noted that no information had been provided on the use of the extender arm apparatus and in what capacity it was used in performing DLA. The ministry also noted some inconsistencies in the documentation, including the GP's identification in the PR of a significant deficit in cognitive and emotional function in the area of motivation, but no impact reported in the AR for motivation in terms of cognitive and emotional functioning.

The appellant's position, as set out in her Request for Reconsideration, is that she can no longer do any housework, shopping, prepare cooked meals and any other day-to-day functions such as banking. She relies on friends and family members for the most part and on her computer for the rest.

She argues that it is impossible for her to vacuum or make a bed, stand over a sink to prepare meals or go shopping without the assistance of a motorized shopping cart. She is unable to climb stairs, stand or walk any distances. She walks with the aid of a cane or walker. Her right shoulder and arm are not usable and she can no longer hold anything of any weight, such as a cup of tea. This is why the GP prescribed the extension arm apparatus in 2011.

She finds it confusing that the ministry found that her impairment is severe yet, despite her dependency on aids for walking and reaching, the ministry can turn around and find that she did not meet the criterion regarding restrictions in her ability to perform DLA.

Panel findings

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion which has been established in this appeal, and be in the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that other evidence should not be factored in, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied" that this criterion is met.

The panel notes that the appellant's GP has provided information that substantiates a significant restriction in the appellant's ability in one DLA, namely moving about indoors and outdoors. In the PR, the GP reports that the appellant is able to walk less than 1 block and climb no steps unaided, indicating that she routinely uses a cane or walker and that mobility indoors, outdoors, climbing stairs and standing all take significantly longer than typical and are all affected by scoliosis and degenerative disc disease.

The panel notes, however, that the GP has not provided any similar information on the extent to which other DLA requiring physical effort are restricted. The GP has indicated that it takes the appellant significantly longer than typical for all aspects of personal care, going to and from stores and carrying purchases home and food preparation and cooking, commenting that these are affected by pain and fatigue, but as the ministry noted, no description is provided as to how much longer activities take. (The panel notes that where the GP has checked the boxes, the AR form asks "describe how much longer" in the "Takes significantly longer" column heading.) With the limited information provided, it is difficult for the panel to develop a clear picture of what is the GP's opinion on the extent to which the appellant's ability to perform these other DLA requiring physical effort is restricted.

The panel further notes that the information provided by the GP contradicts that of the appellant. The GP has assessed the appellant taking significantly longer than typical for several tasks, and has not made an assessment regarding basic housekeeping except to note "affected by fatigue and chronic pain," while the appellant maintains that she is simply unable to do any of these functions, such as housework, shopping, etc., relying on the help of family and friends. Further, the GP has made no mention of how the extender arm apparatus is used in the performing any DLA, or of help provided by other people. Despite the lack of explanatory detail provided by the GP, the panel does not consider the GP's opinion to be consistent with, or confirmation of, the extent of the restrictions to the ability to perform DLA described by the appellant.

The panel also notes that the GP has reported the appellant independent in all aspects of social functioning, providing no evidence that the appellant is significantly restricted in those DLA applicable to a person with a severe mental impairment, namely making decisions about personal activities, care or finances and relating to, communicating or interacting with others effectively.

The panel has canvassed the medical reports submitted with the appellant's PWD application and her Request for Reconsideration for any other opinions by prescribed professionals regarding her ability to perform DLA. In the health authority outpatient clinic report dated 09 August 2010, the consulting physicians write: "... she is married and relies on her husband for the cooking and cleaning and general well-being of their household." This report is somewhat dated and in the panel's view does

not provide sufficient detail to satisfy the minister of significant restrictions in the appellant's ability to perform DLA, as required under the legislation. In the health authority outpatient clinic report dated 25 January 2012, the consulting physician writes: "... she remains independent with her ADLs, and can do her personal care slowly but independently. She has lots of difficulty with the IADLs. She is able to keep driving, with her medications." This more recent report assesses the appellant independent in her ADLs (i.e. basic mobility and personal self care), with no information provided as to what constitutes "lots of difficulty" in performing her IADLs (e. g. housekeeping and shopping).

Based on the foregoing, the panel finds that the ministry was reasonable in determining that this criterion had not been met.

Help with DLA

The position of the ministry is that, as it had been established that DLA are not significantly restricted, it cannot be determined that significant help is required from other persons. No assistive devices are required.

The appellant's position is simply that she relies on ongoing help from others for such DLA as basic housekeeping and shopping, and she requires the use of a cane or walker for basic mobility and an extender arm for functioning around the home.

Panel findings

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

Conclusion

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