

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision of June 6, 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

With the consent of the parties this hearing was conducted in writing, in accordance with s. 22(3) of the *Employment and Assistance Act*.

The information before the ministry at the time of reconsideration included the following:

- A physician's report (PR) signed by the appellant's physician in January, 2013.
- An assessor's report (AR) completed and signed by a registered psychiatric nurse (the RPN) on February 15, 2013.
- The appellant's hand-written self-report, signed by her on January 26, 2013.
- The appellant's hand-written reconsideration submission.
- A medical imaging report regarding a CT scan of the appellant's lumbar spine on November 19, 2010.
- Results of a blood test conducted in July, 2012.

Admissibility of New Information

The appellant provided a written appeal submission that included additional detail with respect to the physical and mental health conditions referenced in the PR and AR. The ministry stated no position on admissibility of the new information. The panel has admitted this new information 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 is diagnosed by the appellant's physician of 8 years as having chronic degenerative discovertebral disease of the lumbar spine with pain (degenerative disc disease) and chronic hypothyroidism.
- Commenting on the severity of the medical conditions, the physician wrote that the appellant has "pain in lower back with exertion – [illegible], difficulties doing any exertion related activities"
- In terms of functional skills the physician describes the appellant as being able to walk 1 to 2 blocks unaided on a flat surface, to climb 5+ steps unaided, and to lift under 5 pounds.
- In the AR the RPN, who had just met the appellant for the first time, indicated the appellant takes significantly longer than typical walking, climbing stairs, standing, lifting, and carrying/holding. The RPN noted the appellant is not able to lift more than 10 pounds and can stand for up to 10 minutes.
- In her self-report the appellant referred to having two health issues that have caused many problems – degenerative disc disease and hypothyroidism. She also wrote that she has high blood pressure, auto-immune disease (lupes), throat nodules, depression, fatigue, hair loss, weight gain, vision problems, and headaches.

- She also wrote that she cannot be on her feet for more than 2 hours because of severe back pain, sciatic pain, swollen feet, and pain between her shoulders.
- In her written reconsideration and appeal submissions the appellant listed numerous other mental and physical conditions from which she suffers, saying that "When I'm under mental distress I feel it physically" and *vice versa*. She indicated that she is getting improper care from her physician and that after seeing several other physicians, she has now found a new physician who she hopes will be able to help her.
- The CT imaging report referred to mild disc bulges in the lower lumbar spine, a small central disc protrusion at L5-S1, and no visible nerve root compression.
- The blood test showed thyroid function as being out of the normal range.

Mental Impairment

- The physician did not diagnose a mental impairment, and indicated no difficulties with communication and no significant deficits with cognitive and emotional function. The physician also indicated the appellant is not significantly restricted with respect to social functioning and decision-making.
- The RPN listed impairments of depression, suicidal attempt (3 months previously), suicidal ideation, panic attacks, and anxiety.
- The RPN indicated that the appellant's ability to communicate is poor in all respects, being impaired 4 to 5 times per week by episodes of depression and anxiety.
- The RPN noted a number of major and moderate impacts on the appellant's cognitive and emotional functioning, but qualified her comments with the phrase "based on client report".
- The RPN also noted that the appellant requires periodic support with social functioning, indicating that she only functions marginally with respect to her immediate and extended social networks. The RPN qualified her comments with the phrase "According to the client..."
- In her reconsideration submission the appellant wrote that she had been suffering from mental and physical problems for over two years.
- In her appeal submission the appellant wrote that mental disorders, including bipolar disorder and/or psychosis run in the family. She stated that she had told her physician that she'd had a "mental breakdown" and was suicidal. She had asked to "see someone", but her physician has still not addressed it so the appellant subsequently attempted suicide.

Restrictions to DLA

- The physician indicated the appellant is directly and continuously restricted in the 2 DLA of *basic housework* and *daily shopping*, and that she is directly and periodically restricted in the 2 DLA of *mobility inside and outside the home*, and *use of transportation*. He described the restrictions as being "moderate to severe." He indicated no restrictions in the other 6 prescribed DLA.
- The RPN related the appellant's restrictions to DLA to her "mental and physical disorders" and qualified her comments with respect to most DLA with the phrase "based on client report."
- She indicated that the appellant is independent with respect to the 2 DLA of *managing medications* and *mobility inside and outside the home*, though commenting that the appellant takes significantly longer than typical with *mobility*.
- The RPN indicated the appellant requires periodic assistance with all or most aspects of the 5 DLA of *personal care* (70% of the time), *daily shopping* (80% of the time), *managing finances* (paying rent and bills, 70% of the time), *use of transportation* (70% of the time), and *social*

functioning.

- The RPN indicated the appellant requires continuous assistance with all or most aspects of the 2 DLA *basic housekeeping* (children help) and *meal preparation* (done by the children).
- In her self-report the appellant wrote that overdoing housework causes her severe pain.

Help

- In response to the question in the PR asking what assistance the appellant requires with DLA, the physician wrote "help with house chores". He indicated she requires no prostheses or aids for her impairment.
- In the AR the RPN indicated that help required for DLA is provided by "family", and that the appellant routinely uses an assistive device (cane). The RPN reported that the appellant does not have an assistance animal.
- In her self-report the appellant said that her pain is sometimes so severe when she gets up in the morning that she crawls to the bathroom where her daughters have to help her. She indicated she either can't do housework or does a minimal amount.

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 is that her back pain and thyroid condition, together with a number of other physical conditions she has described, constitute a severe physical impairment. She says that the reconsideration decision is based on a lack of medical information from her physician.

The ministry's position, as expressed in its reconsideration decision, is that the appellant's functional skill limitations are not significantly restricted and are performed independently; accordingly the ministry is not satisfied that the information provided is evidence of a severe physical impairment.

Panel Decision

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 PR form describes this approach well when it defines the word "impairment" 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 appellant's physician – a medical practitioner – has diagnosed the appellant with two impairments – degenerative disc disease and hypothyroidism. His descriptions of the appellant's functional skills range from the low to the high ends of the spectrum. The appellant can climb 5+ stairs, but can only lift up to 5 or 10 (according to the appellant during her interview with the RPN) pounds. The RPN confirms that the appellant performs these functional skills independently, though taking longer than typical to do so. No information has been provided as to how much longer the appellant takes with these functions.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the limitations resulting from her impairment do not appear to have translated into significant restrictions on the appellant's ability to manage her DLA independently. Accordingly, the panel has concluded that the ministry reasonably determined that there is insufficient evidence to establish that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant's position is that she suffers from several mental conditions that constitute a severe mental impairment.

The ministry's position is that without a diagnosis of a mental impairment from a medical practitioner, the ministry is not satisfied that the information provided is evidence of a severe mental impairment.

Panel Decision

The legislation requires that a severe impairment must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. The appellant's general practitioner has provided no diagnosis of a mental health condition. The physician has not indicated that the appellant has any significant difficulty with decision-making or social functioning, and he has identified no significant deficits with cognitive and emotional functioning.

For these reasons, the panel concludes that the ministry reasonably determined that the information provided falls short of establishing a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that she is significantly restricted, either continuously or periodically for extended periods, from managing virtually all her DLA.

The ministry's position is that the evidence from the prescribed professionals does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

The appellant's physician has known the appellant for 8 years, while the RPN met the appellant for the first time to complete the AR. The AR has qualified much of her commentary in the AR as relying substantively on information provided by the appellant, rather than being the RPN's assessment based on her own observations, familiarity with the appellant, or review of independent medical reports or evaluations. The RPN has also indicated that many, if not all, of the restrictions she has described regarding DLA are based in part on mental impairments that have not been diagnosed by a medical practitioner. Accordingly, where there are inconsistencies between the PR and the AR, the panel has generally tended to give more weight to the PR. The appellant, herself, has provided little information in her self-report and written submissions regarding restrictions in her ability to perform DLA.

There are 4 DLA on which the evidence is reasonably consistent: *basic housework, daily shopping, use of transportation* and *managing medications*. The PR, AR and self-report indicate the appellant is more-or-less continuously restricted from doing *basic housework*, though there is little or no detail with respect to why or how the appellant's impairment restricts her from doing at least the lighter aspects of housework independently. Similarly, the PR and AR indicate the appellant is continuously (or periodically 80% of the time) restricted in *daily shopping*. Again, there is no detail with respect to how the appellant's diagnosed impairments restrict her from aspects of *daily shopping* such as reading prices and labels, making appropriate choices, or paying for purchases. Both the PR and the AR indicate the appellant is periodically restricted from using transportation, but the AR describes those restrictions as substantially arising from undiagnosed mental conditions. Both the PR and AR indicate the appellant is independent with respect to *managing medications*.

With respect to mobility outside the home, the PR indicates the appellant is periodically restricted, but provides no information about the frequency or duration of those periods. The AR, on the other hand, indicates the appellant is independently mobile but that the appellant takes significantly longer than typical to get around.

Regarding the remaining 5 DLA, the evidence in the PR indicates the appellant is independent with respect to *personal self care, meal preparation, management of finances, social functioning, and decision making*.

The evidence indicates that the appellant manages most of her DLA independently. Because there is no explanation or detail provided as to how the appellant's diagnosed impairments restrict her from managing *meal preparation, daily shopping, use of transportation* and at least the lighter aspects of *basic housework*, particularly in view of the appellant's functional skills which indicate she is able to walk unaided for up to two blocks and to lift up to 10 pounds, the panel finds that the ministry

reasonably determined that the evidence does not establish that the appellant's impairments significantly restrict her ability to manage her DLA independently, either continuously or periodically for extended periods.

Help with DLA

The appellant has not expressly advanced an argument with respect to help with DLA, but implicitly her position is that she satisfies this legislative criterion.

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. The ministry acknowledges that the appellant reports she uses a cane.

Panel Decision

It appears that the appellant receives assistance from her children with some aspects of many DLA. The evidence, however, simply doesn't show that the assistance the appellant receives from her children constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA. The appellant's use of a cane for walking is not sufficient to fulfill this legislative criterion.

The appellant does not use an assistance animal.

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's medical conditions 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 a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.

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