

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the Ministry) dated April 15, 2013, which determined that the appellant did not meet two of the 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, that the appellant's impairment was likely to continue for at least two or more years, and that the appellant has a severe mental impairment. However, the Ministry was not satisfied that there was sufficient evidence from the appellant's prescribed professionals that her impairment directly and significantly restricted her daily living activities (DLA) either continuously or periodically for extended periods. The Ministry also held that, as it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

The panel notes that the appellant does not challenge the Ministry's determination that she does not suffer from a severe physical impairment.

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 the time of the reconsideration decision consisted of:

- The appellant's Request for Reconsideration dated March 13, 2013;
- A 2-page supplemental medical opinion questionnaire prepared by the appellant's advocate and completed by the appellant's social worker (who also completed the Assessor Report portion of the appellant's PWD application) dated April 11, 2013;
- A letter from the Ministry to the appellant dated February 20, 2013 advising that her request for PWD designation was denied, attaching the Ministry's PWD designation decision summary of the same date;
- The appellant's PWD application comprised of the following sections and documents:
 - A Self-report (SR) signed by the appellant on the SR's first page on April 26, 2012, and on the last page of the SR on October 30, 2012 (it is apparent that certain portions of the SR were crossed out and the additional information noted below was included);
 - A one-page typed letter from the appellant not dated, answering SR questions 1 "Please describe your disability" and 2 "How does your disability affect your life and your ability to take care of yourself";
 - A one-page typed letter from a friend of the appellant, not dated, saying that he has known the appellant since 2006 and describing the appellant's thyroid condition and behaviour;
 - A 4-page computer printout of the appellant's medical records prepared by the appellant's health care providers on October 31, 2011, November 4, 2011 and November 11, 2011 describing the appellant's hospitalization and treatment for psychosis due to hypothyroidism (printed October 30, 2012);
 - A 1-page letter to the Ministry from one of the appellant's physicians dated October 30, 2012;
 - A Physician Report (PR) dated June 14, 2012 completed by a general practitioner at the appellant's health care provider (a health centre) who indicated that the physician had met the appellant once at the time of completing the PR for the PWD application; and
 - An Assessor Report (AR) dated June 5, 2012 completed by the appellant's social worker at the appellant's health care provider (health centre) who indicated on the AR that she has seen the appellant two to ten times in the past year.

At the hearing, the appellant told the panel that she has hypothyroidism and that this condition has caused her to suffer from psychosis. The appellant is on medication to treat her hypothyroidism (and the resulting psychosis) and told the panel that her physicians are changing her medications by reducing and adjusting the dosages, but that she will be on medication for the rest of her life. She said that the adjustments to her medications have been ongoing for the past 3-6 months, and every 6-12 weeks she has her medication adjusted with blood tests to check her thyroid levels, and that this process has been very difficult for her. At present, she feels she has bad days 5 out of 7 days per week.

DLA

In the PR, the general practitioner notes that the appellant is very sensitive to her thyroid dysfunction and "becomes acutely psychotic if thyroid not perfectly controlled." In the PR, the physician indicated that the DLAs management of medications and social functioning are restricted periodically "whenever thyroid not controlled", commenting that "severe psychosis does not allow for any normal social functioning."

In the AR, the appellant's social worker reports that the appellant requires periodic assistance from other persons to manage walking outdoors and carrying and holding and that she takes significantly longer than typical to perform these activities, as well as climbing stairs, with the comment "sometimes experiences extreme dizziness/vertigo if + when thyroid not well controlled" and "needs assistance on bad days". In this section of the AR, the social worker also wrote "issues with fatigue and lethargy still + problems with sleep." In the section of the AR listing the DLA and the assistance required related to the appellant's impairment that directly restricts her ability to manage the DLA, the social worker indicated that the appellant requires periodic assistance and takes significantly longer than typical to do the following: dressing, grooming, bathing, toileting,

feeding self, regulating diet ("reduced appetite"), transfers (in/out of bed), transfers (on/off of chair), laundry, basic housekeeping, going to and from stores, and carrying purchases home. The social worker wrote "some days when can't even get out of bed because of extreme fatigue, then requires assistance from others – presently living with cousin who helps [the appellant] with activities of DL on her bad days." The social worker also wrote "on days when low energy + lots of fatigue, [the appellant] needs assistance with all of above daily living activities." Further in the AR, the social worker indicated that the appellant requires periodic assistance from other people and takes significantly longer than typical with the following tasks: meal planning, food preparation, and cooking, filling/refilling medications, taking medications as directed, safe handling and storage of medications, getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation arrangements. In the AR, the social worker indicated that the appellant was independent in all of the following tasks: reading prices and labels, making appropriate choices and paying for purchases, safe storage of food, banking, budgeting, and paying rent and bills, appropriate social decisions, able to develop and maintain relationships, interacting appropriately with others, and able to deal appropriately with unexpected demands. However, in the AR, the social worker also commented that the appellant's mental impairment causes her to function marginally with her immediate and extended social networks "during bad periods or days."

The social worker completed a supplemental medical opinion questionnaire on April 11, 2013 (a list of questions prepared by the appellant's advocate with room for the social worker's handwritten notes). The social worker indicated that the appellant's ability to perform the following DLA was severely restricted by her impairment: prepare own meals, shop for person needs, use public or personal transportation, perform housework to maintain acceptable sanitary conditions. For each checked DLA, the social worker wrote, "on a bad day, yes restricted" – including those DLA listed she had not checked (move about indoors and outdoors, manage personal medication, make decisions about personal activities, care or finances, and relate to communicate or interact with others). In response to the question, "If the daily living activities listed on the previous page are considered restricted, is [the appellant's] ability to perform those DLAs restricted continuously or periodically for extended periods?" the social worker circled "periodically restricted" and wrote, "on a bad day – when condition not controlled is severely restricted." In her response to the question asking for comment "on the frequency and duration of these restrictions", the social worker wrote "as above."

At the hearing, the appellant told the panel that she has difficulty sleeping and often doesn't sleep for more than 2-3 hours – she was prescribed medication to help her sleep, but this was discontinued as it was problematic with her thyroid medication. She said that she is so tired she can't think properly. The appellant told the panel that it is on her bad days when she is most impaired. She described a bad day as one on which she cannot get out of bed and cannot take care of herself - she said she can't get dressed, bathe or feed herself and will spend the whole day in bed. Her evidence was consistent with the information in her SR. In response to a question from the panel about the frequency of her bad days, the appellant estimated that at present, 5 out of 7 days in a week are bad days and agreed that the bad days are related to the process of changing the dosages of her medication.

Need for Help

In the PR, the physician did not write anything in response to the question "what assistance does your patient need with Daily Living Activities." In the AR, the social worker notes that the appellant receives assistance with DLA from family, friends and community service agencies. She also wrote in the AR that the appellant accesses medical services through the health clinic's primary care clinic nurses and physicians, and that the appellant also has access to outreach, social work and counseling services. In the supplemental medical opinion form, the social worker circled "yes" that the appellant requires help to perform her DLA, writing, "on a bad day when these are restricted she would require assistance with all activities." The social worker wrote that the appellant's need for help "varies from week to week + month to month", but did not circle the options for how many times per week help is required.

PART F – Reasons for Panel Decision

The issue on the 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's DLA's 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, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA.

The criteria for being designated as a PWD (person with disabilities) 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(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

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.

Restrictions in the ability to perform DLA

The appellant's position is that her severe mental impairment directly and significantly restricts her ability to perform DLA periodically for an extended period – when she has bad days - and that she needs assistance on her bad days to help with household chores, cooking and reminding her to eat, and bathe and look after herself. The appellant's advocate pointed out that the appellant's social worker had repeatedly indicated on the AR and on the supplemental medical opinion questionnaire that on the appellant's bad days, the appellant's ability to perform many DLA is significantly restricted.

The Ministry's position is that the evidence of the appellant's prescribed professionals does not indicate that the appellant requires continuous assistance with any DLA. The Ministry notes that while the social worker – a prescribed professional – in the AR reports that the appellant needs periodic assistance and takes significantly longer than typical with several DLAs, there is no information provided by the appellant's social worker on how often the appellant's bad days occur or the duration of assistance needed. The Ministry's position is that there is not enough evidence to establish that the appellant's severe mental impairment significantly restricts her ability to manage DLAs, continuously or periodically for extended periods.

Panel Decision

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. There is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, an analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably satisfy the Ministry that they have been met. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the Ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

In the PR, there is no information about the duration and/or frequency of the restriction on the appellant's DLA caused by her impairment. In the AR, the social worker reports that the appellant requires periodic assistance for many tasks within the 10 prescribed DLAs - walking outdoors, carrying and holding, dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed, and on/off chair), laundry, basic housekeeping, going to and from stores, carrying purchases home, meal planning, food preparation, cooking, filling/refilling prescriptions, taking medications as directed, safe handling and storage of medications, getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation. In the

comments section, the social worker wrote, "some days when can't even get out of bed because of extreme fatigue, then requires assistance from others – presently living with cousin who helps [the appellant] with activities of DL on her bad days" and "as above needs assistance on days/period of time when she is feeling tired due to thyroid issues – requires assistance from parents shopping." The social worker also wrote "on days when low energy + lots of fatigue [the appellant] needs assistance with all of the above daily living activities." Similar evidence is provided by the social worker in the supplemental medical opinion questionnaire, that is, that it is on the appellant's "bad days when these are restricted she would require assistance with all activities." However, the panel notes that the social worker did not indicate how many times per week the appellant requires help in response to the question – stating that it "varies from week to week + month to month."

The only evidence before the panel is the appellant's response that, at present, she feels she has bad days 5 out of 7 days per week. The panel accepts the appellant's evidence that on her "bad days" she requires assistance performing the DLA indicated above. However, the panel finds that the evidence provided by the appellant's prescribed professionals is not sufficient to establish that there is a direct and significant restriction of the appellant's ability to perform DLA either continuously or periodically for extended periods. In addition, the panel notes that the legislation requires the opinion of a prescribed professional with respect to restrictions to the appellant's DLA and in this case, neither the general practitioner nor the social worker has provided information about the extent and duration of the appellant's bad days – only that on her bad days, the appellant requires assistance. There is no evidence whether the bad days are expected to continue indefinitely – for example, for as long as the appellant is on her medication – or whether the bad days will cease once the medication is at a certain dosage. The panel also notes the appellant's evidence that her bad days are related to the changes in the dosages of her medication, which is supported by the medical records indicating that her psychosis arises when her hypothyroidism is not properly controlled by medication.

Therefore, the panel finds that the Ministry's decision that the noted restrictions in the appellant's ability to perform DLA did not constitute a direct and significant restriction of the appellant's ability to perform DLA either continuously or periodically for extended periods in the opinion of a prescribed professional, thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA, was reasonable.

Help with DLA

The appellant states that on her bad days, she needs assistance with all her DLA. This same evidence is provided by the social worker in the supplemental medical opinion form – that on bad days, the appellant requires assistance with DLAs. The Ministry's position is that as it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is required from other persons, and no assistive devices are required.

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 2(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.

While the panel finds that the social worker's evidence is that the appellant requires assistance with DLA on her bad days, the panel also finds that the Ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA either continuously or periodically for extended periods have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions.

APPEAL #

Conclusion

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