

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the “Ministry”) May 2, 2013 reconsideration decision in which the Ministry determined that the Appellant was not eligible for Persons with Disabilities (“PWD”) designation because she did not meet all the requirements for PWD designation in section 2(2) of the Employment and Assistance for Persons with Disabilities Act. The Ministry was not satisfied that the Appellant has a severe mental or physical impairment that 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 was satisfied that the Appellant has reached 18 years of age and in the opinion of a medical practitioner her impairment is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (“EAPWDA”) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) Section 2.

PART E – Summary of Facts

For its reconsideration decision the Ministry had the following evidence:

1. Appellant's PWD application consisting of:

- Appellant's self-report dated October 11, 2012.
- Physician's Report ("PR") completed on December 27, 2012 by a doctor who indicated he had seen the Appellant 11 or more times in the 12 months preceding the report.
- Assessor's Report ("AR") completed on December 17, 2012 by the same doctor who also indicated that he had known the Appellant for less than 1 year.

2. Medical reports attached to the Appellant's PWD application described below under Physical Impairment.

3. Appellant's April 16, 2013 request for reconsideration with a written submission from her advocate.

Diagnoses

In the PR, the Appellant's doctor diagnosed her with diabetes with renal imbalance (onset June 2002), osteoarthritis (onset July 1995), asthma/COPD (onset 2000), depression (onset 2011), cleft palate and deafness (birth), and renal vascular disease.

Physical Impairment

In her self-report the Appellant described her disability as follows:

- Has both arthritis and osteoporosis; was told by an arthritis specialist that her bones look to be rheumatoid arthritis.
- Her fingers are tightening up and when she sits too long or drives too far, her bones just seize up.
- She needs help to pull her legs out slowly trying to move or just stand, same with her fingers; her daughter has to get warm cloths to help ease her pain; had pain shots that helped her.
- Walking is fun, but she stiffens up; she will drink over a litre of water; she knows she can't get far and needs to catch a bus or a ride; some days it is hard getting into the bus; when walking or standing too long her thighs tingle and start to feel numb; her toes get tingly and numb; her heels start feeling pain like sharp needles jabbing at her heels and ankles.
- Her hands, elbows, shoulders – all have their own pain; she can't hold things too long because of the weight or just because she is unable to hold things.
- Left ear is about 89% deaf and right ear is about 68% deaf.
- She is diabetic; has pills to take daily; has thyroid, asthma, kidney disorders, diabetes, ulcers.

The medical reports have the following information about the Appellant:

- April 26-2012 letter from integrated health nurse– current exercise routine is to walk daily for about 45 minutes; diet is healthy, would like to do the aquatic program, stress greatly impacting her life and contributing to her high blood pressure.
- June 6, 2012 Ophthalmology report/assessment for cataract surgery; right eye vision improved, no evidence of diabetic retinopathy and fundi appear to be completely healthy; visual acuity in right eye reduced by cataract, but is much further reduced than expected; expected amblyopia in right eye; left eye to be operated on after the right.
- June 26, 2012 Oximetry report – repetitive cyclical desaturations consistent with sleep apnea, cyclical desaturations possibly due to sleep staging or body position; conclusion – sleep apnea, CPAP trial warranted; respiratory referral for CPAP/Humidifier system for lifelong treatment of obstructive sleep apnea.

- August 3, 2012 outpatient clinic note – has chronic kidney disease associated with diagnosis of diabetes mellitus, referred to clinic for early diabetic nephropathy; feels well with no issues; referral to kidney clinic; included list of 15 medications.
- July 16, 2012 eye physician report – has visually significant cataracts in both eyes, worse on the right; shows no evidence of diabetic retinopathy; understands glycemic control is important to prevent diabetic eye disease; arranging for cataract surgery.
- July 18, 2011 medical letter – diagnosis of vasomotor rhinitis – suggested saline rinse and prescription for nasal spray; dysphagia due to GERD with cricopharyngeus spasm – prescription and information about GERD; intermittent otterrhea – ear drops and keep ear dry; may have thrush on hypopharynx and larynx – history of using cortisone inhalers; may benefit from another medication; graft to left eardrum not recommended.
- August 18, 2011 clinical summary listing medications, very hypertensive that day, did not start prescription for condition; feeling tired; diabetes.

In the PR, the doctor reported the following regarding the Appellant's impairment:

- Regarding the severity of the Appellant's conditions - "severe pain – chronic narcotic use. Diabetes with renal imbalance. Lifelong hearing problems".
- Has been prescribed medication that interferes with her ability to perform daily living activities – "narcotics – sleepiness" and the anticipated duration of the medications is "lifelong"; her impairment is likely to continue "lifelong".
- Requires a cane for her impairment.
- Can walk 2-4 blocks unaided on a flat surface; climb 2-5 steps unaided; lift 15-35 lbs; and ability to remain seated is unknown.
- Has difficulties with communication – causes are cognitive, motor, sensory and other – cleft palate as a child.

In the AR, the doctor reported that the Appellant:

- Requires periodic assistance with walking indoors and outdoors, climbing stairs, standing, lifting, and with carrying and holding – "cane continuously".

Mental Impairment

In her self-report the Appellant stated that:

- She has panic attacks and fetal alcohol syndrome.

In the PR, the Appellant's doctor reported:

- Significant deficits in the areas of consciousness, executive, language, memory, perceptual psychomotor, psychotic symptoms, emotional disturbance, motivation, impulse control, motor activity and attention or sustained concentration – "patient thinks she may have FASD [fetal alcohol spectrum disorder] this is possible".

In the AR, the Appellant's doctor reported:

- Major impact to other neuropsychological problems and other emotional or mental problems.
- Moderate impact to emotion, attention/concentration, executive, memory, motivation and motor activity.
- Minimal impact to bodily functions, consciousness, impulse control, insight and judgement and language.

- No impact to psychotic symptoms.
- And added "?FASD[fetal alcohol spectrum disorder]. Depression".

Daily Living Activities

The Appellant reported that:

- She doesn't hear the fire alarm right away so she would have to be woken up.
- She can't always use her hearing aid.
- She is unable to get in and out of the tub and she needs help to open can lids.

In the AR, the doctor reported the following about the Appellant's functioning abilities:

- Ability to communicate is satisfactory in speaking and writing and poor in reading and hearing – "cleft palate repair, poor hearing with hearing aids".
- Requires periodic assistance with walking indoors and outdoors, climbing stairs, standing, lifting, and with carrying and holding – "cane continuously".
- Personal care - independent with dressing, grooming, toileting, feeding self/regulating diet; needs periodic assistance with bathing – "help in bath" and with transfers in/out of bed and chair – "occasional help".
- Needs continuous assistance with laundry and basic housekeeping – "daughter does this"
- Is independent making appropriate shopping choices and paying for purchases; needs periodic assistance going to and from stores, reading prices and labels, and carrying purchases home – "needs help".
- Is independent with meal planning and safe storage of food; needs periodic assistance with food preparation and cooking – "help with pots".
- Is independent with all tasks of paying rent and bills and of medications.
- Is independent getting in and out of a vehicle and using transit schedules/arranging transportation; needs periodic assistance with using public transit – "help up into bus".
- In social functioning is independent making appropriate social decisions, developing and maintaining relationships, and interacting appropriately with others; needs periodic assistance with dealing appropriately with unexpected demands and with securing assistance from others – "anxious".
- Has good functioning with her immediate and extended social network – "does not get out much – transport".

Help with Daily Living Activities

In her self-report the Appellant stated that:

- She always needs one of her children with her when shopping or going for an appointment.
- Her children have to help her if she either cramps up or her hearing aid isn't working; she can't always use her hearing aids due to major sweating.
- She uses a cane and her daughter may help her bathe.

In the AR, the doctor reported that the Appellant:

- Has assistance from family and friends
- Uses a cane and hearing aids, but has no assistance animal.

At the hearing, the Appellant described the help she gets from her children, including her daughter who makes sure that she's never alone. The Appellant said she feels like her daughter has been

more of a mother to her than daughter. The Appellant also said that one time she got stuck in the bath and had to wait until her daughter came home from school to help her. She also described difficulties with cooking; for example, when she tried to drain hot water from pots, she burned herself. The Appellant stated that one son does the cooking with his girlfriend, another son does the shopping and the children do the laundry. She said that without her children she would be unable to survive.

The Appellant described how she gets dizzy and can't lift her feet, so she uses a cane all of the time. She cannot do dishes because her back gives out, bending for things is hard and she drops the laundry because she can't carry the weight. She has a hard time getting out of bed and out of chairs if she sits too long. The Appellant said that if she wasn't on pain killers she couldn't move. The Appellant also said she used to be very active, but she has been going downhill the last few years. She stated that she feels so useless she often cries in her room. The Appellant confirmed that she had cataract surgery on both eyes and she still takes 11 medications each morning. She may also need dialysis, depending on further tests.

The Panel admitted the Appellant's oral evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further details relating to the Appellant's diagnosed conditions and impairments, and as being in support of information that was before the Ministry on reconsideration. The Appellant's advocate submitted oral and written argument.

At the hearing, the Ministry reviewed and relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant was not eligible for PWD designation because she did not meet all of the requirements in section 2(2) of the EAPWDA, and specifically, that the Appellant does not have a severe mental or physical impairment that 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 eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:
 2 (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 "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

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.

Severe Physical Impairment

The Appellant's position is that the Ministry failed to consider all of the information with respect to all of the criteria for PWD designation. The Appellant's advocate argued that the evidence must be reviewed in its entirety and full weight must be given to all the information provided. In this case, there is sufficient information in the PWD application to support designation.

With respect to a severe physical impairment, the Appellant submitted that the doctor diagnosed her with several health conditions impacting her ability to function physically. He also reported that she needs a cane "continuously" and she needs help with daily living activities. She must also

continuously use hearing aids and even then, her hearing is still impaired much of the time. The Appellant also provided information about how she is restricted in walking, bending, getting in and out of the bath, a bed and chairs, and with lifting things. She described limitations from arthritis and osteoporosis, including fingers tightening, difficulties using her legs and pain in her hands, elbows, shoulders and legs. She testified that without medication she could not survive.

The Ministry's position is that based on the diagnoses and the functional skill limitations reported by the doctor the Appellant's functional abilities are not significantly restricted and are more in keeping with a moderate degree of impairment. The Ministry also noted the nursing assessment performed on April 26, 2012, which stated that the Appellant's exercise routine was to walk daily for about 45 minutes and that she planned to start an aquatic exercise program. Based on the information provided, the Ministry was not satisfied that there is evidence of a severe physical impairment.

The Panel's Findings

The diagnosis of a medical condition is not in and of itself evidence of the severity of impairment. The EAPWDA provides that the determination of a severe impairment is based on whether the Minister, taking into account all of the evidence including that of the Appellant, is satisfied that the Appellant has a severe impairment. That legislation is also clear that the fundamental basis for that assessment is the evidence from a prescribed professional regarding the nature of the impairment and its impact on the Appellant's daily functioning.

The Appellant provided information about her medical conditions and functional limitations, a number of medical letters and her doctor's reports. The Appellant described having to use a cane to walk, her difficulties getting in and out of the bath, her bed and chairs, and difficulties lifting things. She relies on her children for help with certain tasks, such as cooking, laundry and shopping. In the PR, the doctor diagnosed a number of medical conditions, noted that the Appellant has severe pain and chronic narcotic use, and has been prescribed medication that interferes with her ability to perform daily living activities. The doctor reported that the Appellant uses a cane continuously for mobility; however, he also indicated that she can walk 2-4 blocks unaided on a flat surface, climb 2-5 steps unaided, lift 15-35 lbs. and her ability to remain seated is unknown. The Panel also notes that although there is evidence of restrictions to the Appellant's lifting abilities and transfers, the doctor reported that the Appellant is able to physically function in her daily living activities with continuous help needed only for basic housekeeping and unspecified periodic assistance with other tasks such as bathing, carrying purchases home and cooking. Therefore, when all of the evidence is considered, the Panel finds that the Ministry reasonably determined that the evidence supports a moderate degree of physical impairment and that there was not sufficient evidence of a severe physical impairment.

Severe Mental Impairment

The Appellant submitted that the Ministry acknowledged that there are eleven areas of cognitive and emotional functioning with significant deficits, reported by the doctor. In the AR, the doctor also reported major, minor and moderate impacts to areas of cognitive and emotional functioning. The Appellant argued that the Ministry must consider the overall impacts reported by the doctor and when considered together these impacts demonstrate a severe mental impairment.

The Ministry's position is that although the Appellant's doctor reported a history of depression, there was little narrative to describe the severity, whether medication is required and the outcome of any

treatment. The Ministry also considered the reported deficits to cognitive and emotional functioning, as well as the Appellant's communication difficulties, but it determined that the narrative from the doctor did not support a severe mental health condition that significantly limits the Appellant's ability to function. Also, as most daily impacts are not major, the Ministry was not satisfied that the information provided is evidence of a severe mental impairment.

The Panel's Findings

The Appellant provided little information about her mental impairment other than depression and crying because of her inability to do a number of things. The Panel notes that the doctor did provide a diagnosis of depression and reported significant deficits with cognitive and emotional functioning in 11 areas. He also reported major impacts in 2 areas of cognitive and emotional functioning, moderate impacts in 6 areas and minor impacts in 5 areas. However, his only comment regarding these impacts was "?FASD. Depression". The doctor also provided no information about how depression or any of the noted cognitive and emotional functioning deficits or impacts affect the Appellant's ability to function on a daily basis, particularly with those activities, which may require some level of mental functioning. In fact, the doctor reported that the Appellant independently manages activities such as meal planning and safe storage of food, paying rent and bills, medications, making appropriate shopping choices, and 3 areas of social functioning. The Appellant also has good functioning with her immediate and extended social networks. Therefore, when all of the evidence is considered, the Panel finds that the Ministry reasonably determined that the evidence does not establish that the Appellant has a severe mental impairment.

Restrictions to Daily Living Activities

The Appellant submitted that, based on the information she provided and the doctor's reports, she meets this requirement. The doctor reported that she needs continuous help with all tasks for basic housekeeping and periodic assistance with several other daily living activities. The frequency and duration of the periodic assistance she needs can be determined by the information in the PWD application, including her reports and the information from the doctor. The Appellant's advocate also pointed out that the doctor reported that the Appellant requires a cane continuously for mobility, a clear indication that she requires assistive devices.

The Ministry considered the doctor's reports and determined that many activities are reported as being performed independently, with periodic help needed for some activities. The Ministry also noted that there is no indication of the frequency or duration of periodic assistance needed from another person. The Ministry's position is that, as many daily living activities are performed independently or require little help from others mainly with tasks requiring longer distances and heavier loads, the information from the prescribed professional does not establish that the Appellant's impairment significantly restricts daily living activities either continuously or periodically for extended periods.

The Panel's Findings

Section 2(2)(b) of the EAPWDA requires the opinion of a prescribed professional to confirm that the Appellant's severe impairment directly and significantly restricts her daily living activities. In other words, the restrictions to those activities must be directly caused by the severe impairment. In this case, the doctor reported that the Appellant needs a cane continuously for areas of mobility and physical ability and she needs continuous help with basic housekeeping tasks. However, the doctor also indicated that the Appellant independently manages many other areas of daily living activities; for example, dressing, grooming, toileting, making appropriate shopping choices, paying for

purchases, meal planning, safe storage of food, all areas of paying rent/bills and medications, getting in and out of a vehicle, and areas of social functioning. In addition, although the doctor reported that the Appellant needs periodic assistance with aspects of personal care, shopping, meals and social functioning, he provided no information about the frequency or extent of the help needed, except for occasional help with transfers in/out of chairs. Therefore, the Panel finds that based on the information from the Appellant's doctor, the prescribed professional, the Ministry reasonably determined that the Appellant did not satisfy the requirements in section 2(2)(b)(i) of the EAPWDA.

Help with Daily Living Activities

The Appellant's advocate referred to the doctor's report that the Appellant requires a cane continuously for mobility and must continuously use hearing aids. The advocate submitted that this is a clear indication that she requires assistive devices. Also, the advocate argued that the Appellant needs the help or supervision of another person either continuously or for extended periods of time for many daily living activities. Therefore, the evidence shows that two of the EAPWDA definitions of help with daily living activities have been satisfied.

The Ministry's position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot be determined that significant help is required from other persons. The Ministry did note that a cane and hearing aids are used continuously.

The Panel's Findings

Section 2(2)(b)(ii) of the EAPWDA also requires the opinion of a prescribed professional to confirm that because of restrictions to daily living activities the Appellant requires help as defined in that legislation. Section 2(3)(b) of the EAPWDA defines "help" to perform daily living activities as follows: "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 Panel finds that the doctor reported that the Appellant uses assistive devices, a cane and hearing aids, the cane for the mobility and physical ability aspects listed in the AR. The doctor also reported that the Appellant needs help with certain daily living tasks; that is, continuous help but only with basic housekeeping and periodic help but only with certain other tasks requiring physical abilities and two social functioning elements. The doctor provided little details about the periodic help required except for comments such as "needs help" or "occasional help". The doctor also reported that the Appellant independently manages 19 of the daily living tasks listed in the AR. Therefore, based on the evidence from the doctor, the Panel finds that the Ministry reasonably determined that the extent of the needed help as reported by the prescribed professional is not significant and because direct and significant restrictions in the Appellant's ability to perform daily living activities have not been established, it cannot be determined that the Appellant needs help to perform those activities.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the Panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation, was reasonably supported by the evidence. Therefore, the Panel confirms that decision.