

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (“the ministry”) dated November 19, 2012 which held that the appellant did not meet all of the 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 was not satisfied that a medical practitioner has confirmed that:

- the appellant has a severe physical or mental impairment that is likely to continue for at least 2 years;
- 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

Procedural Issue

The appellant was not in attendance at the hearing which had been re-scheduled following the granting of an adjournment at the appellant's request. After confirming that the appellant was notified of the re-scheduled hearing, the hearing proceeded in the appellant's absence in accordance with section 86(b) of the Employment and Assistance Regulation.

Evidence

The information before the ministry at reconsideration included:

- A PWD application comprised of: a Self-report (SR) signed by the appellant on August 16, 2012; a Physician Report (PR), which was neither dated nor signed but is accepted as having been completed by the appellant's general practitioner of 31 years; and, an Assessor Report (AR), signed and dated August 16, 2012 by the same general practitioner; and,
- The appellant's Request for Reconsideration describing the duration of her time off work and income sources during that period.

Admissibility

On appeal, the appellant submitted additional written testimony including an April 30, 2013 email letter from the appellant and multiple documents dating from April 2011 through January 2012, most of which were completed by the appellant's general practitioner and relate to workplace absences. The additional documents provide further information respecting the medical conditions diagnosed in the PWD application. On this basis, the panel finds the documents to be in support of the information and records before the ministry at reconsideration and admits them in accordance with section 22(4) of the Employment and Assistance Act.

At the hearing, the ministry relied on its reconsideration decision but did not provide additional evidence.

Diagnoses and Duration

The appellant has been diagnosed by her general practitioner with osteoarthritis (OA) of the right knee and depression both with an onset date of April 2010. The general practitioner responded "no" when asked "Is the impairment likely to continue for two years or more from today?" and added "hopefully not."

Physical Impairment

- In the PR, the general practitioner reports that as a result of right knee OA the appellant will undergo joint (knee) replacement surgery November 27, 2012.
- As of the date the PR was completed, the appellant could walk less than 1 block and climb 2 to 5 steps unaided, do no lifting, and remain seated for less than 1 hour.
- In the AR, the appellant is reported as independent with walking indoors and outdoors, climbing stairs, and standing. All of these activities are reported to take significantly longer than typical and require the use of an unspecified assistive device. Continuous assistance from another person is required for lifting and carrying.

- In the SR, the appellant reports that a 3-4 month recovery period will follow the upcoming surgery.
- In the supplemental documents, the physician identifies right knee symptoms including pain, instability and swelling and reports that the appellant is unable to return to work until post surgery.
- In her April 2013 letter, the appellant states that severe knee pain together with severe major depressive disorder caused her to be off work for 2 years and made it very difficult to perform daily activities with increasing difficulty until she had recovered from the surgery. Following surgery on November 27, 2012, she began a return-to-work program in late March.

Mental Impairment

- In the PR, the appellant's depression is described as severe clinical depression related to her physical impairment.
- In the PR, the general practitioner reports no difficulties with communication which is confirmed in the AR where good communication is noted.
- In the PR, significant deficits with cognitive and emotional function are reported for 4 of 11 listed aspects – memory, emotional disturbance, motivation, and attention or sustained concentration. All 4 of these aspects are identified in the AR as having a major impact on daily functioning. Additionally, a major impact on daily functioning is reported for executive functioning and other emotional or mental problems. The physician does not specify what the "other emotional or mental problems" are but does provide narrative respecting severe and chronic pain. A moderate impact on daily functioning is reported for other neuropsychological problems and no impact on daily functioning is reported for the remaining 7 aspects of cognitive and emotional functioning.
- The general practitioner indicates that the appellant independently manages 4 of 5 listed aspects of social functioning (appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, ability to secure assistance from others) and requires periodic support/supervision with the remaining aspect (ability to deal appropriately with unexpected demands).
- Good functioning is reported with the appellant's immediate social network with marginal functioning reported with extended social networks.
- The appellant reports that pain medication greatly impairs her mental functions.
- The supplemental documents identify severe major depressive disorder for which the appellant takes antidepressant medication and receives counselling. Poor concentration and irritability are also noted.

DLA

- The general practitioner reports that the appellant mobilizes independently indoors and outdoors with the use of an assistive device, noting that all walking takes significantly longer than typical.
- All aspects of the DLA personal care, meals, paying rent and bills, and medications are managed independently without restriction.
- Both aspects of basic housekeeping require the continuous assistance of another person as do the 2 physical aspects of shopping (going to and from stores, carrying purchases home). The remaining 3 aspects of shopping (reading prices and labels, making appropriate choices, and paying for purchases) are managed independently without restriction.
- As previously noted, 4 of 5 aspects of social functioning are managed independently without restriction.
- All 3 aspects of transportation require the use of an assistive device.
- The physician reports that pain medication interferes with the appellant's ability to perform DLA.
- The supplemental documents identify an inability to use public transportation.

Need for Help

- The general practitioner reports that the appellant currently receives assistance from her family and requires a cane, walker, and a lifting device.

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 medical practitioner is likely to continue for at least 2 years and, in the opinion of a prescribed professional, directly and significantly restricts her from performing DLA either continuously or periodically for extended periods resulting in 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.

Severe physical impairment that is likely to continue for at least two years

The ministry's position is that the appellant's physician has not confirmed that the impairment resulting from right knee osteoarthritis will continue for at least two years. The ministry argues that although the physical functional skill limitations were quite significant as reported in the PWD application, the appellant subsequently underwent knee surgery in November 2012. The ministry notes that the physician was hopeful that the appellant's condition would improve as a result of surgery and that there is no information from the physician respecting post-operative functioning.

The appellant's position is that her physician has confirmed that her impairment continued for two or more years as indicated by the documents provided on appeal. The appellant argues that her severe knee pain and depression left her unable to work for two years and made it increasingly difficult to manage daily activities.

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, the appellant's general practitioner, has diagnosed the appellant with right knee osteoarthritis which impaired physical functioning to the point of being unable to do any lifting and being limited to walking distances of less than 1 block. While the degree of physical impairment could reasonably be viewed as being severe at the time the PWD application was completed, section 2 of the EAPWDA requires that a severe physical impairment be confirmed by a medical practitioner as being likely to continue for at least two years. The physician's evidence in the PWD application and the documents provided on appeal clearly establishes that the appellant has experienced functional limitations due to right knee osteoarthritis for a period of at least two years commencing April 2010. However, this does not meet the legislative test that a severe physical impairment is likely to continue for at least two years going forward. To the contrary, the evidence of the physician is that the impairment is not likely to continue for two years as he was hopeful that the surgery, which took place in November 2012, would result in improved functioning. That improved functioning has resulted is supported by the appellant's own evidence that she experienced increasing difficulty until she had recovered from surgery and that she began a return-to-work program in March 2013.

For the above reasons, the panel concludes that the ministry reasonably determined that a severe physical impairment which is, in the opinion of a medical practitioner, likely to continue for at least 2 years was not established and that the criteria of section 2(2) of the EAPWDA was not met respecting a physical impairment.

Severe mental impairment that is likely to continue for at least two years

The appellant argues that a severe mental impairment is established in and of itself by the diagnoses severe major depressive disorder. Furthermore, she argues that the physician's evidence establishes the significant impact depression has had on daily functioning in a number of areas including concentration and memory.

The ministry's position is that a severe mental impairment has not been established. The ministry argues that despite evidence of a major impact on daily functioning relating to several significant deficits with cognitive and emotional functioning, the appellant is able to make decisions about personal activities, care, and finances and is able to relate to and communicate and interact with others effectively. Moreover, the ministry argues that the depression is related to chronic pain which is likely to have been ameliorated following joint replacement surgery.

Panel Decision

The evidence from the appellant's physician is that the severe clinical depression and its impact on cognitive and emotional functioning are directly related to the pain caused by the appellant's physical impairment. That the noted impairment to mental functioning is directly attributable to the right knee osteoarthritis is further supported by the appellant's evidence that pain medication impacts her cognitive functioning. The evidence respecting the appellant's ability to perform the 2 DLA that relate only to a mental impairment or brain injury - making decisions about personal activities, care or finances and relating to and communication or interacting with others effectively - establishes a reasonable level of functioning and is not reflective of a severe mental impairment. Based on the aforementioned evidence, together with the evidence of the appellant and her general practitioner respecting the expectation of improved functioning post-operatively, the panel finds that the ministry reasonably concluded that a severe mental impairment which is, in the opinion of a medical

practitioner, likely to continue for at least 2 years was not established and that the criteria of section 2(2) of the EAPWDA was not met respecting a mental impairment.

Restrictions in the ability to perform DLA

The appellant's position is that severe major depressive disorder and severe right knee pain made it increasingly difficult to perform DLA.

The ministry's position is that the physician's evidence that the majority (24 of 28) of tasks of DLA are performed independently, as well as 4 of 5 aspects of social functioning, does not establish a significant restriction in the ability to perform DLA. Furthermore, the identified restrictions were reported 3 months before joint replacement surgery.

Panel Decision

The legislation requires that the minister be satisfied that a prescribed professional is of the opinion that a person is directly and significantly restricted in his or her ability to perform the prescribed DLA either continuously or periodically for extended periods. The only evidence before the panel from a prescribed professional addresses the appellant's ability to perform DLA pre-operatively at which time the appellant required the continuous use of an assistive device, a cane, for the DLA moving about indoors and outdoors, basic housework, and transportation, as well as for the physical aspects of the DLA shopping. Otherwise, the appellant was reported to manage all other physical tasks of the prescribed DLA independently. Excepting the need for periodic assistance from another person with 1 of 5 listed aspects of social functioning, deal appropriately with unexpected demands, no restriction in the ability to perform DLA is attributed to the appellant's depression. The general practitioner also indicates that the appellant's impairment is expected to improve following surgery. The appellant's evidence is that prior to surgery she was finding it increasingly difficult to manage her DLA and that she began a return to work program in March 2013. Based on the above evidence, and in the absence of information from a prescribed professional assessing post-operative functioning, the panel finds that the ministry reasonably determined that the degree of independence managing DLA prior to surgery and the general practitioner's expectation of post-surgical improvement did not establish that the appellant's ability to perform DLA was, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods as required by s. 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the use of an assistive device, a cane, to manage DLA which were becoming increasingly difficult.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is 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 (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 evidence of the prescribed professional establishes that the appellant required

the use of a cane pre-operatively to perform some DLA, the panel also finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions.

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, and therefore confirms the decision.