

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated October 2, 2013 which found that the appellant did not meet three of the five 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 and that her 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; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal 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

The appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the *Employment and Assistance Regulation*.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated April 25, 2013, a physician report (PR) dated April 25, 2013 completed by the appellant's family physician who has known her 1 year, and an assessor report (AR) dated March 8, 2013 and completed by a physiotherapist, as well as the following documents:

- 1) 4 pages from a 41-page Functional Capacity Report dated January 20, 2013 (the Report) , consisting of the Summary of Findings and Conclusions by the same physiotherapist who completed the AR;
- 2) Medical Report- Employability dated September 11, 2013; and,
- 3) Request for Reconsideration dated September 25, 2013.

Diagnoses

The appellant has been diagnosed by her general practitioner with chronic pain syndrome (with a diagnostic code indicating fibromyalgia) and chronic fatigue syndrome, both with an onset in 2004.

Physical Impairment

- Under health history in the PR, the general practitioner wrote that the appellant's "pain and fatigue function in the physical demand level 'less than sedentary to sedentary'. She cannot tolerate sustained sitting, standing, or walking. Her fine dexterity was less than expected on testing so jobs like electronics assembly would be impossible." The general practitioner refers to the January 20, 2013 Report, of which four pages have been provided.
- The general practitioner reported in the PR that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform her daily living activities (DLA) and does not require a prosthesis or aid for her impairment.
- In terms of the degree and course of impairment, the general practitioner commented: "sleep restoration, healthy diet and exercise, medication can all help but patient has symptoms of neurogenic hyperalgesia which is unpredictable."
- Functional skills reported in the PR indicated that the appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift 7 to 16 kg. (15 to 35 lbs.) and remain seated less than 1 hour.
- In the AR, the physiotherapist assessed the appellant as independent with walking indoors, and taking significantly longer than typical with her remaining mobility and physical ability. For walking outdoors, the comment is "walks at grocery store", for climbing stairs the physiotherapist noted "uses handrail". For standing, the physiotherapist commented "longest continuous standing 7 minutes before positioning". For lifting and carrying and holding, the physiotherapist noted that the appellant was "unable to demonstrate ability to lift or carry any weight due to pain exacerbation." The physiotherapist added that the appellant had difficulty with any sustained position, i.e. sitting or standing.
- In the additional information to the AR, the physiotherapist wrote that the appellant was

involved in a motor vehicle crash in 2004 and has had some difficulty ever since. She was able to return to her work until 2010 at which time she found she was unable to cope with the pain, and the pain became global, affecting multiple regions of her body.

- In her self-report, the appellant wrote that she has chronic pain in her whole body and fibromyalgia. Sitting, standing and walking for any amount of time aggravates her lower back, hips and sciatica and she has loss of feeling in her arms and legs. She gets migraine headaches that will last from hours to days, depending on severity. Occasionally a migraine will make the side of her face numb, making it hard to talk or open her eyes, and she will be physically sick.
- In the pages from the report dated January 20, 2013, the physiotherapist stated that the appellant can do more physically at times than was demonstrated during the testing day. The appellant has limited ability to remain in any one position for sustained periods of time without an increase in pain at levels that affect function. She is more likely to tolerate these positions if she has the ability to frequently change her position as necessary.
- The appellant did not demonstrate the ability to work at more than a "less than sedentary" to "sedentary" physical demand level during the evaluation. The physiotherapist wrote that once the appellant's pain (and hypersensitive nervous system) is better controlled, she would be in a position to pursue employment.
- In the Medical Report dated September 11, 2013, the same general practitioner who completed the PR wrote that the appellant's primary medical condition is neurogenic hyperalgesia, that her overall medical condition is severe, and her restrictions are climbing 5 stairs, walking 4 blocks, lifting 15 lbs., and sitting 1 hour.

Mental Impairment

- In the health history in the PR, the general practitioner wrote that the appellant has "difficulty with memory, concentration, and pain; her MoCA score was impaired."
- In the PR, the general practitioner reported significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance, and attention or sustained concentration, with a comment added to see the Report dated January 20, 2013.
- The general practitioner indicated that the appellant does not have difficulties with communication and, in the AR, the physiotherapist indicated that the appellant has a satisfactory ability to communicate in all areas.
- In the AR, the physiotherapist assessed one minimal impact with cognitive and emotional functioning in the area of attention/concentration, with no assessment in the remaining 13 areas of functioning. The physiotherapist commented that the appellant was screened for cognitive deficits with the Montreal Cognitive Assessment (MoCA) and "she demonstrated deficits in the area of attention and concentration (mild)."
- The physiotherapist did not assess the appellant with respect to her social functioning and this portion of the AR was left blank.
- In her self-report, the appellant wrote that her memory has become worse. Sometimes she will be in the middle of a task and cannot remember what or why she was doing it. On occasions, she has forgotten days, such as having no recollections that someone visited.
- In the pages from the January 20, 2013 report, the physiotherapist wrote that the result of a screening questionnaire suggests that the appellant may be depressed which may also have an influence on her reported pain and disability reporting. The MoCA cognitive screen results indicated that the appellant has difficulty with memory and concentration.

Daily Living Activities (DLA)

- In the PR, the general practitioner reported that the appellant is not restricted with any of the listed DLA, including personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, management of finances, and social functioning.
- In the additional comments to the PR, the general practitioner added that the appellant expresses a desire to work but is unable to due to pain, fatigue, poor memory and concentration. "She had a thorough work rehab assessment that found that she is currently unable to work."
- The physiotherapist reported in the AR that the appellant is independent with all tasks of the personal care DLA, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in and out of bed and on and off of chair.
- The appellant is independent with doing her laundry while taking significantly longer than typical with basic housekeeping, with a comment added by the physiotherapist: "requires multiple rests to complete."
- For shopping, the physiotherapist assessed the appellant with requiring periodic assistance with 2 tasks, namely going to and from stores and carrying purchases home, and being independent with reading prices and labels, making appropriate choices and paying for purchases. The physiotherapist commented that the appellant "...reports that her father will accompany her to the grocery store. Her father will pick the groceries from the shelves and push the grocery cart."
- The physiotherapist did not assess the appellant for her ability to perform the remaining tasks of the DLA meals, pay rent and bills, medications, transportation, and the social functioning part of the AR was left blank.
- In her self-report, the appellant wrote that the pain throughout her body makes her unable to do many day-to-day tasks. Her hands and feet swell with a great amount of pain and her joints seize up, making it difficult to write, to do daily activities and housework.
- The appellant wrote that her migraines are caused by daily activities such as reading, driving, cooking and cleaning.
- Because of problems with her memory, the appellant finds that activities that once were simple to do and remember, such as multi-tasking, problem solving, and daily activities have become stressful and confusing.
- In the pages from the report dated January 20, 2013, the physiotherapist wrote that it appears the appellant may have chronic, persistent pain that is limiting her ability to function in all areas of her life. She has difficulty performing her IADLs [instrumental activities of daily living], homemaking, and carrying out activity in general.

Need for Help

- In the reports included in the PWD application, the general practitioner indicated that the appellant does not require an aid for her impairment and the physiotherapist commented: "no assistive devices used."
- The physiotherapist indicated in the AR that the appellant lives with family and help required for DLA is provided by family with a note that the appellant's father "...assists her with groceries and the housekeeping and meal preparation."

In her Notice of Appeal, the appellant expressed her disagreement with the reconsideration decision. The appellant wrote that her quality of life has been impacted with her disability as indicated in the assessment from the physiotherapist. She is unable to commit to an employer for a regular shift or schedule due to her disability.

The ministry relied on its reconsideration decision. At the hearing, the ministry stated that the appellant referred in her Notice of Appeal to inability to commit to an employer due to her disability, but the application for PWD does not assess employability as does the application for Persons with Persistent Multiple Barriers to employment (PPMB), which designation excuses a recipient from working for a period of 2 years and includes some additional benefits.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her daily living activities (DLA) 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, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) 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.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of the chronic pain in her whole body and her fibromyalgia. The appellant argued that activities such as sitting, standing and walking for any amount of time aggravates her lower back, hips and sciatica and she has loss of feeling in her arms and legs. The appellant argued that she gets migraine headaches that will last from hours to days, depending on severity and, occasionally, a migraine will make the side of her face numb and she will be physically sick.

The ministry's position is that a severe physical impairment has not been established by the information provided. The ministry pointed out that the general practitioner indicated that the appellant is able to walk 4 or more blocks unaided, climb 5 or more steps unaided, that she can lift between 15 and 35 lbs. and remain seated less than 1 hour. The ministry argued that, in terms of mobility and physical ability, the physiotherapist indicated that the appellant takes significantly longer with walking outdoors, climbing stairs, standing, lifting, and carrying and holding, with the explanation that the appellant was not able to demonstrate the ability to lift, carry or walk for any length of time due to an exacerbation of body pain. The ministry argued that the impacts described by the physiotherapist are more in keeping with a moderate degree of impairment. The ministry pointed out that although the physiotherapist indicated that the appellant will not be able to return to work as a result of global pain, employability is not an eligible criterion for PWD designation.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. 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 ministry describes this approach well when it defines the word "impairment" in the physician report 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." 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 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 medical practitioner, the appellant's general practitioner of 1 year, diagnosed the appellant with chronic pain syndrome and chronic fatigue syndrome and commented in the health history that the appellant's "pain and fatigue function in the physical demand level 'less than sedentary to sedentary'. She cannot tolerate sustained sitting, standing, or walking." In the PR, the general practitioner commented, in terms of the degree and course of the appellant's impairment, that the appellant has symptoms of neurogenic hyperalgesia which is 'unpredictable.' The functional skills reported in the PR indicated that the appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift 7 to 16 kg. (15 to 35 lbs.) and remain seated less than 1 hour. In the more current Medical Report - Employability dated September 11, 2013, the same general practitioner who completed the PR wrote that the appellant's primary medical condition is neurogenic hyperalgesia, that her overall medical condition is 'severe', and described her restrictions consistently with the description in the PR, as climbing 5 stairs, walking 4 blocks, lifting 15 lbs., and sitting 1 hour.

In the AR, the physiotherapist assessed the appellant as independent with walking indoors, while taking significantly longer than typical with walking outdoors, climbing stairs, standing, lifting, and carrying and holding. The physiotherapist commented that the appellant was "unable to demonstrate ability to lift or carry any weight due to pain exacerbation." In the pages from the report dated January 20, 2013, the physiotherapist wrote that the appellant can do more physically at times than was demonstrated during the testing day. The appellant wrote in her self-report that she has chronic pain in her whole body and that sitting, standing and walking for any amount of time aggravates her lower back, hips and sciatica. The appellant wrote that she gets migraine headaches that will last from hours to days, depending on severity, but she does not describe how often this occurs.

The physiotherapist wrote in the Report that the appellant did not demonstrate the ability to work at more than a "less than sedentary" to "sedentary" physical demand level during the evaluation. The physiotherapist reported that once the appellant's pain (and hypersensitive nervous system) is better controlled, she would be in a position to pursue employment. For an impairment to be a "severe impairment" under the legislation, section 2 of the EAPWDA requires that the ministry must be satisfied that the evidence demonstrates restrictions to a specified degree in certain specified areas of daily functioning. The legislation reads that for PWD designation, the minister must be satisfied that "the person has a severe mental or physical impairment that directly and significantly restricts the person's ability to perform [prescribed] daily living activities and as a result of those restrictions, the person requires help [an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform those activities." As ability to search for, accept or continue in employment is not listed as one of prescribed DLA, the panel finds that the ministry reasonably held that employability is not a factor in assessing eligibility for PWD designation.

The panel finds that the evidence demonstrates that the appellant experiences periods of exacerbation of her pain that have not been detailed for their length or frequency, and that the appellant's mobility and physical ability may be better than demonstrated during the physiotherapist's assessment or as described by the appellant. The appellant does not use an assistive device or an aid to help compensate for her impairment. Considering all the evidence provided by the general practitioner and the physiotherapist together with that of the appellant, the panel finds that the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position is that a severe mental impairment is established by the evidence that her memory has become worse. The appellant argued that sometimes she will be in the middle of a task and cannot remember what she was doing or why, and she has forgotten days.

The ministry's position is that a severe mental impairment has not been established by the information provided. The ministry argued that the while the general practitioner indicated that the appellant has deficits with cognitive and emotional functioning in the areas of memory, emotional disturbance and attention or sustained concentration, in assessing the impacts on daily functioning the physiotherapist indicated that the appellant has a minimal impact to attention/concentration. The ministry pointed out that no information was indicated regarding the impacts to the remainder of the appellant's cognitive and emotional functioning. The ministry argued that both the general practitioner and the physiotherapist reported no difficulties with communication.

Panel Decision

The general practitioner did not diagnose the appellant with a mental disorder but wrote in the PR that the appellant has "difficulty with memory, concentration, and pain; her MoCA score was impaired." In the PR, the general practitioner reported significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance, and attention or sustained concentration, with a comment added to see the Report dated January 20, 2013. In the Report referred to, the physiotherapist wrote that the result of a screening questionnaire suggests that the appellant may be depressed. However, in the AR the physiotherapist assessed one minimal impact with cognitive and emotional functioning in the area of attention/concentration, with no assessment in the remaining 13 areas of functioning. The physiotherapist commented that the appellant was screened for cognitive deficits with the Montreal Cognitive Assessment (MoCA) and that she demonstrated mild deficits in the area of attention and concentration.

The general practitioner indicated in the PR that the appellant is not restricted in her social functioning, and the physiotherapist did not assess the appellant's social functioning, leaving this portion of the AR blank. The general practitioner reported that the appellant has no difficulties with communication and the physiotherapist indicated that the appellant has a satisfactory ability in all areas. Given that the general practitioner did not diagnose a mental condition as an impairment and the little evidence of impacts to the appellant's cognitive, emotional, and social functioning, the panel finds that the ministry reasonably determined that the information provided did not establish a severe mental impairment under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that her physical and mental impairments directly and significantly restrict her ability to perform DLA on an ongoing basis to the extent that she requires the significant assistance of another person.

The ministry's position is that the information from the prescribed professionals does not establish that impairment significantly restricts the appellant's DLA either continuously or periodically for extended periods. The ministry argued that the general practitioner indicated that the appellant's impairment does not restrict her DLA. The ministry pointed out that the physiotherapist indicated that

the appellant requires periodic assistance with going to and from stores and carrying purchases home with an explanation that the appellant's father accompanies her and assists with grocery shopping; however, no information is provided on how often the appellant requires assistance. The ministry argued that the physiotherapist reported that the appellant takes significantly longer with basic housework as the appellant requires multiple rests and that the remainder of the assessed (tasks of) DLA are performed independently.

Panel Decision

The evidence of the appellant's general practitioner is that the appellant's impairment does not restrict her ability to perform any of the listed DLA. The physiotherapist reported in the AR that the appellant is independent with all tasks of the personal care DLA, with doing her laundry and with 3 of 5 tasks of shopping, namely reading prices and labels, making appropriate choices and paying for purchases. The physiotherapist assessed the appellant as independent with walking indoors and taking significantly longer than typical with walking outdoors, and the general practitioner indicated that the appellant can walk 4 or more blocks unaided. The appellant takes significantly longer than typical with basic housekeeping, and requires periodic assistance with 2 tasks of shopping, namely going to and from stores and carrying purchases home, with the explanation that the appellant "...reports that her father will accompany her to the grocery store... pick the groceries from the shelves and push the grocery cart." The panel finds that the physiotherapist does not provide information to allow the ministry to determine that the periodic assistance required for these tasks of shopping is for an extended period. The physiotherapist did not assess the appellant for her ability to perform the remaining tasks of the DLA meals, pay rent and bills, medications, transportation, or social functioning and this part of the AR was left blank.

In the pages from the report dated January 20, 2013, the physiotherapist wrote that it appears the appellant may have chronic, persistent pain and the appellant has difficulty performing her IADLs, homemaking, and carrying out activity in general. In her self-report, the appellant wrote that the pain throughout her body makes her unable to do many day-to-day tasks, that her hands and feet swell with a great amount of pain and her joints seize up, making it difficult to write, to do daily activities and housework. The panel finds that the evidence demonstrates that the appellant has difficulty with some activities, that she may be able to do more than she reports, and that she experiences undefined exacerbations of her pain. However, without a more consistent and detailed picture of how the appellant's medical conditions restrict her daily functioning, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professionals to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the significant assistance of another person to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry argued that no assistive devices are required.

Panel Decision

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.

The evidence of the prescribed professionals establishes that the appellant lives with family and receives assistance required for DLA from her family, that the appellant's father "...assists her with groceries and the housekeeping and meal preparation." The panel 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, as defined by section 2(3)(b) of the EAPWDA.

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.