

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovations (the ministry) reconsideration decision dated September 11, 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, 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 evidence before the ministry at the time of the reconsideration decision included the following:

- 1) Person With Disabilities (PWD) Application comprised of the applicant information dated August 8, 2013, a physician report and an assessor report both dated August 5, 2013 and completed by the appellant's family doctor; and,
- 2) Request for Reconsideration, signed by appellant Sept 10, 2013, with attached hand written letter dated Sept. 9, 2013.

Diagnoses

The appellant was been diagnosed with right lung cancer-onset March 2013, right lung lobectomy-onset April 2013, hypertension-onset many years, and depression-onset May 2013.

Physical Impairment

- In the physician report, Health History, the general practitioner indicated that the appellant was diagnosed with lung cancer in March and had a lobectomy in April. Since surgery she has constant chest pain and was admitted to hospital to rule out heart disease and she is still seeing a cardiologist. She is depressed with anxiety because of the chest pain and lung cancer diagnoses. She is not able to tolerate normal activity due to chest pain, shortness of breath on slight exertion; she has chest palpation and is not able to sleep well. The physician ticked the box reporting that the appellant has been prescribed medications or treatments that interfere with her ability to perform daily living activities (DLA) advising she requires Tylenol #3 as needed for pain. It is unknown how long this may be needed as she may have chronic chest pain. The physician does not explain how the medication interferes with ability to perform DLAs. In the Assessor's report, when explaining the mental or physical impairments that impact the appellant's ability to manage DLAs, he advised she feels short of breath, fatigue, chest pain/palpation with slight exertion.
- In Degree and Course of Impairment the doctor noted impairment would continue for more than two years explaining she is short of breath on exertion with chest pain.
- In Functional Skills the physician indicates that the appellant can walk 2 to 4 blocks unaided on a flat surface, climb no stairs unaided, she has limitations with lifting 15 or more pounds, she has no limitations remaining seated and he lists no difficulties with communication.
- In the assessor report, the appellant is reported as being good with all tasks in Ability to Communicate. In relation to Mobility and Physical Ability, including walking indoors and standing she is independent; walking outdoors takes considerably longer; climbing stairs requires continuous assistance-she is unable to do so; lifting, carrying and holding requires periodic assistance from others.
- In the assessor report, under Assistance Provided for Appellant, the physician indicates that she uses no assistance from other people and uses no assistive devices. He notes that she lives alone and manages at home fine so far but may need to look for help in the future if her cancer returns.
- In the appellant's self-report, the appellant stated that she has a lot of pain in her back and chest, breathing problems and it stresses her out. She can no longer do what she did in the past.

Mental Impairment

- The general practitioner diagnosed depression with an onset of May 2013. In the physician's report, the report states the appellant is depressed with anxiety due to her chest pain with diagnoses of lung cancer. Under Functional Skills, he indicates that there is a significant deficit with cognitive and emotional function - that being an emotional disturbance
- In the assessor report, under Mental or Physical Impairment, the general practitioner reported the appellant is good in all areas of Ability to Communicate. Under Cognitive and Emotional Functioning there are no impacts to 7 of 13 areas that being bodily functions, consciousness, impulse control, insight and judgment, language, psychotic symptoms or any other neuropsychological problems. The physician notes minimal impact to two areas; attention/concentration and executive function. Moderate impact was noted to motor activity. Major impact was noted to 3 of 13 areas; emotion, memory and motivation. The physician comments there is too much stress due to her physical health condition.
- The general practitioner indicated that the appellant independently manages 3 of 5 listed aspects of social functioning and that she requires periodic support/supervision in relation to being able to deal with unexpected demands and the ability to secure assistance from others. In describing how the mental impairment impacts the appellant's relationship with her immediate social network and her extended social networks, the doctor ticked marginal functioning for both.

DLA

- In the physician report, the general practitioner, contrary to the instructions on the form, filled out a portion for DLAs. The physician noted no restriction to 9 of the 10 DLAs; personal self-care, meal preparation, medication management, basic housework, daily shopping, mobility in the home, mobility outside the home, transportation and financial management. In this portion of the report the physician left the area for the 10th category social functioning, blank.
- In the assessor report, when describing the appellant's impairments that impact the ability to manage DLAs he stated the appellant feels short of breath, fatigue, chest pain/palpitation (sic) with slight exertion.
- The general practitioner reported that 6 of the 8 listed DLAs, personal care, basic housekeeping, meals, paying rent and bills, medications and transportation are performed independently without any noted restriction.
- The appellant is independent with 4 of 5 tasks of shopping, while requiring periodic assistance from another person with carrying purchases home. There is no explanation or description of the periodic assistance needed here.
- Additional comments under DLAs noted the appellant can manage at home as long as she can take her time and she needs frequent breaks.
- In relation to social functioning, for someone with an identified mental impairment, the appellant is independent for 3 of the 5 categories; making appropriate social decisions, developing and maintaining relationships and interacting appropriately with others. The physician reports periodic support/supervision is needed with being able to deal with unexpected demands and the ability to secure assistance from others. There is no explanation or description of the degree and duration of the periodic support/supervision needed. In describing how the mental impairment impacts the appellant's immediate social network and

extended social networks the physician advises she has marginal functioning. There is no description of the help the appellant requires or any additional comments in this section.

- In her self-report, the appellant stated that she has clinical depression and her conditions stress her out really bad. She cannot do what she did in the past.

Need for Help

- The general practitioner reported that the appellant requires periodic assistance from another person with carrying purchases home.
- In the Request for Reconsideration the appellant advised that since her cancer diagnosis in February, her life is not the same. She has breathing problems and can't do anything herself. She has to get someone to help her with laundry and household chores. A friend comes two times per week to help her shower and to monitor her as she just can't breathe. Someone goes shopping with her as she can't breathe or carry anything. She does not walk as she gets out of breath. She is very depressed and on medication for this. Since her surgery she has to ask someone to do the littlest things for her and needs help with everything, even getting her medication picked up.

In her Notice of Appeal, the appellant expressed her disagreement with the reconsideration decision because she is being punished for being able to putt around at home. She has been battling depression since 1994 when her spouse died. She was diagnosed with depression and prescribed medication by a Dr. in a different town. Her mental issues play on her every day and there are days she does not want to get out of bed and talk to anyone. This can last for days. She worries every day her cancer will re-occur. Since her surgery her breathing has been very difficult.

At the hearing, the appellant provided oral evidence. Since her operation her life has been difficult. She has had breathing problems when she is up and is in hospital it seems every couple of weeks. She can do a little bit of things at home. She cannot do laundry, mopping, sweeping or anything like that. Her step-daughter assists her with such things and also takes her shopping. She also relies on her neighbours for assistance. She can prepare her own meals and care for herself although she needs assistance when she showers as she gets out of breath. She has anxiety attacks if she has to take the bus. She can't carry anything heavier than a milk jug. She has been on anti-depressants since 1994 and if she does not take the medication she becomes suicidal. The appellant concluded by saying she would rather be working and hopes to get back to that one day. The appellant argued that she cannot do a number of DLAs without assistance and that she is being punished because she does not need a wheelchair or some other assistive device. When asked at the hearing, the appellant confirmed that her Dr. filled out the application, in her presence, while asking her questions. This Dr. also prescribes her medication for depression. She can deal with her personal finances on her own.

The appellant's step-daughter gave evidence confirming she assists the appellant 2-3 times per week by grocery shopping, performing household chores like mopping, sweeping, laundry and dishes, and also ensures she can shower two times a week. This takes approximately 60-90 minutes each time she goes. When they go to the store shopping the appellant has to use a scooter from the store to get around. She has noted the appellant is depressed lately. She is upset she cannot do these things herself. The step-daughter confirmed she is not a health professional.

APPEAL #

At the hearing, the ministry relied on its reconsideration decision reiterating that the ministry was of the position that the evidence available was of a moderate, not severe, impairment. Further, there was not enough evidence from a prescribed professional that any impairment directly and significantly restricted the appellant's DLAs or that the appellant required the significant help of another person to help with DLAs.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, that the appellant is not eligible for designation as a person with disabilities, as she does not meet all the criteria in Section 2 of the EAPWDA, 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 DLAs were 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.

The panel considered 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 a severe physical impairment is established by the evidence of her inability to perform any physical tasks. These tasks require her to rest frequently and seek assistance from others. It takes her much longer to do any activities.

The reconsideration decision points out that the appellant's general practitioner assesses her functional skills at the mid-range of the scale, being able to walk 2-4 blocks unaided, to lift up to 15 pounds and having no limitation with remaining seated. While the physician indicates that the appellant has shortness of breath and chest pain with exertion and has to stop and rest, she also reported that the appellant is independent in walking indoors and standing, that she only requires periodic assistance with lifting, carrying and holding. The ministry argues that while this indicates some functional limitations, they are more in keeping with a moderate degree of impairment.

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 DLAs as evidenced by functional skill limitations, the restrictions to DLAs, and the degree of independence in performing DLAs. 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 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, has diagnosed the appellant with right lung cancer-onset March 2013, right lung lobectomy-onset April 2013, and hypertension-onset many years. While the physician indicated that the appellant gets short of breath with slight exertion, gets fatigued and has chest pain/palpation with slight exertion, the appellant is nevertheless reported to be able to walk up to 4 blocks unaided on a flat surface and lift up to 15 pounds. In the assessor report, the physician indicates that the appellant uses no assistance from other people and uses no assistive devices. The physician notes that she lives alone and manages at home fine so far but may need to look for help in the future if her cancer returns.

In relation to DLAs, the physician report noted no restriction to personal self-care, meal preparation, medication management, basic housework, daily shopping, mobility in the home, mobility outside the home, transportation and financial management. The assessor report, noted that 6 of the 8 listed DLAs, personal care, basic housekeeping, meals, paying rent and bills, medications and transportation are performed independently, without any noted restriction. The appellant is independent with 4 of 5 tasks of shopping, while requiring periodic assistance from another person with carrying purchases home.

The evidence of the appellant and her witness indicates that she does need assistance with some of her household chores and with shopping. This is contrary to the evidence of the physician who reported no such restrictions. This evidence of the appellant and her stepdaughter does demonstrate that the appellant is impaired in her physical functioning. The ministry had before it, and took into consideration, these difficulties as set out by the appellant in her request for reconsideration. The ministry was not satisfied that this was evidence of a severe impairment but of a moderate impairment. The test for the panel is not whether this finding by the reconsideration officer was correct, but whether it was a reasonable finding based on all of the evidence. The panel concludes that the ministry could reasonably determine that the appellant's level of independent physical functioning did not establish 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 general practitioner's diagnosis of depression, and this affects her day-to-day functioning significantly.

The ministry's position is that a severe mental impairment has not been established by the information provided. The ministry relies on the evidence that the general practitioner only reported one deficit to cognitive and emotional functioning being an emotional disturbance. Additionally, there are some areas with minimal or no impact to DLAs, one with moderate and 3 areas with major impact. The ministry again says this is not evidence of a severe mental impairment.

Panel Decision

The physician, when dealing with Functional Skills, indicates that there is a significant deficit with cognitive and emotional function - an emotional disturbance. In the assessor report, under Mental or Physical Impairment, the general practitioner reported the appellant is good in all areas of Ability to Communicate. Under Cognitive and Emotional Functioning there are no impacts to 7 of 13 areas; bodily functions, consciousness, impulse control, insight and judgment, language, psychotic symptoms or any other neuropsychological problems. The physician notes minimal impact to two areas; attention/concentration and executive function. Moderate impact was noted to motor activity. Major impact was noted to 3 of 13 areas; emotion, memory and motivation. The physician comments there is too much stress due to her physical health condition. The physician indicated that the appellant independently manages 3 of 5 listed aspects of social functioning and that she requires periodic support/supervision in relation to being able to deal with unexpected demands and the ability to secure assistance from others. In describing how the mental impairment impacts the appellant's relationship with her immediate social network and her extended social networks, the doctor ticked marginal functioning for both.

Again, the issue in this matter is whether the ministry came to a reasonable determination based on the evidence before it. The evidence demonstrates that the appellant is impaired in her mental functioning. The reconsideration decision had before it, and took into consideration, these difficulties. The ministry was not satisfied that this was evidence of a severe impairment and the panel finds that this was reasonable determination based on all of the evidence. The physician noted the appellant had no or minimal impact to 9 of 13 areas. One area was noted as moderately impacted and only 3 of 13 majorly impacted. She is independent in 3 of 5 social functioning tasks and requires some periodic support. The panel finds that the ministry could, and reasonably did, determine that the information provided did not establish a severe, as opposed to a moderate, mental impairment under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that her impairment directly and significantly restricts her ability to perform DLAs to the point that she requires assistance in various areas of DLA, including tasks of housekeeping and shopping.

The ministry's position is that the Dr. reported no restrictions to DLAs, (presumably in the Physician's Report) and that in DLAs (in the Assessor's Report) she was independent in 27 of 28 activities. In

relation to Social functioning she is independent for 3 of 5 aspects with periodic support/supervision being needed for 2 tasks.

Panel Decision

The evidence of the prescribed professional, in the physician's report, noted no restrictions to 9 of the 10 DLAs; personal self-care, meal preparation, medication management, basic housework, daily shopping, mobility in the home, mobility outside the home, transportation and financial management. He left the area for the 10th category of social functioning blank. In the assessor report, the general practitioner reported that 6 of the 8 listed DLAs, personal care, basic housekeeping, meals, paying rent and bills, medications and transportation are performed independently without any noted restriction. The appellant is independent with 4 of 5 tasks of shopping, while requiring periodic assistance from another person with carrying purchases home. There is no further explanation or description of the periodic assistance needed here. Additional comments under DLAs noted the appellant can manage at home as long as she can take her time and she needs frequent breaks.

In relation to social functioning, for an identified mental impairment, the appellant is independent for 3 of the 5 categories; making appropriate social decisions, developing and maintaining relationships and interacting appropriately with others. The physician reports periodic support/supervision is needed with being able to deal with unexpected demands and the ability to secure assistance from others. Again, there is no explanation or description of the periodic assistance needed for the degree and duration of the periodic support/supervision needed. In describing how the mental impairment impacts the appellant's immediate social network and extended social networks the physician advises she has marginal functioning. There is no description of the help the appellant requires or any additional comments in this section.

The legislation requires that a prescribed professional to be of the opinion that a severe impairment directly and significantly restricts the applicant's ability to perform DLAs continuously or periodically for extended periods. As noted in the reconsideration decision the prescribed professional, the appellant's Dr. opined that the majority of DLAs are performed independently or with little help from others. The panel concludes that the noted restrictions in the appellant's ability to perform some aspects of some DLAs were reasonably viewed by the ministry as not constituting a direct and significant restriction of the appellant's ability to perform DLA in the opinion of a prescribed professional thereby not satisfying the legislative criterion of s. 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the significant help or supervision of another person to perform DLAs. The ministry's position is that because it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is 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.

While the panel finds that the evidence demonstrates that the appellant requires some assistance from another person with tasks of some DLAs, the panel also finds that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLAs have not been established. As such, it cannot be determined that the appellant requires help to perform DLAs 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.