



PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the Ministry) dated October 24, 2013 denying the appellant designation as a person with disabilities (PWD). The Ministry determined that the appellant did not meet three of the five criteria required for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2 (the appellant meets the criteria of being 18 years of age or older and, as reflected in the reconsideration decision, of having a severe physical impairment). Specifically, the Ministry determined that, based on the information provided, the following criteria were not met:

- That, in the opinion of a medical practitioner, the appellant's impairment is not likely to continue for two or more years;
- That, in the opinion of a prescribed professional, the appellant's impairment does not significantly restrict her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- The appellant does not require the significant help or supervision of another person to perform the DLA restricted by her impairment.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2

PART E – Summary of Facts

The evidence before the Ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application, containing the following three parts:
 - The appellant's Self Report completed July 29, 2013, with a 3-page typewritten addendum prepared by the appellant and dated July 30, 2013;
 - The Physician Report (PR) dated July 31, 2013 completed by the appellant's family physician who has known the appellant for 20 years and indicated he had seen her 2-10 times in the previous year; and
 - The Assessor Report (AR) dated July 31, 2013 completed by the appellant's family physician.
2. The appellant's Request for Reconsideration, dated October 21, 2013, signed by both the appellant and her physician, and completed by the appellant's physician, with the following attachments:
 - A 2-page typed submission of the appellant dated October 18, 2013;
 - A 3-page photocopy of the appellant's "results review report" from Hospital #1 where the appellant was admitted from August 31, 2013 until September 6, 2013;
 - A 1-page photocopy of the appellant's release of responsibility form (re patients leaving against medical advice) from Hospital #1 dated September 6, 2013; and
 - A 2-page photocopy of the appellant's discharge plan from Hospital #1 where the appellant was admitted from September 7, 2013 through October 1, 2013.
3. The Ministry PWD designation decision summary dated October 10, 2013.
4. A copy of a Ministry telephone log dated October 10, 2013, indicating that a Ministry adjudicator had contacted the appellant's physician and spoke with him on the telephone. In this log, the adjudicator notes that the appellant's physician indicated that the appellant had been re-admitted to the hospital "2 or 3 times" since the completion of the PWD application. The adjudicator also notes that the appellant's physician responded that "this continues to be the case" regarding his response to the question about the duration of the appellant's impairments, and that "the appellant's functional abilities remain similar" to when the application was completed in July 2013.
5. A 3-page copy of a consultation report from the radiology department of Hospital #2 at which the appellant was examined on June 3, 2013.
6. A 2-page copy of a consultation report from Hospital #3 at which the patient had been admitted on June 9, 2013.
7. A 2-page copy of a discharge plan from Hospital #1, regarding the appellant's admission from June 23, 2013 through June 27, 2013.
8. A 3-page copy of a discharge summarization note from Hospital #1 at which the appellant was treated on July 18, 2013.
9. A 1-page discharge instruction from Hospital #1, referring to the appellant's admission from

July 16, 2013 through July 18, 2013.

The appellant completed her notice of appeal on November 12, 2013, and on it indicated that she was meeting her doctor on November 14, 2013. On November 29, 2013, the appellant submitted the following information:

- a one-page typed submission from the appellant dated November 29, 2013;
- a one-page handwritten note from the appellant's family physician dated November 14, 2013, in which the physician has written, "In follow up to my previous forms I would add that [the appellant] has been hospitalized again, this time from Aug. 31 to Oct. 1, 2013. Her health issues remain as per previous documentation and appear to be chronic. She is likely to be disabled for at least the next two years";
- a one-page typed letter from the appellant's family physician dated November 29, 2013, reviewed below, in which the appellant's family physician discusses the appellant's restrictions in performing her daily living activities; and
- a 3-page copy of a "patient drug summary report" for the appellant prepared by her pharmacy on November 29, 2013, covering the period from June 16, 2013 through November 14, 2013 (together, the "Additional Information").

The Ministry's representative did not object to the admission of the Additional Information. The panel admits as evidence the Additional Information as written testimony in support of the information and records that were before the minister when the decision being appealed was made, pursuant to subs. 22(4)(b) of the *Employment and Assistance Act*.

The following is a summary of the evidence from the PR and AR, together with the evidence provided in the Additional Information, regarding the appellant's impairments as they relate to the three PWD criteria at issue. The panel has also included reference to the appellant's self report in the PWD application, as well as her submissions on reconsideration and on appeal, and at the hearing.

Duration of impairments (criteria set out in subs. 2(2)(a) EAPWDA)

In the PR completed July 31, 2013, the appellant's physician diagnosed the appellant with "severe and recurrent" *Clostridium difficile* ("C diff"), as well as ascites and marked weight loss "undiagnosed malignancy" and commenting that the appellant was "weak and malnourished". The onset of all conditions was May 2013. In response to the specific question in the PR, "is the impairment likely to continue for 2 years or more from today?" the appellant's physician checked the "no" box and wrote "hopefully not, but uncertain." Later in the PR, the appellant's physician wrote the additional comment, "as above, this patient is medically very ill, weak, malnourished. Her problem is not yet cured or even in remission."

In her submissions, the appellant told the panel that it was her understanding that her physician did not have the full report from Hospital #1 regarding her September 2013 admission when he spoke with the Ministry adjudicator on or about October 10, 2013 as noted in the telephone log. She told the panel that she had not met with her physician after she was hospitalized until later in October, around the time she completed the request for reconsideration (October 21, 2013).

In the Additional Information, in particular, his letter of November 14, 2013, the appellant's physician noted that in the 4 months since the completion of the PWD application, the appellant has been

hospitalized for the entire month of September 2013 and that her health issues appear to be chronic. He wrote, "she is likely to be disabled for at least the next two years."

Ability to perform DLA (criteria set out in subs. 2(2)(b) EAPWDA)

As the appellant's physician completed the AR, he did not address the appellant's DLA in the PR. In the section of the AR indicating the degree of restriction the appellant's impairments cause on her DLA, the appellant's physician indicated that the appellant was independent in 4 of the 7 tasks of the DLA of personal care, checking that the appellant takes significantly longer than typical for the tasks of toileting, transfers in and out of bed, and transfers in and out of a chair. The appellant's physician indicated that the appellant took significantly longer than typical in performing the 2 tasks of the DLA of basic housekeeping. For the 5 listed tasks under the DLA of shopping, the appellant's physician checked that the appellant was independent for reading prices and labels, and making appropriate choices. The appellant's physician indicated that the appellant required continuous assistance to perform the tasks of carrying purchases home and going to and from stores. The appellant's physician wrote the comment, "difficulties with muscle weakness/poor endurance and very frequent diarrhea." For the tasks listed under the DLAs of meals, pay rent and bills, medications and transportation, the appellant's physician indicated in the AR that the appellant was independent for all of the listed tasks. The appellant's physician wrote the comment "is in financial difficulties due to this illness" beside the tasks listed under the DLA of pay rent and bills. The appellant's physician also checked "periodic assistance" beside where he had checked "independent" for the task of using public transit, with the comment, "can 'bus it' but is very tiring/wears her out." The appellant's physician checked that the appellant was independent for all of the listed aspects of social functioning in the AR, and that she had good functioning in her immediate and extended social networks.

In her submissions at the hearing, the appellant told the panel that at the time she and her physician completed the PWD application (July 31, 2013), she was taking antibiotics and this reduced her symptoms and she felt she was capable of performing her DLA. She told the panel that when she stopped taking the antibiotics, as directed by her doctors at the hospital, her symptoms became much worse with the result that she ended up in hospital within a few days of stopping the antibiotics. She told the panel she could not take antibiotics now. The appellant stressed that she is in a very physically weakened state, worse than she was in July 2013, and is also in chronic abdominal pain, and as a result, that it is very difficult for her to perform her DLA – she said she has not done her laundry for several weeks and has not been able to clean her bathtub.

In the Additional Information, in his letter of November 29, 2013, the appellant's physician addressed the discrepancies between the information set out in the AR portion of the PWD application he completed July 31, 2013, and the appellant's current situation. The physician wrote that, "as a result of severe, recurrent C-Diff and abdominal ascites NYD [not yet determined], [the appellant] has significant ongoing restrictions to the following [DLA]." The appellant's physician wrote that the appellant has not done "personal self care" for "days at a time due to severe chronic pain and exhaustion." He wrote that she is "too ill to prepare meals or to eat" and noted that the appellant has lost 40 pounds since May 2013. The appellant's physician wrote, "housework, shopping, mobility outside home, use of transportation – done rarely due to severe chronic pain and exhaustion." He commented further, "she needs significant ongoing help with meal preparation and encouragement to eat, housework, shopping and a seat on transit or use of HandyDart as she is weak and emaciated."



Assistance required/provided (criteria set out in subs. 2(2)(b)(ii) EAPWDA)

In the section of the AR describing the assistance provided for the appellant, completed July 31, 2013, the appellant's physician wrote that the appellant received help from friends, but noted, "not really explored. Is a very independent self-assured person. Is getting some help from friends and neighbours, but being [illegible] to need help."

In the Additional Information, in his November 29, 2013 letter, the appellant's physician wrote that the appellant "needs significant ongoing help with meal preparation and encouragement to eat, housework, shopping and a seat on transit or use of HandyDart as she is weak and emaciated."

At the hearing, the appellant told the panel that she lives by herself and she has no close friends or family who can help her with her tasks of DLA. The appellant told the panel that because of her chronic pain, as well as her weakened system, she really needs help performing her DLA.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA. Specifically, the Ministry determined that the information provided did not establish that the appellant's impairment is likely to continue for two years or more, that her severe physical impairment in the opinion of a prescribed professional directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and, as a result of those restrictions she requires help to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

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.

The following section of the *EAPWDR* applies to this appeal:

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:

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- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

In her submissions to the panel, the appellant stressed that at the time she and her doctor were completing the PWD application, she was taking antibiotics and felt that she could perform her DLA for the most part independently, although it took her longer and she was weak and malnourished and suffering from chronic pain. She said that she and her doctor did not understand how to answer the questions regarding the amount of assistance she required to perform DLA – that they thought this asked how much assistance she received at the time the PWD application was completed, not how much help she needed. The appellant discussed with the panel how her condition has become much worse since she stopped taking antibiotics, that she was hospitalized for an entire month, and her conditions still have not improved or resolved.

The Ministry stood by the reconsideration decision, noting the information available to the Ministry at the time the decision was reached did not include the Additional Information. The Ministry said that if it had the Additional Information at the time of reconsideration, the Additional Information would have been “given more weight” and the decision regarding the appellant’s PWD designation “might have been different” as the Ministry is aware that the appellant’s condition is deteriorating.

Duration of impairment

In the reconsideration decision, the Ministry based its determination that the appellant’s impairments were not likely to continue for 2 years or more on the information provided by the appellant’s physician in the PR completed July 31, 2013.

Although the appellant’s physician checked “no” in answer to the question in the PR of whether the impairment was likely to continue for 2 years or more, his comment in the PR indicates that the prognosis is uncertain. This is also reflected in the Ministry adjudicator’s note of the telephone conversation of early October 2013. By the time of his November 14, 2013 letter, the appellant’s physician had reviewed the reports from the appellant’s September 2013 hospitalization and had met with her. Regarding the difference between the evidence of the appellant’s physician provided in the Additional Information, as contrasted with the telephone log of the Ministry adjudicator of October 10, 2013, the panel accepts the appellant’s evidence that it was unlikely her physician had reviewed the reports of her admission at Hospital #1 at the time he spoke with the Ministry adjudicator and he had not spoken with or seen the appellant at that time. The panel affords more weight to the physician’s letter of November 14, 2013.

Accordingly, based on the evidence of the appellant’s physician to which this panel attributes more weight than the evidence in the PR completed 4 months prior, the panel finds that the Ministry’s determination that the appellant did not meet the first criteria required by subs 2(2)(a) of the EAPWDA (impairments continuing for two or more years) is not reasonably supported by the evidence.

Significant restrictions in the ability to perform DLA.

In the reconsideration decision, it is noted that the appellant’s physician reported in the AR that the appellant takes significantly longer “with some activities of personal care and basic housekeeping, but

does not provide information to specify the frequency or the degree of the assistance" that the appellant requires. The reconsideration decision also notes that the appellant's physician indicated in the AR that she requires continuous and periodic assistance with activities of shopping and public transit, but "does not provide information to explain the type or the frequency of the assistance" that the appellant requires to manage these activities. The reconsideration decision notes that in the AR, in assessing all other areas of daily living, the appellant's physician indicated she was able to independently manage all other activities (personal care, shopping, meals, paying rent and bills, medications and transportation). The Ministry's reconsideration decision concluded, "as the majority of daily living activities are performed independently or require little help from others, the information from [the appellant's] prescribed professional does not establish that impairment significantly restricts daily living activities either continuously or periodically for extended periods."

In the AR, the appellant's physician had commented that the appellant required periodic and continuous assistance with 3 of the 5 tasks of the DLA of shopping, because "difficulties with muscle weakness/poor endurance and very frequent diarrhea" were limiting her abilities. The panel notes that in his letter of November 29, 2013 in the Additional Information, the appellant's physician directly addressed the findings of the Ministry in its reconsideration decision. In the appellant's physician's letter, he stressed that the appellant has "significant ongoing restrictions" to her DLA of personal self care, meal preparation, housework, shopping, mobility outside the home and use of transportation, setting out that because of the appellant's severe, chronic pain and exhaustion, she is unable to perform these DLA. The panel accepts the appellant's physician's evidence in this respect.

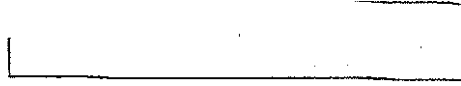
Accordingly, the panel finds that based on the information provided (which includes the information before the Ministry at reconsideration), the Ministry's determination that the appellant was not significantly restricted in her ability to perform DLA as required under subs. 2(2)(b) was not reasonable.

Help with DLA

In its reconsideration, the Ministry determined that as it "had not been established that [DLA] are significantly restricted ... it cannot be determined that significant help is required from other persons."

The panel notes the evidence before the Ministry at the reconsideration as set out by the appellant's physician in the AR of July 31, 2013 regarding the appellant's need for periodic and/or continuous assistance in 3 of the tasks of the DLA of shopping, as well as that the appellant takes significantly longer than typical to perform the DLA of basic housekeeping, as well as 3 of the 8 tasks of the DLA of personal care. The panel also notes the further evidence of the appellant's physician in his November 29, 2013 letter clarifying and expanding on his answers in the AR prepared 4 months earlier – namely, that the appellant "needs significant help with meal preparation and encouragement to eat, housework, shopping and a seat on transit or use of HandyDart" as a direct result of the severe conditions of her impairment.

This panel has found that information has been provided showing that the appellant's impairments significantly restrict her DLA continuously or periodically for extended periods (personal care, meal preparation, basic housework, daily shopping, and use of transportation). The panel gives weight to the information provided by the appellant's family physician in his letter of November 29, 2013 clarifying the information set out in the PWD application and stressing that the appellant requires



"significant help with meal preparation and encouragement to eat, housework, shopping" and taking public transit, and finds that the Ministry's determination that because it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA, is not reasonable.

Conclusion

Having reviewed and considered all of the evidence, including the Additional Information, and the relevant legislation, the panel finds that the Ministry's decision that the appellant was not eligible for PWD designation is not reasonably supported by the evidence. The panel therefore rescinds the Ministry's decision.