

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 which held that the appellant did not meet 3 of the 5 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 a medical practitioner has confirmed that the appellant has an impairment that is likely to continue for at least 2 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 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

The appellant did not attend the hearing. After confirming that the appellant was notified of the hearing, the hearing proceeded in her absence in accordance with s. 86(b) of the Employment and Assistance Regulation.

Evidence before the ministry at reconsideration

- A PWD application comprised of a Self-report (SR) that the appellant chose not to complete and both a Physician Report (PR) and an Assessor Report (AR) completed by the appellant's general practitioner of 12 years and dated April 17, 2013.
- A letter from Service Canada confirming that as of May 2012 the appellant receives a monthly Canada Pension Plan (CPP) disability pension.

Diagnoses and health history

The appellant is diagnosed by her general practitioner with:

- (1) coronary artery disease (2008 onset) requiring angioplasty and stents and resulting in ongoing angina chest pain with exertion despite medical therapy;
- (2) COPD (2005 onset) – cough and dyspnea (shortness of breath); and
- (3) fibromyalgia (onset 1985) – musculoskeletal pain with activity.

Physical Impairment

- Physical functional skills reported in the PR indicate that the appellant can walk less than 1 block unaided, climb 2 to 5 steps unaided, and lift under 5 lbs. The appellant has no limitation respecting the time she can remain seated.
- In the AR, the appellant is reported as independent with walking indoors and outdoors (walking outdoors takes 2 -3 times longer) and standing. Climbing stairs requires the use of a rail and is done slowly. The appellant is reported as unable for lifting and carrying/holding. The physician reports that the appellant frequently stops to rest.

Mental Impairment

- The appellant's physician does not diagnose a mental impairment or brain injury.
- The physician reports that there are no difficulties with communication.
- In the PR, significant deficits in 4 of 11 listed aspects of cognitive and emotional function are reported and identified as relating to chronic pain (executive, memory, emotional disturbance, and motivation).
- In the AR, when asked to indicate to what degree the applicant's mental impairment or brain injury restricts or impacts functioning, the physician identifies a major impact on daily

functioning for 5 of 14 listed aspects of cognitive and emotional functioning – emotion, insight and judgement, attention/concentration, executive, and memory – and comments that fibromyalgia results in cognitive symptoms, depression and anxiety. A moderate impact on daily functioning is reported for 1 aspect, motivation. Either minimal or no impact is reported for the remaining 7 listed aspects.

- The physician reports that the appellant independently manages all 5 listed aspects of social functioning independently.
- Marginal functioning with extended social networks is reported with the comment “isolation”; good functioning is reported with immediate social networks.

DLA

- In the AR, the physician reports that the appellant independently manages all listed aspects of the DLA personal care, meals, paying rent and bills, medications, transportation, and social functioning as well as 4 of 5 listed aspects of shopping without any noted restrictions.
- Both aspects of the DLA basic housekeeping are reported to take 2 times longer and the remaining 1 aspect of shopping, carrying purchases home, is reported to take 2-3 times longer than normal.

Need for Help

- In the PR, the general practitioner reports that the use of a rail for climbing stairs is required.
- In the AR, the physician indicates that assistance is provided by family and friends; no further description is provided.

No additional evidence was provided by either party on appeal.

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 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

The appellant's position is that she has a severe disability and is unable to function independently which is confirmed by the fact that she receives a CPP disability pension.

The ministry's position is that the information does not establish a severe physical impairment. Specifically, the ministry argues that although the physician indicates a significant impact on the appellant's ability to walk in the PR, in the AR the appellant is reported as independent with walking, though 2 to 3 times slower than normal, and is independent with the majority of DLA. The ministry states that railing used to climb stairs is not an assistive device as defined in the legislation and that inconsistent information has been provided respecting the appellant's ability to lift. The ministry also notes that the criteria respecting CPP disability differ from those for PWD designation under this legislation which does not include employability as a criterion. The ministry concludes that the level of functioning is indicative of a moderate rather than severe level of impairment.

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. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

A medical practitioner, the appellant's general practitioner of 12 years, diagnosed the appellant with coronary artery disease, COPD and fibromyalgia. The physician provided some information indicating that the appellant is severely limited in terms of her ability to walk and lift, namely that the appellant can walk less than 1 block unaided and can either do no lifting or lift weights under 5 lbs. However, the physician also reports that the appellant is independent walking indoors and outdoors, though 2-3 times slower than normal, and that she can carry purchases home but takes 2-3 times longer than typical. The appellant has not provided a description of her physical functioning other than her statement that she does not function independently. The information respecting the appellant's ability to manage other DLA is that she is independent, though both listed tasks of the DLA basic housekeeping take 2 times longer than normal to perform. In view of the somewhat inconsistent information provided respecting the appellant's ability to walk and lift/carry together with the information from the physician that the appellant independently manages most aspects of all DLA, though some take 2-3 times longer to perform, the panel finds that the ministry has reasonably viewed the appellant's level of functioning as more in keeping with a moderate degree of physical impairment. In reaching this conclusion, the panel notes that employability is not a basis for establishing eligibility for PWD designation and that the requirements are those set out in the EAPWDA and EAPWDR which may differ from CPP disability pension requirements. In conclusion, the panel finds that the ministry reasonably determined that a severe physical impairment was not established.

Severe Mental Impairment

The appellant's position is that she has a severe disability and is unable to function independently which is confirmed by the fact that she receives a CPP disability pension.

The ministry's position is that the information does not establish a mental disorder that causes a severe impairment to emotional and cognitive functioning. The ministry notes that a mental disorder is not diagnosed by the physician and that the identified deficits with cognitive and emotional functioning are attributed to chronic pain. Further, the physician reports the appellant as independently managing most DLA independently, including those that relate to making decisions about personal activities, care or finances and relating to, communicating or interacting with others effectively.

Panel Decision

The appellant's physician did not diagnose a mental disorder or brain injury but did report that, as a result of chronic pain, the appellant has a number of significant deficits with cognitive and emotional functioning which have a major impact on daily functioning in the areas of emotion, insight and judgement, attention/concentration, executive, and memory. However, the physician reports no restriction or limitation of the appellant's ability to manage any of the listed cognitive DLA tasks, including the ability to make decisions about personal activities, care or finances, or her ability to communicate. All listed aspects of social functioning are managed independently and functioning with immediate social networks is reported as being good. The only limitation noted is that the appellant has marginal functioning with extended social networks due to "isolation" with no further explanation provided. In the absence of a diagnosed mental disorder or brain injury together with the physician's information respecting the appellant's ability to independently manage the cognitive and emotional aspects of DLA, the panel finds that the ministry has reasonably concluded that the information does not establish that a severe mental impairment has not been established.

Restrictions in the ability to perform DLA

The appellant's position is that she is unable to function independently due to severe disability.

The ministry's position is that the information from the prescribed professional, the appellant's physician, does not establish that a *severe* impairment *significantly* restricts the appellant's ability to perform DLA continuously or periodically for extended periods. The ministry argues that, aside from taking 2 to 3 times longer to perform the activities of basic housekeeping and carrying purchases home, which the ministry finds is not indicative of a severe restriction, the appellant independently manages the majority of DLA which do not take longer to complete.

Panel Decision

The legislative requirement respecting DLA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods as a result of a severe physical or mental impairment.

In this case, as noted above, the appellant's physician indicates some limitations which could reasonably be expected to result in significant restrictions in the ability to perform DLA. However, as also noted above, the physician reports that the appellant independently mobilizes indoors and outdoors, though walking outdoors takes 2-3 times longer than normal and 2 to 5 stairs are managed slowly with the use of railing. The panel notes that stair railing is not an assistive device as defined in the legislation - "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."

The physician indicates that the DLA basic housekeeping is managed independently though it takes 2 times longer than typical.

Additionally, while the physician has provided inconsistent information respecting the appellant's ability to lift, having stated both that she is unable to lift/carry and that carrying purchases home takes 2-3 times longer, all remaining tasks of the DLA shopping are performed independently, including going to and from stores, and all tasks of all other DLA are performed independently (personal care, meals, paying rent and bills, medications, transportation, and social functioning).

The panel concludes that the ministry has reasonably determined that the prescribed professional's evidence establishes a level of independent functioning with DLA that is not indicative of a severe restriction and that, consequently, a significant restriction in the ability to perform DLA either continuously or periodically for extended periods has not been established.

Help to perform DLA

The appellant's position is that she is unable to function independently.

The ministry's position is that it has not been established that a severe impairment significantly restricts the appellant's ability to manage DLA are significantly restricted and that as a result the significant help from another person is required. 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 professional, though somewhat unclear with respect to the appellant's ability to lift, is that the appellant manages her DLA independently, though some aspects take 2-3 times longer. As noted above, stair railings are not assistive devices as defined in the legislation. 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.

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.