

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 19, 2013, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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 information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report [dated March 15, 2013], a physician's report ("PR") signed by the appellant's physician of 5 years [dated May 27, 2013], and an assessor's report ("AR") signed by the appellant's chiropractor of 10 years [dated June 12, 2013].
- The appellant's Request for Reconsideration dated October 24, 2013.
- An advocate-prepared questionnaire completed and signed by the appellant's physician on October 29, 2013 (the "Questionnaire").
- Various medical reports including diagnostic imaging reports related to the appellant's impairment (collectively referred to herein as "the Medical Reports").

Physical Impairment

- In the PR the appellant's physician diagnosed her with lower back pain radiating to her right leg, left shoulder pain reducing range of motion, and neck/right shoulder pain.
- In the section of the PR dealing with the Degree and Course of Impairment, the physician referred to the Medical Reports in writing "Permanent [illegible] of left shoulder as per xray, MRI & orthopedic surgeon's report. Ongoing headache due to neck pain & spasm of local muscles of the neck."
- In terms of physical functional skills the physician reported the appellant as being able to walk 4+ blocks unaided on a flat surface, climb 5+ stairs unaided, lift 5 to 15 pounds, and remain seated for 1 to 2 hours.
- In the Request for Reconsideration form the physician commented that "[The appellant] will benefit from ongoing chiropractic therapy, massage therapy & aqua exercise in a local community centre."
- In the AR the chiropractor reported the appellant as having chronic neck, upper back and shoulder pain since 2003. He indicated the appellant is independent in terms of walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding.
- The chiropractor wrote that "She has xrays, CT's, MRI's on the neck & shoulders documenting degenerative joint & disc disease in the neck & a subchondral cyst on the left shoulder."
- In her self report the appellant explained that her impairment arose out of a car accident in 2003.
- In her oral evidence the appellant said that when she does too much her muscles seize up and cause severe pain. During these instances she can only lie down and sleep for 2 or 3 days.

Mental Impairment

- The PR provides no diagnosis of a mental impairment.
- The physician indicated the appellant has no difficulties with communication, and no significant deficits with cognitive and emotional function.
- In the AR the chiropractor reported the appellant's ability to communicate as being good in all respects.

- Section B.4 of the AR form, which is meant to provide detail of impacts to cognitive and emotional functioning, starts with the instruction "Complete item #4 for an Applicant with an identified mental impairment or brain injury." The chiropractor started to complete this section, then crossed out his responses and commented "No impairment or brain injury."

DLA

- The physician reported the appellant has not been prescribed any medications that interfere with her ability to perform DLA.
- The physician indicated that the appellant is not directly restricted in performing the DLA of *personal self-care* (with modification), *meal preparation*, *management of medications*, *daily shopping* (weight lifting is an issue), *management of finances*, and *social functioning*.
- He indicated that the appellant is directly restricted in *basic housework* (modified activity), and in *mobility* (outside the home). Regarding the DLA *use of transportation*, the physician commented "sitting long using break when foot goes numb."
- The chiropractor reported the appellant as being fully independent in all aspects of DLA.
- The chiropractor commented "While she is able to perform most of her [DLA] she is at best minimally employable."
- The Questionnaire is a form prepared by a legal advocacy centre which poses a number of questions to which the physician was asked to respond "agree" or "disagree". The physician indicated that he agreed that while the appellant is able to manage most of her DLA by taking 2-3 times longer than typical, she has periodic episodes where the muscles of her neck, back and leg cause so much pain that she is essentially only able to rest for the duration. The physician agreed that these episodes typically occur "at least" 2 times per month, lasting 2-4 consecutive days.
- The physician also indicated agreement with the statement that "...[the appellant's] condition is severe, that she is significantly restricted with her activities of daily living, and as a result requires periodic assistance with her ADL's..."
- In her self report the appellant provided significant detail about the impacts of her impairments on her employment history since her auto accident. She also wrote that when she drives her vehicle the pressure of the seatbelt on her left shoulder causes discomfort. Her leg and foot tend to go numb and she has to stop to restore the feeling.
- In her oral evidence, the appellant said that she manages as well as she does by taking frequent rests. She stated that if she pushes herself too far her muscles seize up which causes significant pain, and can bring on the severe disabling episodes which she said occur an average of 2 times per month for 2-3 days. She indicated she can sometimes stave off one of these episodes if she recognizes it soon enough and refrains from pushing herself too far.
- In response to a question from the panel regarding meal preparation, the appellant said that during her severe episodes she usually does not feel like eating. She said she reheats frozen dinners in the microwave.
- In response to a question about her ability to perform housework, the appellant said that she has a small kitchen, so she can clean the counter tops and wash dishes if she does it in stages.
- In response to a question regarding mobility outside the home, the appellant said that she can normally walk 3 to 4 blocks and then she has to stop and stretch her muscles. If she goes too far without stopping and stretching her muscles seize up. If she does stop and stretch she can usually resume walking for a reduced distance until she must again stop and stretch.

- Regarding use of transportation, the appellant said that she drives her own vehicle, but that the seat belt rubs on her left shoulder and her right leg and foot tend to go numb.

Help

- The physician indicated the appellant does not require any prostheses or aids for her impairment.
- He commented that "Her son helps her with cleaning the house, vacuuming and occasionally driving her around & shopping, but for the most part [the appellant] has learned to modify her activities to perform most of her works."
- The chiropractor indicated the appellant does not have an assistance animal.
- In her oral testimony the appellant's friend said that she believes the appellant's need for assistance has not been fully documented since she has been doing so well for the past decade. She said that the appellant's son was living with the appellant until January or February, and that it is only since he has left home that it has become apparent how much the appellant relied on him for DLA. Since the son moved out the appellant's friend and daughter have been helping her with cleaning and getting groceries.

Admissibility of New Information

In oral testimony the appellant and her witness provided new information regarding her impairments. This information provides additional detail with respect to issues addressed in the original PWD application. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information.

PART F – Reasons for Panel Decision

The issue on this 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, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform 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.

EAPWDR section 2(1):

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

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

Severe Physical Impairment

The appellant's position is that her neck, shoulder and muscle pain constitute a severe physical impairment.

The ministry's position, as set out in its reconsideration decision, is that the appellant's functional

skills limitations are more in keeping with a moderate degree of physical impairment rather than a severe impairment.

Panel Decision

The legislation makes it clear that the determination of severity is at the discretion of the ministry – the ministry must be “satisfied” that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence. Accordingly, the physician’s agreement in the Questionnaire that the appellant’s impairment is “severe” is not determinative that this statutory criterion is satisfied.

The evidence regarding the appellant’s physical functional skills tend to indicate she is at the mid – to higher end of the ability scale. The appellant indicated that she has to take frequent breaks in order to function, but otherwise provided little evidence to refute the physician’s assessment of her functional skills.

The evidence in the appellant’s self-report focused on the impacts of her medical condition on her ability to work and to pursue former recreational activity, rather than on her ability to manage DLA. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the functional skills limitations resulting from her impairments do not appear to have translated into significant restrictions in the appellant’s ability to manage her DLA independently. Based on the foregoing analysis, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant advanced no argument with respect to severe mental impairment.

The ministry’s position, as set out in its reconsideration decision, is simply that there is not enough evidence to establish a severe mental impairment.

Panel Decision

There is no evidence to indicate that the appellant has been diagnosed with a mental impairment. In terms of mental functional skills, the evidence indicates that the appellant’s communications skills are good in all respects. There is no evidence of any significant impacts to the appellant’s cognitive and emotional functioning.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make

decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*). The evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that she independently manages her finances (pay rent and bills) and her medications. Based on the chiropractor's evidence in the AR, she also independently manages the decision-making components of the DLA of *daily shopping*, and *meal preparation* (meal planning and food storage). There is no evidence of any disruption of the appellant's *social functioning*.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that her DLA are significantly restricted. She said that it is only since her son left home that it has become apparent how dependent she was on him for DLA. She stated that her conditions are chronic, and that she can't function at all during her severe episodes. She said that even when she is not having a severe episode, she is never completely functional – she has to struggle every day to perform DLA.

The ministry's position is that the appellant has learned to adapt to perform her DLA independently. The ministry argued that the frequency and duration of the appellant's severe episodes do not constitute a significant restriction.

Panel Decision

In the panel's view, the evidence of the physician and the chiropractor is consistent in indicating that the appellant is not significantly restricted with respect to 7 of the 10 prescribed DLA – *personal self-care*, *meal preparation*, *management of medications*, *daily shopping*, *management of finances*, *decision-making*, and *social functioning*. The evidence indicates that the appellant does get some assistance with *daily shopping* in the form of getting occasional rides to the store, and heavy lifting or carrying.

With respect to the DLA of *use of transportation*, the evidence is that the appellant drives her own automobile, though it causes her discomfort to drive for more than 15 to 20 minutes at a time. Occasionally her son will drive her.

The physician indicated direct restrictions to 2 of the 10 prescribed DLA. With respect to *basic housework*, the physician's evidence indicates the appellant can perform some housework with "modified activity". This is consistent with the appellant's evidence that she can do lighter aspects of housekeeping if she paces herself by taking frequent breaks. She gets help from her daughter and her friend.

Regarding the outside component of the DLA *move about indoors and outdoors*, the physician indicated that the appellant is directly restricted, though he hasn't indicated whether the restriction is continuous or periodic. The chiropractor's evidence indicated that the appellant is independent with respect to walking indoors and outdoors. The appellant has indicated that she can walk up to 4 blocks before needing to stop and stretch her muscles, and that she can then carry on walking but

with diminishing intervals between stops for stretching.

The appellant argued that the professional evidence with respect to her abilities and restrictions really only applies when she is not having one of her severe episodes, which she indicated occur approximately twice a month for 2 to 3 days. There is some evidence that the appellant is sometimes able to exercise some control over the onset of these episodes, and that she can, to some extent, plan for them by preparing meals in advance.

The evidence, considered as a whole, demonstrates that the appellant does experience direct restrictions in her ability to perform DLA. However, she is mostly able to perform her DLA independently except during the approximately 2 episodes per month when she is incapacitated for 2 to 4 days at a time. In the panel's view, the evidence does not present a compelling picture of an individual whose ability to manage her DLA is significantly restricted as contemplated by the legislative scheme. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage her DLA independently is not significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she relies on help from her daughter and her friend to perform the DLA of *basic housework* and *daily shopping*, and that she relies completely on others to perform DLA when she is having a severe episode.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

In the panel's view, on the evidence it would be difficult to conclude that the help provided to the appellant by her daughter and her friend with respect to aspects of housework and shopping constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA.

The appellant does not use an assistive device or an assistance animal to perform DLA.

For these reasons, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.