

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated September 12, 2013 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – Summary of Facts

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated April 9, 2013, a physician report (PR) dated April 25, 2013 and an assessor report (AR) dated April 26, 2013 both completed by the appellant's family physician who has known her more than 10 years. The following document was also included: Request for Reconsideration dated September 9, 2013.

Diagnoses

The appellant has been diagnosed by her general practitioner with migraine headaches (diagnostic code: neurological disorders), depression, and generalized anxiety disorder, all with an onset of 2010.

Physical Impairment

- Under health history in the PR, the general practitioner wrote that the appellant "suffers from migraine headaches that interfere with her daily activities. She is being treated with some new preventative meds."
- The general practitioner reported in the PR that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform her daily living activities (DLA) and she does not require a prosthesis or aid for her impairment.
- Functional skills reported in the PR indicated that the appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, and has no limitation with lifting or remaining seated.
- In the AR, the general practitioner assessed the appellant as independent with all mobility and physical ability, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. The general practitioner did not add any comments.
- In her self-report, the appellant wrote that she has severe chronic migraines, which affect a big part of her life and her ability to take care of herself. The appellant wrote that her migraines sometimes last 3 to 4 days. The severe, throbbing pain makes it hard for her to do activities in the day and to work full-time. She also gets migraine attacks during which she cannot do anything. She has to lie in bed with all the lights off since lights, TV, and movement hurts her head more. The appellant wrote that she has had migraines her whole life and she cannot take care of herself properly or work to make a living.

Mental Impairment

- In the health history in the PR, the general practitioner wrote that the appellant "suffers from depression with anxiety and some panic attacks that interfere with her daily activities."
- In the PR, the general practitioner reported a significant deficit with cognitive and emotional function in the area of emotional disturbance (e.g. depression, anxiety), with no further comments added.
- The general practitioner indicated in the PR that the appellant does not have difficulties with communication and, in the AR, that the appellant has a good ability to communicate in all areas.

- In the AR, the general practitioner assessed one moderate impact with cognitive and emotional functioning in the area of emotion and one minimal impact in the area of attention/concentration. The remaining 12 areas of functioning are assessed with no impact, and the general practitioner did not provide additional comments.
- In her self-report, the appellant wrote that she has really bad anxiety/depression, and she gets panic attacks. The appellant wrote that it feels like vertigo and is a "really intense feeling" that strikes without warning. She cannot do anything when she gets attacks and she gets scared and stressed out and it is hard. The appellant wrote that her depression drains her energy and drive, making it difficult to get out of bed and do what she needs to do in the day. It affects her work and makes her panic attacks worse. She feels tired and her body aches, and it affects her ability to work, eat, and sleep.

Daily Living Activities (DLA)

- In the PR, the general practitioner reported that the appellant is not restricted with any of the listed DLA, including personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, management of finances, and social functioning.
- In the additional comments to the PR, the general practitioner added that the appellant "has only been able to keep part-time employment as a result of her conditions."
- The general practitioner reported in the AR that the appellant is independent with all tasks of all listed DLA including all aspects of social functioning, and did not provide further comment with respect to any DLA.
- In the additional comments to the AR, the general practitioner wrote that "due to her headaches and emotional issues, finds it difficult to maintain full-time employment."
- In her self-report, the appellant wrote that with all the things she is sick from, it is hard and it affects her day-to-day life.
- In her Request for Reconsideration, the appellant wrote that she has severe chronic migraines and really bad anxiety and depression and it is really hard for her to work full-time hours. She does not know when she is going to have a migraine attack or an anxiety attack, as these can happen anytime.

Need for Help

- In the reports included in the PWD application, the general practitioner indicated that the appellant does not require an aid for her impairment and no assistive devices are used.
- The general practitioner indicated in the AR that the appellant lives with family, friends or caregiver. The general practitioner did not provide information regarding who provides help required for DLA.
- In her Request for Reconsideration, the appellant wrote that she thinks she needs as much help as anyone else who is a sick person.

In her Notice of Appeal, the appellant expressed her disagreement with the reconsideration decision. The appellant wrote that migraines are still an illness and so is anxiety and depression. The appellant wrote that it is hard for her to work full-time. Neither the appellant nor the ministry provided additional written submissions on the appeal. The ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

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

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

- (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of the chronic pain due to migraine headaches and migraine attacks. The appellant argued that her migraines sometimes last 3 to 4 days and the severe, throbbing pain makes it hard for her to do activities in the day and to work full-time. The appellant argued that she also gets migraine attacks during which she cannot do anything, that she has to lie in bed with all the lights off since lights, TV, and movement hurts her head more.

The ministry's position is that a severe physical impairment has not been established by the information provided. The ministry pointed out that the general practitioner reported no physically restrictive medical diagnosis and no functional skill limitations and the appellant has mobility and is able to do physical activities. The ministry pointed out that although the general practitioner indicated that the appellant is restricted as she has only been able to keep part-time employment as a result of her conditions, employability is not an eligible criterion for PWD designation.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. To assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage her DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach well when it defines the word "impairment" in the physician report as being "a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of over 10 years, diagnosed the appellant with migraine headaches, with a diagnostic code for neurological disorders, and commented in the health history that the appellant "suffers from migraine headaches that interfere with her daily activities." However, the general practitioner reported no limitations with the appellant's

functional skills and complete independence in all the appellant's mobility and physical abilities. In her self-report, the appellant wrote that her migraines sometimes last 3 to 4 days and the severe, throbbing pain makes it hard for her to do activities in the day and to work full-time. The appellant also wrote that she gets migraine attacks during which she cannot do anything and she has to lie in bed with all the lights off. The panel finds that these exacerbations of pain described by the appellant have not been reflected in the general practitioner's reports as all DLA are reported as being performed independently. The appellant does not use an assistive device or an aid to help compensate for her impairment.

In the additional comments to the PR, the general practitioner added that the appellant "has only been able to keep part-time employment as a result of her conditions." For an impairment to be a "severe impairment" under the legislation, section 2 of the EAPWDA requires that the ministry must be satisfied that the evidence demonstrates restrictions to a specified degree in certain specified areas of daily functioning. The legislation reads that for PWD designation, the minister must be satisfied that "the person has a severe mental or physical impairment that directly and significantly restricts the person's ability to perform [prescribed] daily living activities and as a result of those restrictions, the person requires help [an assistive device, the significant help or supervision of another person, or the services of an assistance animal] to perform those activities." As ability to search for, accept or continue in employment is not listed as one of the prescribed DLA, the panel finds that the ministry reasonably held that employability is not a factor in assessing eligibility for PWD designation.

Considering the evidence provided by the general practitioner together with that of the appellant, the panel finds that the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position is that a severe mental impairment is established by the evidence of her anxiety/depression, and her panic attacks. The appellant argued that her depression drains her energy and drive, making it difficult to get out of bed and do what she needs to do in the day, that it affects her work and makes her panic attacks worse. The appellant argued that she feels tired and her body aches, and it affects her ability to work, eat, and sleep.

The ministry's position is that a severe mental impairment has not been established by the information provided. The ministry argued that while the general practitioner indicated that the appellant has a deficit with cognitive and emotional functioning in the area of emotional disturbance, in assessing the impacts on daily functioning the general practitioner indicated that the appellant has a moderate impact to emotion and one minimal impact on attention/concentration, with no impact on 12 of 14 other aspects. The ministry argued that the general practitioner reported no difficulties with communication.

Panel Decision

The general practitioner diagnosed the appellant with depression, and generalized anxiety disorder and wrote in the PR that the appellant "suffers from depression with anxiety and some panic attacks that interfere with her daily activities." The general practitioner reported a significant deficit with cognitive and emotional function in the area of emotional disturbance (e.g. depression, anxiety), with

no further comments added. In terms of degree of impact, the general practitioner assessed one moderate impact with cognitive and emotional functioning in the area of emotion and one minimal impact in the area of attention/concentration, and no impact in the remaining 12 areas of functioning. In her self-report, the appellant wrote that she has really bad anxiety/depression, and she gets panic attacks. The appellant wrote that it feels like vertigo and is a "really intense feeling" that strikes without warning and she cannot do anything when she gets attacks and she gets scared and stressed out. The appellant wrote that her depression drains her energy and drive, making it difficult to get out of bed and do what she needs to do in the day. She feels tired and her body aches, and it affects her ability to work, eat, and sleep.

The panel finds that these exacerbations of pain described by the appellant have not been reflected in the general practitioner's reports as all DLA are reported as being performed independently. The general practitioner indicated in the PR that the appellant is not restricted in her social functioning and has no difficulties with communication. Given the little evidence of impacts to the appellant's cognitive, emotional, and social functioning, the panel finds that the ministry reasonably determined that the information provided did not establish a severe mental impairment under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

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

The ministry's position is that the information from the prescribed professionals does not establish that impairment significantly restricts the appellant's DLA either continuously or periodically for extended periods. The ministry argued that the general practitioner reported no restriction to DLA including social functioning, and that all DLA are performed independently including social functioning.

Panel Decision

The evidence of the appellant's general practitioner, as the prescribed professional, is that the appellant's impairment does not restrict her ability to perform any of the listed DLA. The general practitioner reported that the appellant is not restricted with any DLA and is independent with all tasks of the listed DLA including all aspects of social functioning, and did not provide further comment with respect to any DLA. In her self-report, the appellant wrote that with all the things she is sick from, it is hard and it affects her day-to-day life. The appellant added, in her Request for Reconsideration, that she has severe chronic migraines and really bad anxiety and depression and it is really hard for her to work full-time hours since she does not know when she is going to have a migraine attack or an anxiety attack, as these can happen anytime. In the additional comments to the AR, the general practitioner wrote that "due to her headaches and emotional issues, finds it difficult to maintain full-time employment." However, as set out above, the panel finds that the ministry reasonably held that employability is not a factor in assessing eligibility for PWD designation. Considering the reported level of the appellant's independent functioning with no need for assistance with any listed DLA, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

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

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

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The evidence of the prescribed professionals establishes that the appellant lives with family, friends or caregiver, and there is no information provided regarding who provides help required for DLA. In her Request for Reconsideration, the appellant wrote that she thinks she needs "as much help as anyone else who is a sick person."

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.