

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of December 2, 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, including a two-page typewritten response to questions 1 and 2 [dated June 26, 2013], a physician's report ("PR") signed by the appellant's physician of over 2 years [dated June 10, 2013], and an assessor's report ("AR") signed by a registered psychiatric nurse [dated June 21, 2013].
- The appellant's Request for Reconsideration [dated November 26, 2013], with attached handwritten reconsideration submission from the appellant.
- A "To Whom it May Concern" letter from the appellant's physician [dated August 8, 2013].

Physical Impairment

- In the PR the physician diagnosed the appellant with chronic hepatitis C, scoliosis, and an ankle ligament tear.
- In her letter of August 8, 2013 the physician wrote "Patient has been newly diagnosed with Fibromyalgia. She is also known with chronic pain from arthritis and mod to severe depression. Due to the above mentioned medical problems she is not able to work currently."
- With respect to functional skills, in the PR the physician indicated that the appellant can walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs., and can remain seated for less than 1 hour.
- In the AR the psychiatric nurse indicated that the appellant uses an assistive device (a cane) for walking indoors and outdoors. She noted that the appellant takes significantly longer than typical climbing stairs, commenting "Dr. reports - unable to climb more than 5 stairs." She described the appellant as being independent with respect to standing, lifting, and carrying/holding.
- The psychiatric nurse also reported that the appellant has hypoglycemia (low blood sugar).
- In her self-report the appellant wrote that she is unable to drive because of her ligament tear and that she needs a scooter to aid her mobility. She reported that she had surgery on the ligament tear which has left her with limited ankle range, chronic pain, and low response time. The appellant wrote that she can't walk for more than half an hour without feeling severe pain. She stated that her inability to walk long distances makes it very difficult to perform housework, grocery shopping, taking children to and from school, parenting, and quality time with children.
- In her written reconsideration submission the appellant referenced the impacts from her ligament tear in a typical day. She wrote that 90% of her day is spent in bed as it hurts to sit in a chair or to stand for more than 10-15 minutes.
- In her oral testimony on appeal the appellant said that she can no longer go down the 15 stairs to the basement in her home to do the laundry. She said that the last time she went down the stairs she had to sit down and rest every 5 stairs, and that it took her over an hour to make the round trip down and back up the stairs.

Mental Impairment

- In the PR the physician diagnosed the appellant with anxiety and depression. She noted that the depression is "long standing – might improve with [illegible]."
- In terms of functional skills the physician noted the appellant has no difficulties with

communication, but that she has significant deficits with four aspects of cognitive and emotional function: executive, memory, emotional disturbance, and motivation.

- In the AR the psychiatric nurse wrote that the depression and anxiety “impacts sleep patterns, appetite poor, labile mood and short term memory issues.” She noted the appellant’s physical symptoms compound the symptoms of depression and anxiety.
- The psychiatric nurse indicated the appellant’s ability to communicate is good in all respects.
- She indicated the appellant’s impairment causes moderate impacts in 5 of 14 categories of cognitive and emotional functioning, including emotion and motivation. She indicated minimal impacts in 4 other categories, including executive and memory. The remaining 5 categories are indicated as having no impact.
- The psychiatric nurse reported the appellant is marginally functional with her immediate and extended social networks, commenting that the appellant is seeking support and counselling. She indicated the appellant is independent in terms of making appropriate social decisions, interacting appropriately with others, and able to secure assistance from others. The psychiatric nurse indicated the appellant needs periodic assistance in developing and maintaining relationships (client isolates due to anxiety) and in dealing appropriately with unexpected demands (irritable, angry mood).
- In her self-report the appellant wrote that “the physical aspect has a great impact on the severity of the mental aspect.” She stated that she has social anxieties which make it very difficult to impossible to interact appropriately, that it can take up to 5 hours to prepare to leave the house because she fears forgetting items, that she is taking the maximum dosage of anti-anxiety medication to be able to leave the house, and that she becomes panicked and overwhelmed when trying to solve a problem.
- In her reconsideration submission the appellant wrote that “...right now I could care less if I live or die...” She stated that the diagnosis of fibromyalgia has made her depression even worse than it was before.
- She wrote that in her PWD application she had been unable to fully describe how she is on a normal day because of a fear that someone will think she is unable to look after her children properly and that they will be taken away from her.
- In her oral testimony on appeal the appellant said that she can not say when her depression will hit or how long it will last or how severe it will be.
- In response to a question from the panel the appellant said that she is depressed all the time, but that about twice a week it gets sufficiently severe that she can’t get out of bed. She said that the length of these periods of being bed-ridden vary, with the longest being about a week and a half, but the average being about 2 days.

DLA

- In the PR the physician indicated that the appellant is not directly restricted in the 2 DLA of *use of transportation and management of finances*.
- She indicated the appellant as being continuously restricted with the 3 DLA of *meal preparation, basic housework, and daily shopping*, as well as with the “mobility outside the home” aspect of the DLA *moving about indoors and outdoors*.
- The physician reported the appellant as being periodically restricted with the 2 DLA of *personal self-care and management of medications*. She also reported the appellant as being periodically restricted with the “mobility inside the home” aspect of the DLA *moving about indoors and outdoors*.
- In explaining her use of the term “periodic”, the physician wrote “depends on her motivation +

mood. Inside house – can only manage upper floors, can't go down to basement.”

- In the AR the psychiatric nurse indicated the appellant is independent in all aspects of the 2 DLA of *manage personal finances* (pay rent and bills) and *manage personal medication*.
- The psychiatric nurse indicated the appellant is independent in all aspects of the 2 DLA of *personal care* and *basic housekeeping*, but indicated that she needs periodic assistance with some aspects and continuous assistance with basic housekeeping. The psychiatric nurse indicated the appellant's need for assistance “fluctuates”, and that she may use a cane for assistance with DLA.
- The psychiatric nurse reported the appellant as being independent with most aspects of the DLA of *daily shopping* (including “making appropriate choices”), but that she needs periodic assistance going to and from stores, and continuous assistance carrying purchases home.
- Regarding the DLA of *meal preparation*, the psychiatric nurse indicated the appellant requires continuous assistance with meal planning but that she is independently manages safe storage of food. She commented “unknown” with respect the the appellant's abilities with food preparation and cooking.
- Regarding the DLA of “use of transportation”, the psychiatric nurse indicated the appellant requires continuous assistance getting in and out of a vehicle.
- In her written reconsideration submission the appellant wrote that she has not been able to cook a full meal for 10 years. She reported that for the last 8 years she has had to have help getting in and out of the bath, cooking meals, and walking her daughter to school.
- In her oral testimony on appeal the appellant stated that she can't go shopping and she can't let her child hug her. She also stated that her husband always has to help her in and out of the shower as she once had a serious fall in the shower.
- With respect to cooking meals the appellant said that she can take something out for dinner, but that she then can't stand up long enough to cook a meal so she leaves it for her husband to do.
- In response to a question from the ministry the appellant acknowledged that she is capable of planning a meal, but added that she can't actually prepare the meal.

Help

- The physician indicated that the appellant uses a cane to assist with walking,
- The psychiatric nurse indicated that the appellant relies on assistance from family and community service agencies. She reported that the appellant uses a cane and a BGM (blood glucose machine) for her hypoglycemia, and that she does not have an assistance animal.
- The appellant said that she is in need of a scooter.

Admissibility of New Information

In her oral testimony the appellant provided additional detail with respect to how her impairments affect her ability to manage DLA. 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 impairments cause severe pain, constituting a severe physical impairment. She argued that the physician's and psychiatric nurse's evidence support each other with respect to her inability to climb stairs.

The ministry's position, as set out in its reconsideration decision, is simply that the prescribed professionals have not provided enough evidence to confirm that the appellant has a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the appellant's physician and the psychiatric nurse.

In the panel's view, the appellant's functional skills, as described by the physician and the psychiatric nurse, are more in keeping with a moderate impairment rather than a severe impairment. This is consistent with the information provided by the appellant in her self-report where she focused her response to question 2 on her difficulties in walking "long distances". The appellant stated at the appeal hearing that she is bed-ridden much of the time, that she is confined to the main floor of her home because she cannot readily use the basement stairs, and that she is unable to use the shower without assistance from her husband. These are very significant impacts, and the panel finds it unusual that the appellant would not have mentioned these profound impacts in her original self-report. A reference to the basement stairs can be found in the PR, and the impacts on showering can be inferred from the AR and PR, but neither of the prescribed professionals provided any narrative regarding the extent of this impact, and neither prescribed professional reported the appellant as spending "90% of each day in bed." The physician's letter of August 8, 2013 did not provide any evidence that the recent diagnosis of fibromyalgia has changed her assessment of the appellant's functional skills.

The evidence of the appellant conflicts with that of the psychiatric nurse in terms of her ability to stand. The appellant said that she can only stand for 10-15 minutes, while the psychiatric nurse indicated the appellant is completely independent in terms of standing, and she provided no narrative to describe any limitations to standing. Where the appellant's evidence conflicts with that of the prescribed professionals, the panel prefers the professional evidence.

There are frequent references in the evidence to the impact the appellant's medical conditions have on her ability to work at paid employment. 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.

For the foregoing reasons, 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 argued that her anxiety and depression constitute a severe mental impairment. She stated that her physical impairments aggravate her mental condition, and that the recent diagnosis of fibromyalgia has made things worse.

The ministry's position, as set out in its reconsideration decision, is that the information submitted does not establish a severe mental impairment.

Panel Decision

The physician has diagnosed the appellant with long-standing anxiety and depression. The physician indicated that the appellant has significant deficits in 4 categories of cognitive and emotional function. The psychiatric nurse has indicated that the impacts in those 4 categories are either minimal (executive and memory) or moderate (emotion and motivation). The psychiatric nurse noted other impacts as well, none of which were more than moderate.

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. The physician indicated that the appellant requires periodic assistance with *managing personal medication*, but provided no narrative detail of what type of assistance the appellant requires or how frequently she requires it. Because of this lack of detail and because of the psychiatric nurse's specialized practice in the field of mental impairment, the panel has given more weight to the psychiatric nurse's assessment of this DLA.

Based on the psychiatric nurse's evidence in the AR, the appellant also independently manages the decision-making components of the DLA of *daily shopping* (making appropriate choices) and *social functioning* (appropriate social decisions). The psychiatric nurse indicated the appellant requires continuous assistance with the decision making component of the DLA of *meal preparation*, but in her oral evidence the appellant confirmed that while she can plan a meal, she stated she can't carry through with meal preparation.

The evidence indicates that the appellant has good communication skills and that her *social functioning* is adequate.

There is no medical evidence confirming that the appellant's recent diagnosis of fibromyalgia has significantly aggravated her mental impairment.

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 argued that the combination of physical impairment and anxiety essentially keep her confined to her home. She said that she is confined to bed most of the time and that she simply cannot manage her DLA without assistance.

The ministry's position, as set out in its reconsideration decision, is that the appellant is able to independently, or with periodic assistance, manage the majority of her DLA. The ministry felt that the prescribed professionals have not provided sufficient evidence of the frequency or duration of periodic restrictions. The ministry stated that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislation – section 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician and physiotherapist. This doesn't mean that other evidence – such as that from the appellant - shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied". In the appellant's case, the prescribed professionals have supplied little in the way of narrative to provide detail to the degree of restriction to DLA.

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The panel notes that where there is evidence of frequency or duration of restrictions to the appellant's ability to manage DLA, it is often conflicting or inconsistent. The prescribed professionals both indicate that the appellant requires periodic assistance with aspects of the DLA of *personal self-care* (without indicating how often this occurs or what type of assistance is required) while the appellant said that she continuously requires help getting in and out of a shower. The physician indicated the appellant requires periodic assistance with *managing personal medication* (what type of assistance she requires), while the psychiatric nurse indicated she is independent with this DLA.

The physician indicated that the appellant requires continuous assistance with *daily shopping* while providing no evidence of the type of assistance required. The psychiatric nurse indicated the appellant is independent in most aspects of daily shopping, but that she requires periodic assistance

getting to and from stores, and that she needs continuous assistance carrying purchases home. This latter observation conflicts with the psychiatric nurse's assessment that the appellant is independent with the functional skills of lifting/carrying/holding. The appellant's self-report indicated that the difficulty she has with *daily shopping* is her inability to walk long distances.

With respect to *meal preparation*, the appellant has said that she can take food out for a meal, but that she doesn't have the strength to prepare the meal. This appears to be inconsistent with the prescribed professional's assessment of her functional skills with respect to standing, lifting, carrying, and holding.

The evidence indicates that the appellant has some restrictions to her ability to *move about indoors and outdoors*, though the panel notes the appellant stated in her self-report that she can walk up to half an hour before experiencing severe pain.

The onus is on the appellant to prove on the balance of probabilities that she satisfies the legislative criteria with respect to direct and severe restrictions to her ability to manage her DLA independently. In the panel's view, while the evidence as a whole indicates that the appellant has some difficulty with her DLA, it does not paint a coherent and compelling picture of an individual whose impairments directly and significantly restrict her ability to manage her DLA either continuously or periodically for extended periods. Accordingly, the panel finds that the ministry reasonably found that this legislative criterion is not satisfied.

Help with DLA

The appellant's position is that she relies on help from her family members to be able to manage her DLA.

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

Findings that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period are a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been proved on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 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 finding 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.