

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the Ministry) reconsideration decision dated November 20, 2013 which found that the Appellant did not meet all of the 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 despite there being insufficient evidence to establish that she has a severe mental impairment, there is evidence to establish that the Appellant has a severe physical impairment which was likely to continue for at least two or more years. However, the Ministry determined that, based on the information provided, the following criteria were not met:

- that 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, 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 Assistance Act*.

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

1. The Appellant's Person With Disabilities (PWD) Application which includes the applicant self-report ("SR") dated May 28, 2013 as well as the physician report ("PR") dated June 4, 2013 and the assessor report ("AR") dated June 11, 2012 which were both completed by the Appellant's general practitioner ("GP");
2. A one-page letter from the Appellant's GP dated May 10, 2013 and addressed to "To Whom It May Concern" stating that the Appellant has osteoarthritis in her knees and is not able to work ("the GP Letter");
3. A two-page diagnostic imaging report dated June 11, 2013 setting out the results of x-rays of the Appellant's knees ("the X-Ray Report");
4. A one-page letter dated August 14, 2013 and addressed to the Appellant reporting on her employment insurance benefits;
5. A one-page letter from the Appellant to Service Canada dated August 14, 2013 requesting information regarding her application for medical benefits;
6. A one-page letter from Human Resources and Skills Development Canada addressed to the Appellant and dated August 15, 2013 regarding her application for medical benefits;
7. A letter from the Ministry addressed to the Appellant dated October 17, 2013 enclosing a PWD Designation Decision Summary of the same date; and
8. The Appellant's Request for Reconsideration dated November 14, 2013 ("RFR") to which the Appellant attaches two pages of written submissions, a letter from Service Canada dated September 10, 2013 confirming the approval of her Canada Pension Plan disability pension, the Appellant's bank statement for the period of September 25 through October 24, 2013, a prescription form issued by the Appellant's GP dated May 10, 2013 and a one-page statement from Service Canada regarding the final payment of the Appellant's employment insurance benefits on August 17, 2013.

The Appellant completed her Notice of Appeal on November 26, 2013 and states that she has a severe impairment which directly and significantly restricts her DLA and that it stands to reason that she therefore requires assistance with DLA. The Appellant comments further that she has been prescribed medication by her GP in May 2013 and that the analysis in the Reconsideration Decision that references medications prescribed by her GP is incorrect.

The Appellant provided written submissions in support of her Appeal. The Appellant did not seek to introduce any further evidence. The Ministry did not provide submissions or any further evidence but rather relied on the Reconsideration Decision.

Diagnoses

In the PR, the Appellant's general practitioner ("the GP") has diagnosed the Appellant as suffering from severe knee arthritis and osteochondritis with date of onset for both being June 1960.

Duration

In the PR, the Appellant's GP checks the "Yes" box in response to the question as to whether the Appellant's impairment is likely to continue for two years or more and further wrote that that the Appellant's arthritis has lasted since childhood and is getting worse as she gets older.

Physical Impairment

In the SR, the Appellant describes her work background and states that she cannot walk one city block and

that she is waiting for operations. She states that she was diagnosed with osteochondritis as a girl and that she had her first knee surgery on her right knee at the age of 24 and a subsequent surgery on her left knee 10 years later. The Appellant states during her last job, she took extra strength Tylenol 3 times per day over 30 days and that she now uses a prescribed medication for pain management.

In the PR, the GP comments that the Appellant has had severe arthritis since childhood, that she is always in pain, that she has had two surgeries in her knees and that both knees are swollen and very painful. The GP comments further that the Appellant is not able to bend her knees or kneel and that if she gets down she cannot get up. The GP notes that the Appellant is 5'2" and 160lbs, that she has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA and that she uses a cane due to her impairment. With respect to functional skills, the GP notes that the Appellant is able to walk less than one block unaided, climb 2 to 5 steps unaided, that she has no limitations lifting and that she can remain seated for 2 to 3 hours. The GP adds that he has been the Appellant's physician for two months and that he has seen the Appellant 2 to 10 times in the prior 12 months.

In the AR, the GP reports that the Appellant lives with family, friends or a caregiver and comments that because of her long history of arthritis she is always in pain and not able to bend her knees or kneel. The GP notes that the Appellant's ability to communicate through speaking, reading, writing and hearing are all good. With respect to mobility and physical ability, the GP indicates that the Appellant requires periodic assistance with all aspects including walking indoors ("requires help going downstairs"), walking outdoors ("takes longer time and assistance"), climbing stairs ("requires assistance from husband"), standing ("can stand for long"), lifting ("can't bend to lift") and carrying and holding ("can't carry much"). In the additional comments, the GP indicates that the Appellant is waiting to see an orthopaedic surgeon.

In the GP Letter, the Appellant's GP confirms that she has "chronic, severe pains in her knees due to osteoarthritis" and the X-Ray report lists findings of degenerative joint disease, severe loss of joint space and osteophytes in both knees as well as effusion in both knee joints.

In her written submissions, the Appellant describes her physical impairment as severe and prolonged and that she is limited to walking less than 1 block unaided and that she must use a cane or lean on her husband. She continues that she can walk indoors and outdoors but for only a short distance and to do so is painful. She states that she cannot walk down steps and needs significant help from her husband, that she can climb 5 steps while using a railing, that she can lift items but cannot carry them, that she cannot stand for longer than 5 minutes and that she must lie down at least every hour to relieve pain in her legs.

The Ministry in the Reconsideration Decision states that it is satisfied that there is evidence that the Appellant has a severe physical impairment.

Mental Impairment

In the PR, the GP does not diagnose the Appellant with a mental disorder and indicates that the Appellant suffers from emotional disturbance, commenting further that the Appellant is usually emotional and anxious due to her disability and that she has episodes of anxiety when she thinks about her future.

In the AR, for section 4, cognitive and emotional functioning, where asked to complete for an applicant with an identified mental impairment or brain injury, the GP has marked the section "N/A". Similarly, the GP has marked the Social Functioning aspect of the AR as "N/A".

The Ministry in the Reconsideration Decision asserts that there was not sufficient evidence that the Appellant suffers from a severe mental impairment.

DLA

The Appellant's GP prepared the AR and as such he did not address the Appellant's DLA in the PR other than to check the "Yes" box in response to the question of whether the Appellant's impairment directly restricts her ability to perform DLA.

In the AR, the GP makes the following assessments:

- **Personal care:** the Appellant is independent with dressing, grooming, toileting, feeding herself, and regulating her diet but requires periodic assistance from another person with bathing ("requires in and out bathtub"), transferring in and out of bed ("requires assistance out of bed") and transfers on and off a chair ("requires help getting up").
- **Basic housekeeping:** the Appellant is noted as independent in all aspects of this DLA.
- **Shopping:** the Appellant is independent reading prices and labels, making appropriate choices and paying for purchases but requires periodic assistance from another person going to and from stores ("husband help to shop and carry") and carrying purchases home ("not able to carry heavy loads").
- **Meals:** the Appellant is noted as independent in all aspects of this DLA.
- **Pay rent and bills:** the Appellant is noted as independent in all aspects of this DLA.
- **Medications:** the Appellant is noted as independent in all aspects of this DLA.
- **Transportation:** the Appellant is noted as requiring continuous assistance from another person getting in and out of a vehicle ("need help from husband in and out"), she requires periodic assistance from another person using public transit ("need assistance in and out") and she is noted as independent using transit schedules and arranging transportation.
- **Social functioning:** with respect to social functioning, the Appellant's GP has not made any assessment but rather has marked the page "N/A".

In her written submissions, the Appellant describes herself as being directly and significantly restricted in her ability to perform all DLA that require walking, carrying, standing or kneeling. She states further that DLA that are difficult without continued periodic assistance for extended periods include not being able to shop including carrying and walking to the store, not being able to use public transportation, not being able to carry including vacuum, garbage and laundry, not being able to get in our out of the bath without constant help, not being able to come downstairs without continuous help and requiring wheelchair assistance at the airport.

The Ministry in the Reconsideration Decision asserts that the evidence does not support a finding that, in the opinion of a prescribed professional, the Appellant's severe impairment directly and significantly restricts her ability to perform DLA.

Need for Help

In the PR, the GP comments that the Appellant uses a cane. In the AR, the GP notes that the Appellant lives with family, friends or a caregiver, that she receives regular help for DLA from her husband and that she requires a cane and a shopping cart as a walker when shopping to help compensate for her impairment.

In her written submissions, the Appellant states that she requires her husband's help for any DLA that requires walking or carrying.

The Ministry in the Reconsideration Decision asserts that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

PART F – Reasons for Panel Decision

The issue on the 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 mental impairment?
- That the Appellant's DLA's 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, the Appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA?

The criteria for being designated as a 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.

In the Reconsideration Decision, the Ministry has found that there is evidence to support a finding that the Appellant is at least 18 years of age and that she has a severe physical impairment that will continue for two years or more.

Severity of mental impairment

The Appellant has not made submissions in support of an argument that she has a severe mental impairment.

The Ministry takes the position that based on the information provided by the GP in the PR and the AR, the evidence does not establish a severe mental impairment.

Panel Decision

Section 2(2)(a) of the *EAPWDA* is clear that when addressing the issue of a severe mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The panel finds in the present case that while the Appellant's GP has noted in the PR that the Appellant suffers from episodic anxiety and emotional disturbance, the GP has not specifically diagnosed the Appellant with a mental impairment and he specifically notes in the AR that consideration of any mental impairment and its impact on the Appellant's functioning is not applicable.

Given the evidence as a whole and the lack of a diagnosis by a medical practitioner that the Appellant suffers from a severe mental impairment, the panel concludes that at the Ministry was reasonable in determining that the evidence did not establish that the Appellant has a severe mental impairment under section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

The Appellant's position is that she is directly and significantly restricted in her ability to perform all DLA that require walking, carrying, standing or kneeling.

The Ministry's position is that it has not been established by the evidence that the Appellant's severe physical impairments directly and significantly restrict her ability to perform DLA.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that there must be evidence of a prescribed professional that a person's DLA are directly and significantly restricted by their severe impairment either continuously or

periodically for extended periods.

The evidence of the GP in the PR is that the Appellant's impairment directly restricts her ability to perform DLA but as he has also completed the AR, he has not provided any further specific evidence of the restrictions. In the AR the GP reports the Appellant to be independent in 5 out of 8 personal care activities, all basic housekeeping activities, 3 out of 5 shopping activities, all meal activities, all paying rent and bills activities, all medications activities and 1 out of 3 transportation activities other than getting in and out of a vehicle and using public transit. For the DLA of moving about indoors and outdoors, the Appellant is assessed by the GP as requiring periodic assistance with walking indoors ("going downstairs") and outdoors ("takes longer time"). No assessment was provided by the GP for the Appellant's abilities in the areas of social functioning.

In the Reconsideration Decision, the Ministry acknowledges the GP's findings in the AR but comments that there is no indication of the frequency of assistance required by the Appellant. The Ministry comments further that no additional evidence from a physician or previous physicians of restrictions on the Appellant's DLA was provided beyond that set out in the PR and AR.

In the present case, the evidence of a prescribed professional, the Appellant's GP, is that the Appellant is able to perform the majority of her DLA independently and for those tasks that require periodic assistance, there is insufficient evidence to establish that the assistance is required for extended periods of time. While there are two tasks that require continuous assistance, the GP qualified the assistance required for one task, namely carrying purchases home, to "heavy loads". The Appellant describes herself, in her written submission, as being directly and significantly restricted in her ability to perform all DLA that require walking, carrying, standing or kneeling and that she is unable, for example, to do her laundry. However, the appellant's GP has assessed her as independent and requiring no assistance with the DLA basic housekeeping, including laundry, and the legislation requires that the opinion of a prescribed professional confirms the direct and significant restrictions to DLA.

Based on the evidence, the panel concludes that the Ministry was reasonable in finding that the Appellant's impairment does not directly and significantly restrict her ability to perform DLA, either continuously or periodically for extended periods under section 2(2)(b) of the *EAPWDA*.

Help with DLA

The Appellant's position is that she requires her husband's help periodically for an extended period to perform any DLA that requires walking or carrying.

The Ministry's position is that as it has not been established that the Appellant's DLA are directly and significantly restricted, it cannot be determined that significant help is required from other persons.

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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

While the panel finds that the GP has indicated in the PR that the Appellant requires the assistance of a cane to perform her DLA and in the AR that the Appellant uses a cane and a shopping cart as a walker to compensate for her impairment, the evidence of the prescribed professional does not establish that the Appellant requires assistance continuously or periodically for extended periods of time with her DLA.

The panel finds therefore 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 which determined that the Appellant was not eligible for PWD designation was a reasonable application of the applicable enactment in the circumstances of the Appellant, and therefore confirms the decision.