

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 27, 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 June 17, 2013], a physician's report ("PR") signed by the appellant's physician of 3 years [dated June 17, 2013], and an assessor's report ("AR") also signed by the appellant's physician [dated June 17, 2013].
- The appellant's Request for Reconsideration [dated October 31, 2013], and written reconsideration submissions from the appellant and her advocate [dated October 31, 2013 and November 12, 2013 respectively].
- A written submission from the appellant's daughter [dated October 23, 2013].
- A letter from the appellant's physician [dated October 30, 2013].
- A medical report on the results of x-rays of the appellant's right hip and lumbar spine [dated October 31, 2013].

Admissibility of New Information

At the appeal hearing the appellant submitted the following documents for consideration by the panel:

1. Two pages of written argument.
2. A page of written instructions from a physiotherapist to the appellant [dated December 9, 2013].
3. A letter from the appellant's physician [dated December 18, 2013].
4. A prescription for two medications made out to the appellant [dated December 3, 2013].
5. A letter from the appellant's cousin providing details about the assistance provided to the appellant by her cousin [dated December 20, 2013].

The ministry was invited to make submissions of the admissibility of these documents but declined to do so.

The panel accepted document 1 as written argument. Documents 2 through 5 related to matters that were before the ministry at reconsideration. The panel admitted documents 2 through 5 as information in support of information and records that were before the ministry at the time of reconsideration in accordance with section 22(4) of the *Employment and Assistance Act*.

In oral testimony the appellant and her witnesses 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.

Physical Impairment

- In the PR the physician diagnosed the appellant with osteo-arthritis of the lumbar spine and right hip.
- In the Health History portion of the PR the physician paraphrased from the appellant's self-report: can't walk more than 2 blocks; can't sit or stand for more than 2 hours; difficult going up and down stairs; cannot lift heavy objects; haven't been able to sleep on one side for 4 years; can't work or go to school; specialist said she would need a hip replacement at some time in the future.
- In terms of functional skills, the physician indicated the appellant can walk 1 to 2 blocks, can climb 2 to 5 steps unaided, can do no lifting, and can remain seated for 1 to 2 hours.
- In the AR the physician indicated the appellant is independent in walking indoors and outdoors (slower than other people), independent climbing stairs (slower than other people); independent in standing (can stand 2 hours); needs periodic assistance from another person in lifting, and needs continuous assistance in carrying/holding.
- The substance of the appellant's self-report was as summarized by the appellant's physician in the Health History portion of the PR referred to above. In her self-report the appellant also said that her pain is worsening and has increased in the last 6 years. She mentioned that she is depressed because she can't engage in activities with her children.
- In her reconsideration submission the appellant wrote that "it is a severe physical impairment, but this was not clear in the PWD application and was incomplete...The other injury that was left out was the fracture of my lumbar spine, which is a severe impairment."
- In her reconsideration submission the appellant wrote that she gets depressed because she fears she is going to be crippled, and cries because it is sometimes too painful to move. She also wrote that forcing her to work would be too dangerous and would create a risk of further injury.
- In the letter of October 30, 2013 the physician wrote that "...apparently some of the diagnoses were missed and some of the questions were incompletely answered...[The appellant] advises me that she previously suffered a fracture of her lumbar spine...[She] reports that last week she sneezed and the pain in her back severely increased... [A specialist] mentioned that he might have to book [the appellant] for a hip replacement in the future."
- The medical report of October 31, 2013 indicates there is no bone or joint abnormality in the right hip. With respect to the lumbar spine, the medical report indicated normal vertebral curvature alignment, normally maintained intervertebral disc spaces, a minor bony deformity of L4 vertebra consistent with old healed fracture site, and apparent posterior osteophytic encroachment at the L5-S1 intervertebral foramen.
- In the letter of December 18, 2013 the physician noted the appellant has a long history of back pain and that she is currently unable to work. The physician wrote that the appellant is going to physiotherapy on a regular basis and is taking anti-inflammatories and muscle relaxants for her back pain on an ongoing basis.
- The prescription form of December 3, 2013 indicates the appellant has been prescribed two medications as described by the physician in the letter of December 18, 2013.
- The physiotherapist's instructions of December 9, 2013 include the following: "Try to avoid sitting...lying or standing are best...at least twice a day lie face down for a few minutes...at least twice a day walk a few hundred yards..."
- In her letter of December 20, 2013 the appellant's cousin wrote that the appellant's condition is worsening and that she is in pain.

- In her oral testimony the appellant said that she takes her medications twice a day and that she needs help going up stairs. She said that she needs help to prepare meals because she can't stand up long enough to reach things from the cupboard or to prepare meals.
- The appellant said that as a follow up to the x-ray she is scheduled for further medical testing.
- In response to a question from the panel the appellant stated that she was present with the physician when the physician completed the PR and AR.
- In response to a question from the panel attempting to clarify the appellant's capacity for lifting, the appellant said that at the time of her PWD application she could do some lifting, but that now she can't lift anything. She acknowledged that she can lift a cup of tea, but said that a box of mandarin oranges is too heavy.
- In response to a question from the panel asking her to comment on the 2 hour ability to stand referred to in the AR, and her oral statement that she can't stand, the appellant said that her ability to stand has diminished from what it was at the time of the PWD application. She said that it fluctuates...it is now a half hour to 45 minutes. She stated she can stand up long enough to do some housework.

Mental Impairment

- The physician provided no diagnosis of a mental impairment in the PR, and indicated no significant deficits with cognitive or emotional function in the PR and AR.
- In the PR the physician indicated the appellant has no difficulties with communication, and in the AR indicated that the appellant's ability to communicate is good in all respects.
- In the letter of October 30, 2013 the physician wrote "... [The appellant's] back problems are causing her a lot of anxiety and she feels depressed..."
- In her self-report and reconsideration submission the appellant indicated that she is depressed by the circumstances of her physical condition.

DLA

- The physician reported the appellant has not been prescribed any medications that interfere with her ability to perform DLA.
- In the AR the physician indicated the appellant is fully independent in all aspects of the 4 prescribed DLA of *managing personal finances* (pay rent and bills), *managing personal medications*, *use of transportation*, and *social functioning* (relate to, communicate or interact with others effectively).
- The physician indicated the appellant can independently manage all aspects of *personal self-care* except that she requires periodic assistance with transfers in/out of bed and on/off chairs as it takes her significantly longer than typical.
- The physician indicated the appellant requires periodic assistance from her children with *basic housework* as it takes her significantly longer than typical.
- The physician noted the appellant independently manages most aspects of *daily shopping*, including reading prices and labels, making appropriate choices, and paying for purchases. The physician reported the appellant as requiring periodic help going to and from stores, and continuous help carrying purchases home.
- In the letter of October 30, 2013 the physician wrote that "[The appellant] advises me that she is unable to do most of her [DLA] and that over the years her pain has increased."
- In her reconsideration submission the appellant wrote that her children help her every day with DLA such as carrying the laundry to the laundry room, carrying groceries, reaching items from

lower cupboards, reaching things up high, carrying everything for her, helping her up and down the stairs, helping her out of the tub, and getting out of a car.

- In her oral testimony the appellant said that she can no longer take the bus as she can no longer walk that far.
- In her letter of October 23, 2013 and in her oral testimony the appellant's daughter stated that she and other family members have to help the appellant with her DLA every day.
- In her letter of December 20, 2013 the appellant's cousin wrote that she helps the appellant each morning with meal preparation, laundry and house cleaning, and anything that requires bending and lifting. She wrote that she helps the appellant put on her pants and shoes, and that she cleans the appellant's feet, back and legs in the shower as the appellant can no longer bend that far.
- In her oral testimony, the appellant's cousin said that she has been helping the appellant with DLA since September, 2013.

Help

- The physician indicated the appellant uses a cane and a brace, and that she does not have an assistance animal. The physician also indicated the appellant receives assistance from family and friends.
- In her reconsideration submission the appellant wrote that she uses a brace, a cane, and a scooter for mobility.

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 back and hip pain from osteo-arthritis and lumbar fracture constitute a severe physical impairment.

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

submitted does not establish 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 a prescribed professional – in this case, the appellant's physician and the physiotherapist.

In the appellant's case, despite the appellant's acknowledgement that she was with the physician when the PR and AR were completed, there are some significant inconsistencies in the evidence that was provided in the original PWD application and the evidence that is before the panel. For example, in the PR and in the appellant's self-report, the evidence indicates that the appellant can stand for up to 2 hours. In her oral testimony, in response to questions from the panel, the appellant said that currently she can only stand for 45 minutes to an hour.

There are also inconsistencies with respect to the amount of weight the appellant can lift (in her self-report she wrote that she can't lift "heavy items", but her evidence now indicates that she "can't lift anything.")

The appellant's explanation for the inconsistencies is that her condition has gotten worse since the time of the original PWD application. Unfortunately, in neither the October 30, 2013 letter nor the December 18, 2013 letter has the physician expressed the opinion that the appellant's condition has worsened. The language in the October 30, 2013 letter is couched in terms of "[the appellant] advises" and "[the appellant]...reports..", rather than the physician expressing his or her opinion. The appellant, through her advocate, argued that the physician did not dispute that the appellant's statements are valid. In the panel's view, without some express statement by the physician as to his or her opinion that the appellant's impairment is significantly worse than originally described in the PWD application in June, the October 30, 2013 letter is essentially no more than a self-report by the appellant.

The evidence of the appellant and her family members paints a picture of an individual who can't walk on her own, and who can't stand up for long enough to prepare meals. By way of contrast, the physical therapist (who is a prescribed professional) appears to have been of the opinion as recently as December 9, 2013 that the appellant is capable of "... at least twice a day walk[ing] a few hundred yards." Where there is a significant discrepancy between the evidence provided by the prescribed professionals and the evidence provided by the appellant and her family members, the panel has given more weight to the evidence of the prescribed professionals.

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 advanced no argument with respect to severe mental impairment.

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

Panel Decision

The legislation requires that a severe impairment must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. The appellant's physician has provided no diagnosis of a mental health condition, though in the October 30, 2013 letter (which, as explained above, the panel views as substantially being a self-report by the appellant) the physician indicated that the appellant's back problems are causing her anxiety and she feels depressed. 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 physician'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 argued, through her advocate, that the physician's evidence shows that she requires periodic assistance with 8 DLA, and continuous assistance with 2. She stated that the periodic assistance is for extended periods of time as it is ongoing. The appellant emphasized the statement in the physician's letter of October 30, 2013 that "...she is unable to do most of her [DLA]." The appellant argued that the ministry was

wrong to equate "independent" performance of a DLA with requiring "periodic assistance" with a DLA.

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. While acknowledging that the appellant has serious medical conditions, 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 and her family members - 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 physician has 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 – it must be more than trifling. 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.

Because (as determined above under the heading Severe Mental Impairment) the appellant does not have a severe mental impairment, the 8 DLA prescribed in section 2(1)(a) of the EAPWDR are applicable.

In the AR the physician has indicated that the appellant is not significantly restricted in any aspect of 3 of these 8 DLA: *management of medications*, *management of personal finances*, and *use of transportation*. The appellant has indicated that she can no longer use public transportation, but as explained above, where the evidence of the prescribed professional conflicts with that of the appellant and her family members, the panel has given more weight to the professional evidence.

With respect to *moving about indoors and outdoors*, the physician indicated in the AR that the appellant is independent in walking indoors and outdoors, though she takes significantly longer than typical. The physiotherapist has indicated an opinion that the appellant is capable of walking several hundred yards at least twice a day. The evidence of the appellant and her family members is not consistent with the evidence of the prescribed professionals. The panel has given more weight to the evidence of the prescribed professionals with respect to this DLA.

With respect to *personal self-care*, the physician's evidence indicates that the appellant is independent with most aspects, but that she needs periodic assistance with transfers from bed or chair. There is no indication how often this assistance is required.

With respect to the remaining 3 DLA of *basic housekeeping, daily shopping, and meal preparation*, the physician has indicated the appellant independently manages most aspects of these DLA, and that she receives periodic assistance from family members with others. The physician provided no evidence as to how frequently these periods occur. The appellant has argued that the need for periodic assistance is "extended" because it is "ongoing". In the panel's view, the evidence indicates that the need for periodic assistance with these 3 DLA arises primarily because of restrictions in the appellant's ability to walk, stand, and lift. As discussed above, there are significant inconsistencies in the evidence as to the appellant's functional skills in these areas. It may be that these inconsistencies will be explained by the further medical tests that the appellant is scheduled to undergo, but the panel must rely on the information it has before it.

Given the prescribed professionals' evidence of the appellant's ability to perform the majority of aspects of most DLA independently, the inconsistencies in the evidence with respect to the appellant's physical functional skills regarding her ability to walk and lift, and the lack of any evidence from the appellant's physician as to how often or for what duration she requires assistance with those aspects of the DLA for which she does require assistance, the panel finds that the ministry reasonably concluded that this legislative criterion was 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, those preconditions have 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.