



PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of January 22, 2014 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 July 23, 2013], a physician's report ("PR") signed by the appellant's physician of 6 years [dated July 23, 2013], and assessor's report ("AR") signed by the appellant's anesthesiologist [dated June 27, 2013].
- An updated section E of the PR completed by the appellant's physician on December 23, 2013 (the "New Section E").
- An advocate-prepared questionnaire completed by the appellant's physician on December 23, 2013 (the "Questionnaire").
- Supporting medical documents including medical imaging reports and consultation reports from the anesthesiologist (collectively referred to as "the Medical Reports").

The panel reviewed the evidence as follows:

Physical Impairment

- In the PR the physician diagnosed the appellant with lower back pain/degenerative disc disease L5 nerve root compression. He commented that the appellant has been deriving benefit from nerve root blocks.
- In terms of physical functional skills, the physician reported that the appellant can walk unaided 1 to 2 blocks on a flat surface, climb 5+ stairs unaided, lift 5 to 15 pounds, and can remain seated for 1 to 2 hours.
- In the AR the anesthesiologist (who administers the appellant's nerve root blocks) indicated the appellant suffers from chronic pain secondary to lumbar degeneration and L5 nerve root compression.
- The anesthesiologist reported that the appellant is independent with respect to walking indoors and outdoors, climbing stairs, and standing. She indicated that the appellant takes significantly longer than typical with lifting/carrying/holding, and commented that the appellant should not lift anything over 5 pounds. She commented that when the appellant is working she is in pain most of the time and is unable to concentrate at school or do any social activities.
- The anesthesiologist recommended chronic pain treatments with lumbar injections, referral to psychologist for depression management, and a gentle exercise program.
- In her self-report the appellant wrote that she suffers from chronic low back pain caused by her L4/5 and L5/S1 discs which are making contact with her nerve endings. She indicated that her sleep is disturbed by pain every couple of hours.
- Regarding the Medical Reports:
 - a medical imaging report from 2010 indicated the disc protrusion at L4-5 results in moderate bilateral lateral recess compromise and mild-to-moderate central canal stenosis [narrowing]. Mild bilateral neural foraminal stenoses were noted due to disc bulge and osteophyte complex.
 - an outpatient clinic note prepared by the anesthesiologist on March 4, 2013 - assessed the appellant as being "...within normal limits. Full flexion, full extension, side flexing, rotation are all normal. Reflexes are normal. Myotomes are normal. She has

some gross sensory changes in the lateral aspect of her L5 distribution as well as S1 distribution on the right. The left remains normal.”

➤ an MRI report dated April 14, 2013 indicated that the findings are “advanced for this patient’s age.” It reported that the bulging disc at L4/5 makes mild L5 nerve root contact bilaterally and that there is bilateral neural foraminal canal narrowing at the L5/S1 level which could affect either the right or left L5 nerve root.

- In the Questionnaire, the physician indicated that the appellant has a severe impairment, referring to the appellant’s use of analgesics.
- In her oral testimony the appellant testified that she is in horrible pain every day. She said the pain severely impacts her ability to walk and to get out of bed.
- In response to a question from the panel the appellant said that when walking outdoors, she can walk 1 to 2 blocks before back pain requires her to sit down for 15 to 20 minutes. After resting she can continue walking, but the pain never really goes away until she has a chance to lie down for a while. She stated that she can manage stairs on her own as her bedroom at home is upstairs.

Mental Impairment

- In the PR the physician diagnosed the appellant as having depression. He noted the appellant has no difficulties with communication, but noted one significant deficit in cognitive and emotional function related to depression.
- In the AR the anesthesiologist indicated a moderate impact with respect to 1 of 14 aspects of cognitive and emotional functioning – emotion (depression). She indicated minimal or no impacts to the other 13 aspects of cognitive and emotional functioning.
- In her self-report the appellant wrote that she has anxiety and depression, and that she can be very moody. She stated that the anxiety causes her to become easily stressed and sometimes causes left leg pain to flare.
- In the Questionnaire, the physician indicated that the appellant has a severe impairment, referring to PTSD and general anxiety disorder.
- In her oral testimony the appellant was adamant that she is not claiming to have a mental impairment.

DLA

- In the PR the physician indicated that the appellant has not been prescribed any medication or treatments that interfere with her ability to perform DLA.
- In the PR the physician reported the appellant’s impairment does not directly restrict her ability to perform the 6 prescribed DLA of *personal self-care, meal preparation, management of medications, use of transportation, management of finances and social functioning*. He reported direct restrictions of 3 DLA where the appellant required periodic assistance: *mobility inside and outside the home* (periodic assistance required with mobility outside the home), *basic housework*, and *daily shopping*. The physician described “periodic” as “requires assistance with heavier housework, carrying heavy purchases and occasionally requires a driver.”
- In the AR the anesthesiologist described the appellant as independently managing all aspects of the 6 DLA of *personal self-care, meal preparation, management of finances* (pay rent and bills), *management of medications, use of transportation*, and *social functioning*. She indicated that the appellant requires periodic assistance with *basic housekeeping* and with 1 of 5 aspects of *daily shopping* (carrying purchases home).

- In her self-report the appellant wrote that she lives with her mother and that her mother does about 90% of the housecleaning with the appellant "pitch[ing] in when possible." She wrote that she tends to go a few days longer than she probably should with respect to doing laundry.
- The appellant wrote that though she bathes and grooms herself it sometimes seems like an impossible task. She stated she can't any longer make plans with friends because she never knows if she is going to be able to get out of bed on any given day.
- In the New Section E the physician indicated that the appellant was continuously restricted with the DLA of *personal self-care, meal preparation, basic housework, daily shopping, mobility inside and outside the home* (specifically outside the home), *use of transportation, and social functioning*. He described the restrictions as being "ongoing and significant". Regarding *social functioning*, the physician commented that the appellant was very withdrawn and isolated. Describing the assistance required by the appellant for DLA the physician indicated bathroom grab bars, extra pillow, heating pad, meal preparation, housework, transport and counselling for anxiety.
- In the Questionnaire the physician noted that the appellant's DLA are significantly restricted by pain.
- In her oral testimony the appellant testified that pain often makes taking a shower "impossible". She said that she often can't get out of bed for 5 or 6 days at a time.
- The appellant stated that her medications do not interfere with her ability to perform DLA. She said that she has been fortunate in that she has not had to be upgraded to stronger opioids such as OxyContin.
- In response to a question from the panel regarding the use of assistive devices, the appellant said that when shopping, if the store has a wheelchair or power scooter the appellant will always use it. She said she seldom goes shopping to places that don't have a wheelchair or scooter.
- In response to a question from the panel as to why the physician's responses in the New Section E are so different from his responses in the PR, the appellant said that though she'd been with the physician when the PR was completed, she'd had little input into the physician's responses because the physician didn't ask her many questions. She said that she had significantly more input into the physician's responses to the New Section E and the Questionnaire.

Help

- In the PR the physician noted the appellant does not require any prostheses or aids for her impairment.
- In the AR the anesthesiologist indicated that the appellant receives assistance with DLA from her family. She indicated no assistive devices required, and that the appellant does not have an assistance animal.

Admissibility of New Information

In oral testimony the appellant provided additional information regarding her impairment. This information provides 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 provided 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 back pain constitutes a severe physical impairment. She said that the MRI results show huge amounts of damage to her spine, and that she is in "horrible" pain daily.

The ministry's position is that while it acknowledges a degree of physical limitation, the information

provided is not evidence of a severe physical impairment. The ministry argued that remedial measures are in place which provide some benefit, and that no assistive devices are routinely used to help compensate for the appellant's 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. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

The onus of proving that she satisfies the statutory criteria rests with the appellant. Unfortunately, there is a significant conflict in the evidence of one of the prescribed professionals – the appellant's physician. The physician's evidence in the New Section E and the Questionnaire indicate that the appellant's impairment causes continuous restrictions to 7 DLA as opposed to the PR which indicates periodic restrictions to 3 DLA. The physician has provided no explanation for the difference. The appellant has said that she had more input into the New Section E and the Questionnaire. However, the panel notes that the physician has known the appellant for 6 years and could be expected to have a level of familiarity with the appellant's functional abilities. Furthermore, the PR and the AR are both reasonably consistent with respect to their evidence. Because of the vastly different picture of the level of impairment painted by the New Section E and Questionnaire on the one hand and the PR on the other, and because the PR and the AR are remarkably consistent with each other despite being completed by two different professionals, the panel has decided that little weight can be given to the New Section E and the Questionnaire.

In terms of functional skills, the PR and the AR indicate that the appellant independently manages walking indoors and outdoors up to 2 blocks, and climbing stairs. She has a reasonable tolerance for remaining seated, and stands independently. Her ability to lift/carry/hold is limited to objects under 5 pounds.

The appellant stated that her pain can keep her bed-ridden for 5 or 6 days at a time. In the panel's view, if the appellant was being impacted to this extent the physician and the anesthesiologist would more likely than not have confirmed this in the PR, AR, the New Section E, or the Questionnaire. There is no such confirmation.

The appellant emphasized the evidence in the Medical Reports as supporting the severity of her impairment; however the panel notes the heavy preponderance of adjectives such as "mild",

"moderate" and "normal" to describe the appellant's condition in the Medical Reports.

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 the appellant's impairments do not appear to have translated into significant restrictions in her ability to manage her DLA independently. For the foregoing reasons, the panel has concluded that while the appellant does have physical health issues, the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment as contemplated by the legislation.

Severe Mental Impairment

The appellant's position is that she does not have a severe mental impairment and that she has not claimed to have a severe mental impairment. She stated that her depression and anxiety are well managed.

The ministry's position is that given the appellant's good communication skills and the limited evidence of impacts to cognitive and emotional functioning, and given that the appellant requires no support or supervision for social functioning, the information does not establish a severe mental impairment.

Panel Decision

The evidence indicates that the appellant has some degree of depression and anxiety, but that these are well-managed and have little impact on the appellant's ability to function. The evidence of the physician and the anesthesiologist are consistent that the appellant's communication skills are good in all respects. The physician in the PR and the anesthesiologist in the AR noted limited impacts to cognitive and emotional function.

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 the decision making aspects of *manage personal medication* (filling/refilling/taking as directed), *manage personal finances* (banking and budgeting), *daily shopping* (making appropriate choices), *meal preparation* (meal planning), and *social functioning* (appropriate social decisions). On balance the panel concludes that the evidence indicates the appellant manages her own *decision making*.

With respect to *social functioning*, the evidence in the appellant's self-report, the PR and the AR indicates that while the appellant's pain causes her to self-isolate to some degree, she essentially has good functioning with respect to her immediate and extended social networks. There is no evidence that the appellant receives or requires any support or supervision with respect to her *social functioning*. For the reasons discussed above under the heading Severe Physical Impairment, the panel has given little weight to the conflicting evidence in the New Section E and the Questionnaire.

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 ability to perform DLA is significantly restricted. She emphasized the physician's evidence from the New Section E and said that it "speaks for itself" in demonstrating continuous significant restrictions.

The ministry's position is that as the majority of DLA are performed independently or require little help from others, the information from the prescribed professionals does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

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 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.

Section 2(1) of the EAPWDA prescribes 10 DLA. Of those 10, the professional evidence in the PR and the AR are consistent that the appellant is unrestricted with respect to 7: *personal self care, meal preparation, management of medications, use of transportation, management of finances, social functioning, and decision making.*

With respect to the DLA of *moving about indoors and outdoors*, the evidence is consistent that the appellant is independently mobile indoors. She is restricted to walking up to 2 blocks outdoors without having to stop and rest. Other than the appellant's evidence that she makes use of a wheelchair or scooter if one is available in a store, there is no other evidence that the appellant relies on the support of anyone else or an assistive device for *moving about indoors and outdoors.*

With respect to *basic housekeeping*, the physician's evidence in the PR is that the appellant requires assistance with "heavier housework". This is consistent with the anesthesiologist who indicated the appellant requires periodic assistance with housekeeping but that she independently manages her laundry. The anesthesiologist's observations with respect to laundry reflect the appellant's comment on her ability to do laundry in her self-report.

With respect to *daily shopping*, the evidence indicates that the appellant requires assistance with carrying heavier items over 5 pounds. The appellant also said that she will use a scooter or wheelchair in stores where one is available.

For reasons mentioned above, the panel has given little weight to the evidence in the New Section E and the Questionnaire. The panel prefers the professional evidence in the PR and the AR to the appellant's evidence regarding the significance of restrictions to her ability to perform DLA.

Viewing the evidence as a whole, the panel concludes that it falls short of showing on the balance of probabilities that the appellant's ability to perform her DLA is directly and significantly restricted either continuously or periodically for extended periods. The panel finds that the ministry reasonably determined that this legislative criterion was not satisfied.

Help with DLA

The appellant's position is that she relies on continuous help from her mother 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

The panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical condition affects her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel concludes 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.