



PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of January 29, 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

With the consent of the appellant, the ministry had an observer attend the hearing.

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 August 1, 2013], a physician's report ("PR") signed by the appellant's cardiologist of 2 years [dated July 18, 2013], and assessor's report ("AR") signed by the appellant's family physician of 4 months [dated August 1, 2013].

Physical Impairment

- In the PR the cardiologist diagnosed the appellant as having idiopathic cardiomyopathy. He commented that the appellant has moderate cv systolic dysfunction that has not improved despite good medical therapy. The condition causes fatigue, shortness of breath, and dizziness.
- In terms of physical functional skills the cardiologist indicated that the appellant can walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 stairs unaided, lift 5 to 15 pounds, and remain seated for 2 to 3 hours.
- In the AR the physician indicated that the appellant independently manages walking indoors, but that she requires periodic assistance with respect to walking outdoors (needs help for longer distances), climbing stairs, standing (need to lean against if a long time), and lifting/carrying/holding.
- In her self-report the appellant wrote that she is unable to work, and that she gets tired and dizzy after walking 1 block. She stated that her future is "on stand still until I get a new heart."
- In her oral testimony the appellant said that her heart problem is genetic and that it won't get any better. She stated that she is in a state of congestive heart failure which is causing her blood pressure to be high, and that she's in the process of being put on a waiting list for a heart transplant. She said that her ribcage is expanding to accommodate her enlarged heart.
- The appellant said that she takes her heart medication 2 times a day, and that she has to lie down for 2 hours each time she takes it because it causes severe dizziness and nausea. She stated that she has to attend her physician's office every 2nd day to monitor the effects of the medication.

Mental Impairment

- In the PR the cardiologist diagnosed the appellant as having depression.
- The cardiologist indicated that the appellant has no difficulties with communication and he identified no significant deficits with cognitive and emotional functioning.
- In the AR the appellant's family physician reported the appellant's ability to communicate as being good in all respects, and commented that her chronic depression is "generally well-treated."
- The physician indicated that the appellant's impairments cause no impact in 12 of 14 categories of cognitive and emotional function, and minimal impact in 2 categories: impulse control and motivation.
- In her oral testimony the appellant said that her impairment is her heart, not her mind. She said that mentally she is fine, but that she can feel her body shutting down.

DLA

- In the PR the cardiologist answered the question "Does the impairment directly restrict [the appellant's] ability to perform [DLA]?" by indicating "No."
- In the AR the physician indicated that the appellant independently manages all aspects of the DLA of *personal self-care*, *manage personal finances* (pay rent and bills), *manage personal medications*, *use of transportation*, and *social functioning* (good functioning with respect to both immediate and extended social networks).
- The physician indicated that the appellant requires periodic assistance with *basic housework*, two aspects of *daily shopping* (going to/from stores and carrying purchases home), and two aspects of *meal preparation* (food preparation and cooking – "need to sit or have help from [illegible]").
- In response to the direction in the AR form to "Please provide any additional information relevant to understanding the nature and extent of the [appellant's] impairment and its effect on [DLA]" the physician responded "Prolonged effort is only problem."
- In her self-report the appellant wrote that she has to take a bus or cab, or try to get a ride to her medical appointments.
- In her oral testimony the appellant said that she can't work, and that she can't be out for more than an hour before she gets tired. She stated that she can still do her DLA, it just takes longer. She said that she can only stand by the stove for 10 minutes at a time and that vacuuming puts a strain on her heart. She stated she relies on a neighbour to help with housework.

Help

- In the PR the cardiologist indicated that the appellant does not require any prostheses or aids for her impairments.
- With respect to the DLA of *social functioning*, the physician commented "only need help if out for a long period of time."
- The physician indicated that the appellant receives help from family, friends and health authority professionals. He responded "N/A" with respect to the appellant's use of prostheses, and stated that the appellant does not have an assistance animal.

Admissibility of New Information

For the purposes of the appeal hearing the appellant submitted the following new documents:

1. A chart of the medications she takes each day for her heart, blood pressure, depression and asthma.
2. A number of printouts from pharmacy and medical websites providing generic information with respect to anatomy of the heart, cardiomyopathy, heart failure, enlarged heart, and medications being taken by the appellant.

The ministry reviewed the documents and had no objection regarding admissibility.

Each of these documents, as well as the oral testimony of the appellant, provided supporting information about the nature of the appellant's impairments, the restrictions they impose, and medications she takes. Accordingly, the panel has admitted this new information as being written and oral testimony 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 heart condition and the effects of her medication constitute a severe physical impairment. She said that she is unable to work and that she is confined to bed for 2 to 3 hours twice a day because of the medication. She stated that she is under doctor's orders not to work.

The ministry's position, as set out in its reconsideration decision, is that the functional skills limitations are in keeping with a moderate degree of physical limitation and that the information provided is insufficient to demonstrate 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, taking into account all of the evidence. 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 cardiologist and her family physician.

With respect to functional skills, the evidence of the cardiologist in the AR indicates that the appellant is in the mid-range of impairment. This is consistent with the evidence of her family physician which indicates that while the appellant requires periodic assistance with mobility, she only needs help walking longer distances outdoors, and needs to lean against something if she is standing for a long time.

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 a subsequent section of this decision under the heading Significant Restrictions to DLA, the functional skills limitations do not appear to have translated into significant restrictions in the appellant's ability to perform 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 a severe mental impairment, and stated that her impairment is physical rather than mental.

The ministry's position, as set out in its reconsideration decision, is that the cardiologist did not identify any significant deficits to cognitive and emotional function, and the physician indicated only 2 minimal impacts. Accordingly, the ministry stated that the evidence does not support a finding of a severe mental impairment.

Panel Decision

The cardiologist provided a diagnosis of chronic depression, which the family physician described as "well-treated." Both professionals indicated that the appellant's ability to communicate is good in all respects.

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 family physician's evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that she independently manages the decision making aspects of *daily shopping* (making appropriate choices), *manage personal medication* (filling/refilling/taking as directed), *manage personal finances* (banking, budgeting, pay rent and bills), *social functioning* (appropriate social decisions) and *meal preparation* (meal planning).

There is no evidence of any restrictions to her *social functioning*, and the physician confirmed in the AR that the appellant has good functioning in respect of her immediate and extended social networks.

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 she experiences significant restrictions in her ability to perform the physical aspects of DLA. She said that she can still perform DLA but that it takes a long time.

The ministry's position, as set out in its reconsideration decision, is that the majority of DLA are performed independently or require little help from others. The ministry said that there is no description of the frequency or duration of periodic assistance. The ministry concluded that the professional evidence did 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.

With respect to the appellant's degree of independence, the panel notes that section 2(3) of the EAPWDA indicates that a person must "require" help as defined. In the panel's view the word "require" indicates a degree of necessity so that it is something that a person cannot reasonably do without. If the person does not get the help she requires, the DLA goes undone either continuously or periodically for extended periods, or the DLA takes an unreasonably long time to complete.

Section 2(1) of the EAPWDA prescribes 10 DLA. Of those 10, the professional evidence in the PR and the AR is consistent that the appellant is unrestricted with respect to at least 6: *personal self care, management of medications, use of transportation, management of finances, social functioning, and decision making.*

Of the remaining 4 DLA – *moving about indoors and outdoors, meal preparation, basic housekeeping, and daily shopping* - the family physician has indicated that the appellant manages aspects of each of them independently, and that she requires periodic assistance with other aspects. He's provided no indication of the frequency or duration of the periodic assistance other than to indicate that it is only necessary after "prolonged effort". The cardiologist expressed the opinion that none of the appellant's DLA are directly restricted by her impairment. The appellant's testimony was that she can still perform DLA, but that it takes her a long time. The panel notes that the AR form includes space specifically for the assessor (in this case the family physician) to confirm whether it takes an applicant significantly longer than typical to perform DLA. In this case, the family physician has provided no such confirmation. While the cardiologist indicated that the appellant's medications can interfere with DLA by causing lightheadedness and fatigue, he has not provided any indication as to the significance or degree of such interference in the appellant's circumstances.

Considering the evidence as a whole, while acknowledging a degree of restriction, the panel concludes that the ministry reasonably determined that the evidence is insufficient to show on the balance of probabilities that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires help from a neighbour to perform DLA such as *basic housekeeping*.

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 is 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 satisfied 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.