

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

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 October 11, 2013], and a physician's report ("PR") and assessor's report ("AR") both signed by the appellant's physician of 2 months [dated October 9, 2013].
- The appellant's type-written reconsideration submission.
- A letter from the appellant's physician dated November 26, 2013.
- A Service Canada Medical Report form, completed by the appellant's previous physician of 10 years, dated February 19, 2013.
- An undated typewritten document prepared by the appellant titled "CPP summary PART B". At the appeal hearing the appellant said she believed the document was prepared in early January, and though it wasn't referenced expressly in the reconsideration decision the appellant stated that it was before the ministry.

Admissibility of New Information

For the purposes of the appeal hearing the appellant submitted 3 new documents:

1. A two-page letter from the appellant's daughter, dated February 21, 2014.
2. A one-page letter from the appellant's physician, dated February 26, 2014.
3. A two-page outline of argument.

The panel accepted document 3 as argument. Documents 1 and 2, as well as the oral testimony of the appellant and her daughter, provided supporting information about the appellant's impairments, the restrictions they impose, and the assistance the appellant receives. 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.

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The panel reviewed the evidence as follows:

Physical Impairment

- In the PR the physician diagnosed the appellant with breast cancer, thyroid cancer, melanoma, ischemic heart disease, and diabetes. He described these conditions as being chronic.
- In terms of functional skills, the physician indicated that the appellant can walk less than 1 block unaided on a flat surface, can climb 2 to 5 steps unaided, can lift 5-15 pounds, and can remain seated for 1 to 2 hours. He commented that her functional abilities are severely impaired by her medical problems.
- In the AR, in response to a question asking what impairments impact the appellant's ability to

perform DLA, the physician responded "She has surgical scars from her surgical interventions causing pain in her shoulder and limited range of motion. She has had thyroidectomy causing fatigue."

- The physician indicated that with respect to mobility and physical ability the appellant is "impaired 100% of the time" and takes significantly longer than typical regarding walking indoors and outdoors, climbing stairs, standing, and lifting/carrying/holding.
- In his letter of November 26, 2013 the physician indicated that the appellant has some pending surgery on her foot and it requires ongoing followup.
- In the Service Canada Medical Report, the appellant's former physician provided the following diagnoses: 1) breast cancer 2005 – rt. Mastectomy; 2) 2001 gastroplasty for obesity; 3) asthma; 4) type 2 diabetes; 5) migraines; 6) sciatica with pain in both legs; 7) melanoma taken off rt. shoulder – no metastases so far; 8) fracture of rt. base of 5th metatarsal awaiting surgery; 9) hypertension; 10) neuropathy secondary to sciatica and diabetes; 11) "smouldering" rheumatoid arthritis; 12) smoker. He identified sciatica as the main problem, commenting "ongoing and daily discomfort". The melanoma excision was described as a day procedure.
- In her self-report, the appellant identified most of the diagnoses from the Service Canada Medical Report, and added sleep disturbance, left and right foot pain (right has had surgery May 2013), thyroid cancer (removed April 2013), eczema, glaucoma, frozen shoulders, and "investigating TIA's".
- In her oral testimony the appellant said that she is in pain all the time, that it takes her up to ½ hour to get out of bed, and that she can't sit for long. She stated that her feet feel like glass, and that during "bad times" she needs help getting on and off the couch. The appellant reported that she loses her balance and can only stand for 5 to 10 minutes, which makes showering difficult.
- In her letter of February 21, 2014 and in her oral testimony, the appellant's daughter said that since 2011 the appellant has been experiencing transient ischemic attacks (TIA's) that have caused her to become weak and unstable and unable to lift her head or put her arms over her head. She wrote that in December 2011 a TIA caused the appellant to fracture her foot, leaving the daughter to be the main caregiver for the family. Surgery for the foot did not take place until May 23, 2013.

Mental Impairment

- In the PR the physician diagnosed no mental impairment, reported the appellant as having no difficulties with communication, and indicated no significant deficits with cognitive and emotional function.
- In the AR the physician reported the appellant's ability to communicate as being good in all respects. In section B4 of the AR, which is to be completed for an applicant with mental impairment or brain injury, the physician responded by drawing a line through the section.
- In his letter of November 26, 2013 the physician wrote that the appellant requires "...a significant amount of supervision medically, as well as socially."

DLA

- In the PR the physician indicated that the appellant's diabetes and cardiac medications cause fatigue. He commented that the appellant is unable to work and perform DLA normally.
- In the AR the physician indicated that the appellant independently manages all aspects of the DLA of *social functioning*, *manage personal finances* (pay rent and bills) and *manage personal*

medications.

- The physician indicated the appellant independently manages the mental aspects of the DLA of *daily shopping* (reading prices and labels, making appropriate choices) and *meal preparation* (meal planning, safe storage of food).
- With respect to the remaining aspects of *daily shopping* and *meal preparation*, and all aspects of the DLA of *personal self-care*, *basic housekeeping*, and *use of transportation*, the physician indicated that the appellant is impaired by pain and fatigue 100% of the time and that she takes significantly longer than typical to complete them.
- In his letter of November 26, 2013 the physician wrote that "My opinion is that her mobility and [DLA] are significantly impacted. She takes significantly longer mobilizing indoors as well as outdoors. Climbing stairs, lifting, standing and carrying is particularly difficult for her. Even her toileting takes significantly longer to perform."
- In her self-report the appellant identified some of the impacts being caused by each of her diagnoses.
- In the "CPP summary PART B" document the appellant wrote that her sciatica, swollen knees, and frozen shoulders impact her ability to perform DLA. She wrote that her frozen shoulders prevent her from lifting higher than her shoulders or more than 5-10 pounds, making it difficult to do her hair and makeup. She wrote that it is difficult to stand in the shower, that she attends frequent medical appointments, and that she is on many medications which require 4 times per year lab work.
- In her oral testimony the appellant stated that she can only do one "event", such as showering, per day. In response to a question from the panel the appellant said that she spends most of the day reading or watching television.
- In response to questions from the panel, the appellant said that:
 - For a while her shoulder was frozen and took 2 years to come back. It now has a limited range of motion.
 - She does do some vacuuming.
 - She can partly make her bed – throwing it together – not like she used to.
 - She can do a load or so of laundry once in a while, but folding is difficult.
 - She dresses herself.
 - She usually just has coffee or a muffin for breakfast, and a salad for lunch which she prepares herself. She can put something like fast food into the oven but she can't stand long enough to do something like stuffing a turkey. Her daughter usually makes dinner as the appellant can't do it.
 - She only drives if she has to. She feels the pain impairs her driving, so her daughter is the chauffeur 95% of the time.
 - She retired from her career as a foster parent in July 2013, at which time she moved to her present community to live with her daughter.
- In her letter of February 21, 2014 the appellant's daughter wrote that her mother recently attempted to clean the bathroom and 4 days later had not managed to complete the task since it causes too much pain to stand, bend, or reach.
- In her oral testimony, in response to a question from the advocate, the appellant's daughter said that while the appellant does dress herself, she struggles with it. She said the appellant often stays in her pajamas all day and that it can take her up to 25 minutes to put on an outfit.
- The daughter stated that:
 - The appellant doesn't cook meals.
 - The daughter does most of the shopping. The appellant only goes shopping once or

twice a month, and only to stores where there is a scooter available. If there is no scooter the appellant either sits and waits for one to be available, or she goes out to sit in the car and waits for the daughter, or she will walk a maximum of 2 aisles and then go sit in the car. The daughter does the majority of errands.

- The appellant tries to wash dishes but can only stand for 10 minutes, the last 5 leaning against the counter.
- The daughter often has to straighten out the appellant's clothes.
- The appellant doesn't yet need help showering but likely will in the future.

Help

- In response to the question in the PR as to whether the appellant requires any prostheses or aids for her impairment, the physician responded "Yes - prosthetic bra".
- In the PR the physician indicated that the appellant does not routinely use any devices to compensate for her impairment, and that she does not have an assistance animal. He indicated that assistance for DLA is provided to her by family, friends, and health authority professionals.
- In his letter of February 26, 2014 the physician wrote "[The appellant] needs help to complete all daily tasks included but not limited to cooking, cleaning, shopping, driving, and errands. She currently resides with her daughter to ensure assistance is available at all times."
- In the "CPP summary PART B" document the appellant wrote that she uses a leg brace on the left leg and a knee tensor on her right leg.
- In response to a question from the panel to clarify her use of prostheses, the appellant said that despite her physician's evidence she doesn't wear a prosthetic bra, and that her physician of 2 months doesn't know her well enough to know that she wears a leg brace prescribed by another physician.

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 many medical conditions constitute a severe impairment. The appellant emphasized the physician's use of the terms "severe" and "significant" and said that he couldn't have been clearer in his choice of language. She argued that the ministry was unreasonable in not taking the physician's opinion at face value to determine that this legislative criterion had been

satisfied.

The ministry's position is that, while it acknowledges that the appellant's medical conditions cause some limitations, the physician's evidence doesn't provide sufficient information to demonstrate that the appellant's physical impairment is severe.

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 physician.

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. In other words, the ministry cannot simply take the approach that "The physician used the word 'severe' so we must accept that this criterion is satisfied." That approach would constitute an improper fettering of discretion. The ministry must assess the professional evidence in context in order to be satisfied as to whether the legislative criteria are met.

In this case, there are a number of gaps and inconsistencies so that the evidence does not present a coherent, convincing picture of an individual with a severe physical impairment. The appellant testified that her current physician of 2 months doesn't know her very well and that he didn't realize she wears a knee brace, which calls into question the reliability of his evidence regarding her degree of impairment. The physician commented in the AR that the appellant's primary problems are her shoulder pain and fatigue from medications. In her oral testimony the appellant emphasized leg and foot pain, and did not refer to fatigue in her self-report, her reconsideration submission, or the CPP summary PART B document. Her previous physician, in the Service Canada Medical Report, identified sciatica as the primary problem. The appellant's daughter's evidence stressed unsteadiness due to TIAs, a diagnosis which she said was recently confirmed, but no supporting medical evidence was provided. (This is not to say that the panel doesn't believe the daughter's evidence on this point, but section 2 of the EAPWDA requires that the diagnosis of an impairment must be confirmed by a medical practitioner.) The appellant and her daughter had said that the appellant's condition had worsened over the past 2 years, but there is no medical explanation as to how it was that the appellant managed to perform DLA for both herself and foster children under her care until her retirement in July 2013, but by the time of her PWD application in October 2013 she could no longer perform DLA for herself.

The panel acknowledges that it would be unreasonable to expect every minute detail of the evidence to align perfectly, but the number of inconsistencies here significantly lessens its impact. The panel

also acknowledges that there may be some additional medical information yet to come as a result of the ongoing assessment of the TIA issue mentioned by the appellant and her daughter, and the foot surgery issue mentioned by the physician. However, the panel is limited to considering the evidence that it currently has before it. Accordingly, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing on the balance of probabilities that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant advanced no argument with respect to mental impairment.

The ministry's position, as set out in its reconsideration decision, is that the physician did not provide a diagnosis of mental impairment and did not identify any significant restrictions to cognitive and emotional function. Accordingly, the ministry stated that the evidence is insufficient to demonstrate a severe mental impairment.

Panel Decision

The physician has provided no diagnosis of a mental impairment, and has 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 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 her ability to perform DLA is significantly restricted. She emphasized the evidence of the physician from the AR indicating that she is "significantly" restricted in the physical aspects of all DLA "100 % of the time", and argued that the ministry must accept the physician's opinion with respect to the significance of the impairment. She acknowledged that in the PR and AR the physician did not provide evidence regarding the amount of time it takes the appellant to perform DLA and the amount of help she requires, but said that the ministry should have drawn logical conclusions with respect to this, and also pointed to the additional evidence from the physician and the appellant's daughter as providing the missing information.

The ministry's position, as set out in its reconsideration decision, is that the physician did not provide any information as to how long it takes the appellant to perform DLA, and he did not indicate that she requires assistance from another person or from an assistive device. The ministry argued that as the majority of DLA are performed independently and require little help from others, the evidence is insufficient to 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.

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.

The physician's evidence from the AR is that the appellant's ability to perform DLA is restricted 100% of the time. He provided no evidence as to how much longer the appellant takes or that she required any assistance to perform DLA. As explained above in the discussion of Severe Physical Impairment, the ministry cannot fetter its discretion by merely accepting the physician's use of the words "significantly impacted" and "significantly longer" as fulfilling the statutory criteria.

The ministry did not have the benefit of the appellant's daughter's letter of February 21, 2014 or the physician's letter of February 26, 2014. Both of these letters are consistent in saying that the appellant requires help with DLA and that it is the appellant's daughter who provides the help.

Essentially, the evidence of the physician in the AR is that the appellant independently manages the mental aspect of all DLA but that she is "significantly impacted" with the physical aspects of DLA. In the November 26, 2013 letter he wrote that she takes "significantly longer" with the DLA of *moving about indoors and outdoors* and with the toileting aspect of the DLA of *personal self-care*. The daughter's letter attempts to fill the gap with respect to the significance of the restrictions.

The assessment of the appellant's restrictions to DLA must be considered in the context of there being no medical explanation as to why the appellant was able to perform DLA for herself and foster children until her retirement in July, 2013, but by October, 2013 she could no longer perform DLA for herself. Viewing the evidence as a whole, it indicates that the appellant independently performs all aspects of the 5 DLA of *personal self-care, manage personal finances, manage personal medications, decision-making, and social functioning*.

With respect to the *use of transportation*, the appellant can drive when she has to. Regarding *meal preparation*, she can prepare breakfast and lunch, and can plan meals and use the oven for heating

meals but generally leaves dinner up to her daughter. With respect to *basic housekeeping*, the appellant can make her bed, do a load of laundry, and some vacuuming. Large jobs or heavy cleaning have to be broken down into smaller components but appear to require an inordinate amount of time.

Regarding the 2 remaining DLA, the appellant is restricted with respect to *moving about indoors and outdoors*, but there is no evidence that she receives any assistance with this other than that she wears a knee brace and uses a scooter or wheelchair when one is available at a store. With respect to *daily shopping*, the appellant is usually accompanied by her daughter but she can independently get to and from the store and make decisions about what to purchase.

On balance, while acknowledging a degree of impairment, 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 manage her DLA is significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires her daughter's help to manage her DLA, and that she simply would not be able to get by on her own.

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.