



PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of January 20, 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 August, 2013], and a physician's report ("PR") and assessor's report ("AR") both signed by the appellant's physician of 7 years [dated July 23, 2013 and August 6, 2013 respectively].
- An undated "to whom it may concern" letter from the appellant's daughter.

Physical Impairment

- In the PR the physician diagnosed the appellant with mechanical back pain (entire back), mild left first CMC arthritis (degeneration), and fibromyalgia. In the AR he also referred to "osteoarthritis left hand." He described the appellant's impairments as being "chronic", and referred to her having "moderately severe pain" in her neck and lower back, and between her shoulder blades.
- In terms of functional skills the physician reported the appellant as being able to walk 4+ blocks unaided on a flat surface, being able to climb 5+ steps unaided, being able to lift 15 to 35 pounds, and being able to remain seated for less than 1 hour.
- In the AR the physician reported the appellant as being independent with respect to walking indoors, climbing stairs, and standing. He wrote that she can walk about 2 blocks outdoors before back pain prevents walking. He indicated that the appellant requires continuous assistance with lifting/carrying/holding, commenting that she can lift about 20-25 pounds but that she cannot carry more than 10 pounds.
- In her self-report the appellant wrote that she has good days and bad days. On days when she feels bad "head pressure", she stays in bed all day. She stated that she has arthritis in her hands and feet, and has to wear a brace on her left thumb. She wrote that she has "the beginning of Multiple Sclerosis" and asthma.
- In her oral testimony on appeal the appellant said that she simply can't be expected to work every day. She said that she gets bad migraines and can't hold a job.
- In her letter, the appellant's daughter wrote that the appellant suffers from so much pain every other day that she can't live alone or walk anymore.

Mental Impairment

- In the PR the physician diagnosed the appellant with having anxiety attacks. He indicated that the appellant has no difficulties with communication and noted no significant deficits with cognitive and emotional function.
- In the AR the physician described the appellant's ability to communicate as being good in all respects.
- Section B4 of the AR form (dealing with cognitive and emotional functioning) and the portion of Section C of the AR form (dealing with social functioning) both contain the notation that these sections should only be completed for applicants that have an identified mental impairment or brain injury. In each case the physician left these sections blank, except for the notation "N/A".
- In her self-report the appellant wrote that she has anxiety attacks "all the time" which affect her life.

- In her oral testimony on appeal, the appellant said that she suffers from memory loss and headaches due to previous incidents of domestic violence. She said, however, that she is never forgetful with her granddaughter.
- In her letter, the appellant's daughter wrote that her mother's anxiety sometimes makes her bed-ridden, and that her bad days can't be anticipated. She wrote that the appellant lives with her daughter and granddaughter, and that when the appellant is bed-ridden the daughter has to be available to take care of her.

DLA

- In the PR the physician indicated that the appellant has not been prescribed any medication or treatments that interfere with her ability to manage DLA.
- In the AR the physician reported that the appellant independently manages all aspects of the 5 prescribed DLA of *managing personal finances* (pay rent and bills), *managing personal medications*, *personal care* (indicating that the appellant takes significantly longer than typical bathing because her hands go numb when she holds her arms above her head), *meal preparation* (taking about 2 times longer than typical with food preparation and cooking) and *use of transportation* (taking longer than a healthy person to get out of a vehicle due to back pain.)
- The physician indicated that the appellant takes longer than typical with respect to the DLA of *basic housekeeping*, but that she requires continuous assistance with laundry, noting that back pain requires that the appellant's daughter help her with removing laundry from the dryer. The physician also commented that the appellant takes about 2 times longer than a healthy person to sweep, vacuum, and do dishes.
- Regarding the DLA of *daily shopping*, the physician noted the appellant independently manages reading prices and labels, making appropriate choices, and paying for purchases, but that she requires continuous assistance carrying purchases home (her daughter helps her carry anything over 10 pounds), and she takes significantly longer than typical going to and from stores.
- In response to questions from the panel at the appeal hearing, the appellant said that she can prepare grilled cheese, but that her daughter prepares anything more complicated than that. She said that the ministry pays her rent, and that she has no other finances to manage. She gives her bank card to her daughter and has no other bills. The appellant also said that for shopping, she drives her daughter to the store and the daughter does the shopping. She said that she won't use public transit because it makes her feel claustrophobic.
- Also in response to questions from the panel, the appellant said that her mobility indoors is fine, but she has a problem bending over due to back pain. Regarding self-care, the appellant said that sometimes her daughter washes and dyes the appellant's hair. She also said that her "bad days", when she is bed-ridden, are about 3 times per week.
- In her self-report the appellant wrote that she has continuous pain and that she does limited housework. She indicated that some days she does not do her housework, or even wash her hair because of pain.
- In her oral testimony, the appellant's daughter said that she wasn't able to attend the physician's office with her mother when the PWD application forms were completed, so she believes the forms don't accurately reflect the severity of the appellant's impairments or the significance of the restrictions they impose.
- The daughter said that the appellant has an eating disorder and that the daughter has to make sure the appellant eats; otherwise she would skip eating for days.

- The daughter reported that the ministry pays the appellant's rent directly, but that otherwise the appellant has no bills or other income. She said that she (the daughter) pays for everything and that her mother needs to be able to pay for more things.
- The daughter said that her mother does not use public transit – the daughter is afraid that the appellant will get lost. She said that she has to remind the appellant every day to take her medication.
- The daughter also reported that her mother is limited to walking 1 or 2 blocks outdoors before she is forced to turn back, often due to bladder leakage. In response to a question from the panel, the appellant and her daughter said that the bladder issue is not advanced to the point where the appellant has to wear diapers.
- In response to questions from the panel, the daughter said that the appellant sometimes helps with the laundry and that she does "occasional" housekeeping, that the appellant does most of the dish-washing because the daughter "hates to do dishes" and that the appellant is able to get into and out of chairs independently. She said that the appellant would not be able to function if she were living on her own.

Help

- The physician indicated that the appellant does not require any prostheses or aids for her impairments, and that she does not have an assistance animal.
- In her oral testimony on appeal, the appellant said that she has recently started wearing custom-made hand braces.

Admissibility of New Information

In oral testimony the appellant and her daughter provided additional information regarding her impairments and the restrictions caused by them. 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 submitted no new information.

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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.

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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 she her arthritis, fibromyalgia and constant pain constitute severe physical impairments. She stated that she cannot work due to her poor health.

The ministry's position is that the physician's assessment of the appellant's functional skills limitations

are more in keeping with a mild to moderate degree of physical limitation. Accordingly, the ministry said that the information provided is not sufficient to show 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 prescribed professionals – 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 as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In terms of functional skills, the physician's evidence in the PR and AR is consistent in showing that the appellant's abilities are at the mid- to higher end of the assessment scale. She is limited to walking somewhere between 1 and 4 blocks unassisted outdoors on level ground, and she requires assistance carrying weights over 10 pounds. The panel notes the appellant's and her daughter's evidence that the appellant is bed-ridden for up to 3 days per week. In the panel's view, if this was an effect of the appellant's impairments, it is something that the physician would more likely than not have noted in the PR and AR. In substantial part because of this inconsistency, the panel has given more weight to the physician's evidence than to that of the appellant or her daughter.

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, despite the physician's references to "moderately severe pain", the functional skills limitations he has described as resulting from her impairments 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 argued that her anxiety and forgetfulness constitute a severe mental impairment, which

often keeps her bed-ridden.

The ministry's position, as set out in its reconsideration decision, is that the information submitted does not establish a severe mental impairment. It noted that the physician did not identify any cognitive and emotional deficits, and while acknowledging that the appellant can experience up to 5 anxiety attacks per day, the ministry noted there was no information as to whether medical treatment had been instituted to ameliorate the anxiety.

Panel Decision

The physician has diagnosed the appellant as having anxiety attacks. However, in both the PR and AR the physician indicated this does not impact the appellant's cognitive or emotional function, and noted that the appellant's ability to communicate is good in all respects. In the AR, the physician noted "N/A" in the two sections relating to mental impairment or brain injury. The panel concludes that in the physician's opinion the appellant does not have a severe mental impairment.

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), and *meal preparation* (meal planning).

The evidence indicates that the appellant has good communication skills and there is no evidence of any restrictions to her *social functioning*.

The panel acknowledges the daughter's opinion that if left on her own the appellant would be "non-functional" but, 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 said that she experiences constant pain, and that she has about 3 bad days per week during which she is bed-ridden. She indicated that her ability to manage DLA is not as good as indicated by her physician in the AR.

The ministry's position, as set out in its reconsideration decision, is that the appellant is able to manage the majority of her DLA independently or with little help from others. The ministry stated that there is not enough evidence to confirm that the appellant's impairments significantly restrict her ability to perform 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 physician's evidence indicates that the appellant manages 5 of them independently in all respects: *managing personal finances, personal self-care, managing personal medications, meal preparation, and use of transportation*. The evidence of the physician and the appellant indicate that the appellant manages the indoor component of *moving about indoors and outdoors* independently, and that outdoors she is able to manage independently for at least 2 blocks. Taking up to 2 times longer than typical to perform some aspects of some DLA does not constitute a significant restriction.

Based on the analysis presented above under the heading Severe Mental Impairment, the panel concludes that the appellant also manages the 2 DLA of *decision making, and social functioning* independently.

Of the remaining 2 DLA – *basic housekeeping and daily shopping*, the appellant manages most aspects of both DLA independently, though some aspects take her longer than typical. The evidence does not indicate to the panel that the daughter's assistance with either of these DLA represents anything more than a normal sharing of domestic chores within the household.

Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage her DLA is not 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. The ministry noted that the appellant does not require any assistive devices.

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, that precondition has not been satisfied on the balance of probabilities in this case.

The appellant's recent use of hand braces is not sufficient to constitute "help". There is no evidence that the appellant has an assistance animal.

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.