

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of January 3, 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 panel notes that the date on the reconsideration decision is January 3, 2013, but based on the chronology of events concludes this was a clerical error and the year was actually 2014.) The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant's daily living activities ("DLA") are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act ("EAPWDA"), section 2
Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"), section 2

PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report [dated June 29, 2013], and a physician's report ("PR") and assessor's report ("AR") both signed by the appellant's physician of 6 years [dated June 29, 2013].
- The appellant's undated handwritten reconsideration submission.
- A "to whom it may concern" letter from the appellant's physician [dated December 10, 2013].

Admissibility of New Information

At the appeal hearing the appellant, through her advocate, submitted the following documents for consideration by the panel:

1. A letter from the appellant's physician, dated January 27, 2014.
2. A written outline of the submissions to be made by appellant through her advocate.

The panel accepted document 2 as written argument.

The ministry was invited to make submissions of the admissibility of document 1. The ministry took the position that the above-noted document provided new information regarding the frequency or duration of restrictions caused by the appellant's impairment that was not before the ministry at the time of reconsideration. The ministry noted that if this new information had been available at reconsideration it may have made a different decision.

The appellant argued that it was implicit from the information previously provided by the physician that the appellant's impairments affect her chronically or continuously, and that his January 27, 2014 letter was simply providing clarification in support of that previous information rather than being entirely new.

In the panel's view, if document 1 were to be interpreted as meaning that wherever the physician had previously stated that the appellant required "periodic" assistance he was now saying she needed "continuous" assistance, it would represent a significant change from what had been before the ministry and so would not be admissible. However, the panel has interpreted document 1 as providing express clarification of the GP's previously stated opinion as to the continuous nature of the appellant's restrictions, rather than the significance of the restrictions. Accordingly, the panel admitted document 1 as information in support of information and records that were before the ministry at the time of reconsideration in accordance with section 22(4) of the *Employment and Assistance Act*.

In oral testimony the appellant 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 submitted no new information.

Physical Impairment

- In the PR the appellant's physician diagnosed her with anemia, loss of sensation in her right arm, a skin disorder, colitis, and a torn rotator cuff. He commented that she has permanent chronic pain and loss of sensation in her right arm. He noted that she has recurrent bouts of abdominal pain due to colitis, and that she suffers from mild iron deficiency.
- In terms of functional skills the physician indicated the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ stairs unaided, and experiences no limitations in remaining seated. He indicated "no lifting", and commented in the AR that pain and loss of sensation in her right arm impair her ability to carry heavy objects and that even minor tasks are difficult.
- In his letter of December 10, 2013 the physician wrote that the appellant is undergoing investigations including a CT scan of her abdomen, and that she is scheduled to see a gynecologist and a urologist.
- In her self-report the appellant wrote that she has severe diverticulitis. She also wrote that she has swelling in her face every day and that she cannot get her right eye to focus. She reported that she has psoriasis on her back because her immune system is not good, and that most nights she has a fever.
- In her written reconsideration submission the appellant wrote that the iron IV causes phlebitis in her left arm, and that her right arm has carpal tunnel, tennis elbow, a torn rotator cuff, and nerve damage. She also noted that she suffers abdominal pain from clamps that were left in her from previous surgery.
- In her oral testimony the appellant said that she sleeps poorly, and that for 3 to 5 days out of every 7 she is awake with fever and throwing up. She indicated that she is still undergoing medical tests and appointments to determine the cause of the fever, with the expectation that it is some sort of chronic infection. She said that she has been waiting for months to see specialists.

Mental Impairment

- In the PR the appellant's physician diagnosed her with severe recurrent depressive episodes. He noted that she has had poor response to therapy.
- With respect to functional skills, the physician indicated that the appellant's ability to communicate is good in all respects. He noted significant deficits in 3 categories of cognitive and emotional function: emotional, motivation, and motor activity/bodily function. In the AR the physician described these 3 deficits as having major impacts on the appellant's functioning. He indicated minimal or no impacts in the remaining 10 categories of cognitive and emotional function.
- In the AR the physician commented that when the appellant's depressive symptoms "are not controlled she has severe depression with loss of motivation. When she is in treatment her mood is better and she is able to function better but her depression interferes with memory, planning, attention and causes poor concentration."
- In his letter of December 10, 2013 the physician wrote that the appellant's medical condition interferes with her DLA, that she cannot afford a full time housekeeper, that she is the only caregiver for her 3 children, and that there are no family supports for her. He stated "It is my opinion that she is not medically fit to work at this time."

- In his letter of January 27, 2014 the physician wrote that he has known the appellant for 6 years and that her physical health has not improved much. He said that her physical symptoms play a huge role in her mental health, and that despite her depression medications having been adjusted and optimized, she continues to struggle mentally. He wrote "Her depression affects her ability to function 100% of the time. Her mood interferes with her sleep, her appetite, [h]er ability to take care of her physical needs as well as those of her children."
- In her written reconsideration submission the appellant wrote that she's been treated for depression for the past 8 years.
- In her oral testimony, the appellant said that 3 or 4 times a week she can't get out of bed. She said that she has been under treatment for her depression continuously over the past year, and that she cries about three times a week.

DLA

- In the PR the physician commented that he has known the appellant for 6 years, that she was a high functioning individual who ran her own business, but that at the moment her symptoms are severe and impair her abilities to work and to "...take care of her home tasks."
- In the AR the physician commented that "Even minor tasks e.g. dressing + brushing hair are difficult."
- In the AR the physician indicated that the appellant is independent with respect to managing all aspects of the DLA of *personal self-care, manage personal medication, and use of transportation*.
- He indicated the appellant requires periodic assistance with respect to the DLA of *basic housekeeping*, and with one aspect of *daily shopping* (carrying purchases home), commenting that "[The appellant] needs help carrying and lifting due to her right shoulder pain."
- The physician indicated that the appellant requires periodic assistance with all aspects of the DLA *manage personal finances* (when depressive symptoms are severe she needs encouragement and support from friends) and *social functioning* (...has a limited social network...does not have good relationships when she is depressed.) The physician indicated that the appellant is functioning marginally with both her immediate and extended social networks.
- In response to questions from the panel the appellant responded:
 - that she doesn't do well with meal preparation, she can't chop vegetables and she often drops items because of her right arm. She said that she has to manage because she has to feed her children. She said she has no help so she has to be independent.
 - she can't carry laundry up and down the stairs in her residence so her children do that for her about 3 times per week. Otherwise, she said that she receives "no assistance with anything."
 - regarding the type of assistance she receives with social functioning, the appellant stated "None." She said that she doesn't get anything from anybody, and that Mental Health says she is "managing OK", "coping". She noted that she does get some counseling help for herself and her children who also suffer from depression.
 - regarding the type of assistance she gets with paying rent and bills, the appellant said that she sometimes forgets appointments and bills. She said she gets no help with anything.

Help

- With respect to social functioning, the physician indicated that the appellant “does have help through mental health services.”
- In response to the question “The help required for [DLA] is provided by:” in the AR, the physician responded “N/A”. He indicated that the appellant does not require any prostheses or aids, and that she does not have an assistance animal.
- In his letter of January 27, 2014, the physician wrote that the appellant has received some help from mental health services as well as the ministry in the past.

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 impairments cause severe pain and lack of sleep, constituting a severe physical impairment.

The ministry's position - as set out in its reconsideration decision - is that it acknowledges that the

appellant has limitations with her right arm and shoulder, but says there was no information regarding functional abilities of the left arm and hand. The ministry says that as the appellant is able to manage the majority of her DLA independently or with periodic assistance, the evidence does not establish a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

The physician's evidence from the PR is that the appellant is unrestricted in terms of walking, climbing stairs, standing, and sitting. His evidence in the AR is consistent with this. In the PR the physician noted "no lifting", but his commentary in the AR makes it clear that he was referring to her ability to lift "heavy objects." He noted in the AR that "even minor tasks are difficult", but this doesn't necessarily constitute a "severe" impairment as contemplated by section 2 of the EAPWDA.

The panel notes that the appellant is still undergoing medical tests for other potential problems, but the panel must base its decision on the evidence that it currently has before it.

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 some serious 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 argued that her chronic depression constitutes a severe mental impairment. She stated that her physical impairments aggravate her mental condition, and that her condition is worsening.

The ministry's position, as set out in its reconsideration decision, is that it is not clear how often the appellant has episodes of depression or how long her mood is better when she is in treatment. The ministry concluded that not enough evidence had been provided by the physician to confirm a severe mental impairment.

Panel Decision

The physician's evidence in the PR and the AR is consistent that the appellant's depression is episodic...there are periods when it is better and periods when it is worse. When she is feeling better, the appellant manages to function better, though her depression continues to affect her memory, planning, and attention/concentration. This is supported by the physician's letter of January 27, 2014 in which he notes that her DLA are affected "100 % if the time." However, despite this observation, there is no evidence as to how often or for how long her depression is "not controlled", and how often or how long her mood is "better".

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 *daily shopping* (making appropriate choices), *manage personal medication* (filling/refilling/taking as directed), and *meal preparation* (meal planning). The physician noted that the appellant requires periodic assistance from others in *managing personal finances* (pay rent and bills) when "depressive symptoms are severe", but the appellant's evidence was that she gets no help with this.

With respect to *social functioning*, the physician indicated that the appellant requires periodic support with all aspects, but there is no evidence before the panel as to what type of support she receives or from whom. The evidence indicates that the appellant has good communication skills. The appellant said that she gets no help with *social functioning*, and indicated that while she is on medication for her depression she is not currently receiving any counselling or therapy. The physician indicated that the appellant manages to function - marginally, but sufficiently to meet her basic needs – with respect to 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 DLA are significantly restricted. She emphasized the physician's use of the terms "recurrent" and "chronic" to argue that the combination of physical impairment and depression continuously restrict her management of DLA 100% of the time. The appellant also argued that the ministry equated the terms "independently" and "with periodic assistance", but that the legislation clearly differentiates between the two.

The ministry's position, as set out in its reconsideration decision, is that the appellant is able to independently, or with periodic assistance, manage the majority of her DLA. The ministry felt that the prescribed professionals have not provided sufficient evidence of the frequency or duration of periodic restrictions. The ministry stated that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislation 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 ten DLA. Of those ten, the physician's evidence indicates that the appellant manages four of them independently in all respects: *use of transportation, move about indoors and outdoors, personal self-care, and manage personal medication.*

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

The physician indicates that the appellant's impairments directly and continuously restrict the appellant's ability to manage her DLA, but because she manages them independently or with minimal assistance – as discussed below under the heading Help with DLA - the restriction cannot be said to be "significant" as required by the legislation.

Regarding the three remaining DLA – *meal preparation, basic housework, and daily shopping* – the evidence indicates that the appellant is performing these DLA with at most some limited help from her children. Other than the evidence that her children carry laundry up and down the stairs three times per week, that she gets help with lifting or carrying heavy objects while shopping, and that she has difficulty chopping vegetables and often drops things while cooking, the panel has been presented with no evidence to demonstrate that the appellant is significantly restricted with these DLA.

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 help to manage her DLA, even though she is not currently receiving any help. She says that she manages her DLA independently because she has to – she has no alternative.

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 notes that there may be situations in which a person may "require" help but not be receiving it. The appellant essentially argues that "require" means that a person would benefit from having assistance. 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 panel acknowledges that the appellant's medical conditions impact her ability to manage her DLA, and that she would likely benefit from having assistance with some of her DLA. However, the panel is bound by the legislation, and in the panel's view there is simply insufficient evidence to show that the appellant's DLA go undone for lack of assistance, that it takes her an inordinate amount of time to perform DLA, or that she relies upon "the significant help or supervision of another person" as required by EAPWDA section 2(3)(b)(ii).

The panel finds that there is no evidence to indicate that the appellant uses assistive devices or that she has an assistance animal.

Accordingly, 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 conditions affect her ability to function as she once did. 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.