

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision dated October 7, 2013 which found that the appellant did not meet two of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that she has a severe physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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 parties, the appeal was conducted as a written hearing in accordance with section 22(3)(b) of the *Employment and Assistance Act*.

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 May 6, 2013], and a physician's report ("PR") and assessors report ("AR") both signed by the appellant's physician [dated May 7, 2013].
- A written statement from the appellant dated September 30, 2013 (the "Statement"), with an endorsement by the physician.
- Various medical reports.

The panel assesses the evidence from the PWD application form as follows:

Diagnoses

- In the PR the physician diagnosed the appellant with mitral valve prolapse (surgical repair), left total hip replacement, L2 compression fracture, and left ilio-tibial fasciitis.

DLA

- In the PR the physician reported that the appellant has not been prescribed any medications that interfere with her ability to perform DLA.
- The physician reported that the appellant cannot walk any distance unaided and that she uses a cane.
- In the AR the physician commented "Difficulty/unable to manage any physical tasks other than light duty and not for any length of time."
- He indicated the appellant is restricted in terms of the DLA of *mobility indoors and outdoors* and that she uses an assistive device for this.
- With respect to the DLA of *personal self-care*, the physician noted that the appellant takes significantly longer than typical with most tasks.
- Regarding the DLA of *basic housekeeping*, the physician indicated that the appellant requires periodic assistance.
- Regarding the DLA of *daily shopping*, the physician reported that the appellant requires periodic assistance with the physical tasks of going to and from stores, and that she uses an assistive device to carry purchases home, but that she was otherwise independent.
- With respect to the DLA of *meal preparation*, the physician reported that the appellant requires periodic assistance with the tasks of food preparation and cooking.
- He reported the appellant as independently managing all aspects of the DLA of *managing personal finances* (pay rent and bills), and *managing personal medications*. He indicated no restrictions with respect to the DLA of *social functioning*.
- Regarding *use of transportation*, the physician indicated only that the appellant requires periodic assistance getting in and out of a vehicle.

Help

- In the AR the physician indicated that the appellant uses an assistive device in the form of a cane and that she relies on friends for housework and shopping etc.

In the Statement the appellant provided more detail with respect to restrictions of DLA. In particular, she noted several impacts caused by side-effects of her medications. She also provided more detail regarding restrictions to *personal self-care, mobility indoors and outdoors, basic housework, use of transportation*, the pain, fatigue and lack of stamina restricting her ability to manage DLA, and the need for assistance with DLA. She also provided evidence of a new diagnosis "consistent with chronic lymphocytic leukemia/small lymphocytic lymphoma".

The appellant's physician endorsed the Statement with the following qualifications "[The appellant] has asked me to read her statement above. I have done so. I find it to be a credible description of the types of limitations she would face in light of her medical condition. I would expect a woman in her condition to face the daily restrictions due to her disabilities that she describes in her statement. [The appellant] has asked me to make any modifications or additions to this statement that I see fit to make. I have done so. I am now signing this statement and I am asking [the ministry] to accept it as my own." He commented "No alterations".

In her Notice of Appeal dated October 14, 2013 the appellant wrote that she is constantly in and out of atrial fibrillation, which leaves her breathless and unable to do menial tasks, and she is also battling cancer.

Admissibility of Additional Information

1. In his letter of October 31, 2013 the physician clarified that when he had commented "No alterations" in his endorsement of the Statement, he had meant that he agreed with the Statement and that he did not wish to make any amendments to it, not that the ministry should have based its decision solely on the information in the original PWD application.

The panel assesses the above-noted document as clarifying the physician's endorsement of the Statement that had been before the ministry at the time of reconsideration. The panel has admitted this letter as written testimony in support, in accordance with section 22(4) of the *Employment and Assistance Act*.

The panel has accepted the following documents as written argument:

1. The appellant, through her counsel, provided a typewritten submission dated May 2, 2014.
2. On May 14, 2014 the ministry provided a written submission stating that in light of the information provided by the appellant, the ministry is not opposed to the panel rescinding the decision to deny PWD designation.
3. On May 20, 2014 the ministry provided a written submission stating that "The Minister's reconsideration decision was not reasonably supported by the evidence and was not a reasonable interpretation of the Employment and Assistance for Persons with Disabilities Act and Regulation and should be rescinded."

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 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.

The Effect of the Ministry's Submission

This panel's jurisdiction is set out in s. 24 of the *Employment and Assistance Act*:

24 (1) After holding the hearing required under section 22 (3) [*panels of the tribunal to conduct appeals*], the panel must determine whether the decision being appealed is, as applicable,

(a) reasonably supported by the evidence, or

(b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

(2) For a decision referred to in subsection (1), the panel must

(a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and

(b) otherwise, rescind the decision, ...

The panel must assess the reasonableness of the reconsideration decision in terms of the evidence and the applicable legislation. That the ministry and the appellant now both agree in arguing that the reconsideration decision was unreasonable is to be considered by the panel but is not determinative of the issue that is before the panel. The panel must interpret the relevant legislation and apply it to the facts of the appellant's case.

Reasons for Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician.

In this case the information provided by the physician in the PR and AR was inadequate to establish that the appellant was significantly restricted in her ability to perform DLA either continuously or periodically for extended periods.

The Statement provided additional evidence with respect to the significance of the restrictions to DLA, and also introduced new evidence that was before the minister at the time of reconsideration to the effect that:

1. Contrary to the physician's original evidence in the PR, the medications were significantly restricting the appellant's ability to perform DLA; and
2. It provided evidence of a new diagnosis to account for the fatigue experienced by the appellant.

The ministry interpreted the physician's endorsement as meaning he did not agree with the Statement and that he was endorsing no alteration to the information he had provided in the PR and AR. In light of the physician's subsequent letter of October 31, 2013, it is clear that the ministry erred in its interpretation of his endorsement.

For the foregoing reasons, the panel concludes that the ministry was unreasonable in its finding that the appellant is not significantly restricted in her ability to perform DLA either continuously or periodically for extended periods.

Given the significance of the restrictions experienced by the appellant, her use of an assistive device, and her need for assistance from others, the panel concludes that the ministry was unreasonable in

its finding that the appellant does not require help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel concludes that the ministry's decision finding the appellant ineligible for PWD designation is not a reasonable application of the legislation in the circumstances of the appellant. The panel therefore rescinds the ministry's decision in favour of the appellant.