

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 6 May 2014 determined that the appellant did not meet 3 of the 5 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 her impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or 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. The ministry was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help 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

The following evidence was before the ministry at the time of reconsideration:

- A 3 page PWD Application self report dated 4 November 2013 completed and signed by the appellant stating the following:
 - Her disabilities are with her back, hips, shoulders and hands.
 - Her back injuries are the result of severe physical abuse suffered years ago.
 - She feels the pain of a slipped disc in her lower back, where it bulges out to the right side of her spine and cannot be fixed by surgery, as the risks of paralysis are too high.
 - She had hip surgery due to severe bursitis.
 - She also has rheumatoid arthritis in her hips, knees, back, shoulders and hands.
 - She suffers from hepatitis C.
 - Her back injuries make simple house work painful, vacuuming is harder, lifting anything over 20 lbs is hard and walking more than 3-4 blocks is not possible.
 - When she learned she had hepatitis C, this had the result of breaking up her marriage of almost 20 years since her husband blamed her for that and she fell into depression and lost 40 lbs recently.
 - Because of her arthritis, she does not go out alone and is always accompanied by one of her children but most of the time they will do the shopping for her.
 - When she does arts and crafts, her hands hurt much sooner than before and those tasks are slowly becoming harder for her.
- A 8 page Physician Report (PR) dated 30 October 2013 completed and signed by the appellant's physician indicates the following:
 - Specific diagnosis: Mechanical low back pain since the 1990's; depression since 6 months; hepatitis C since end of 2012.
 - Health history: Low back pain severe and limiting, worse lately. Marriage ended – mood disorder secondary to this and chronic pain. Hepatitis C causing fatigue.
 - No medication prescribed but may need interferon in the future.
 - She does not require any prostheses or aids for her impairment.
 - The impairment will continue for 2 years or more, being chronic problems unlikely to improve.
 - She can walk 2 to 4 blocks on a flat surface unaided.
 - She can climb more than 5 steps unaided.
 - She is limited to lifting 2 to 7 kg.
 - She cannot remain seated for more than 1 hour.
 - She has no difficulties communicating.
 - The physician identifies 3 areas of significant deficits with cognitive and emotional function: Emotional disturbance; motivation; attention or sustained concentration and comments: Poor motivation.
 - The physician comments that she relies on family for help and has known her since 2008, having seen her 2 to 10 times in the previous 12 months.
- An 11 page Assessor Report (AR) also dated 30 October 2013 completed and signed by the same physician as the PR, indicating the following:
 - To the question "What are the [appellant's] mental or physical impairments that impact his ability to manage DLA?" he indicates: Fatigue, severe back pain, poor motivation.
 - The appellant's ability to communicate is good in all respects.

- In terms of mobility and physical ability, she is independent walking indoors; needs periodic assistance from another person for walking outdoors, climbing stairs and standing (30 minutes maximum) and needs continuous assistance from another person or unable to do any lifting and carrying and holding. He comments: "Gets help".
- In terms of cognitive and emotional functioning for someone who has an identified mental impairment or brain injury the AR indicates no impact on most areas, minimal impact on memory; moderate impact on emotions, attention/concentration and executive and major impact on bodily functions and motivation. In terms of major impact, there are no other explanations but that "Insomnia now a problem".
- In terms of assistance required related to impairments that directly restrict the appellant's ability to manage DLA, the assessor indicates that she is independent for all areas except 2, where she needs periodic assistance from another person: going to and from stores and carrying purchases home and 1 where she needs continuous assistance from another person or unable: getting in and out of a vehicle. He comments: "Help with shopping needed", "Help needed to obtain goods and transport them", "Back pain" and in terms of public transit, he indicates "not applicable".
- She is independent in 3 out of 5 areas of social functioning, requiring periodic support / supervision to deal appropriately with unexpected demands and to be able to secure assistance from others but without any explanation or description.
- She exhibits good functioning in both immediate and extended social networks.
- There are no additional comments other than assistance is provided by family members and no assistive devices or assistance animals are needed.
- His information sources for completing the AR are the appellant and her medical chart.
- In her request for reconsideration dated 10 March 2014 and signed by the appellant she indicates:
 - Walking: she must walk 4 blocks once or twice a week because she walks with her grandchildren to a school but she has to walk "baby steps" and must stop half way. After that walk, she finds climbing stairs painful. Other than that, she does not walk anywhere else.
 - To climb stairs, she must use the handrails to pull herself up.
 - Lifting 15 lbs: She mentioned that to her doctor because it is her youngest granddaughter's estimate weight but she cannot lift her when she is standing – she must sit before picking her up.
 - Grocery shopping: In general, she does not go out shopping but give her daughter a list of what she needs and if she goes, she waits in the car. She had a bad experience 2 years ago in a big store when her hip popped out of the joint and after that she was too scared and stopped going out.
 - Mental impairment: Suffers from depression as a result of her marriage that broke up and denial of having hepatitis C. She stopped doing crafts because it is too hard on her hands, shoulders, hips and back. She writes "If I sit in one spot for an hour or more, my legs go numb from the knees down and swelling begins, getting up is difficult on the hips and back, when I do get up I have to walk hunched over for a bit. I have always been a strong working mother, now having to live with my oldest is hard mentally, feeling useless and a burden on her."
 - Daily activities: They are next to none because it is too painful to walk around big stores. She stays home, does not go out and is restricted to the main floor where she lives. She cannot visit her other children's homes because there is no bathroom on the main floor and

climbing stairs is hard. She is depressed for not going out anymore and after her walks to school it takes her 2 or 3 days to recover. She finds it hard to ask for anything since her children will never say no to her and she used to be independent and hard worker until surgeries in the late 90's – since then she has not worked other than babysitting.

At the hearing, the appellant testified that she did not know how she ended up with Hepatitis C and before that, she used to do things on her own and as a single mother she raised her 3 children. Now, she cannot even do household chores because of pain in her back. She reported she has now a new bed but sometimes she still cannot get out of bed because of her back. She used to babysit but cannot do that anymore because of her condition. In May, she was hospitalized as a result of a twisted intestine. She cannot lift anything anymore, including her granddaughter because of that pain. Because of poor circulation in her hips, her feet get swollen. She stated she was expecting to have heart surgery in approximately 6 months and that her white blood cells numbers are low, something that she is afraid of because her mother died of a similar ailment. She tried to get another letter from her physician but she couldn't because he was very busy and she did not have the money to pay for a doctor's letter, but he was supportive of her application. She testified she has arthritis in her shoulders and her hands started deforming. Her condition has worsened to the extent she said she needed help to get out of her chair.

The panel determined the additional oral evidence about the appellant's medical situation in May (twisted intestine) and her eventual heart surgery was not admissible under s. 22(4) of the Employment and Assistance Act (EAA) as it was not in support of the records before the minister at reconsideration as it reveals a new medical condition that was not made by her physician and was not known at the time of reconsideration. The panel also determined the remaining additional oral evidence was admissible under the said section as it was in support of the records before the minister at reconsideration and provides more information about the appellant's health condition in respect of her DLA. However, the panel notes the physician did not make mention of rheumatoid arthritis or arthritis in the PR as part of his diagnosis.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR, which are set out below.

Section 2 of the EAPWDA states:

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;

"health professional" repealed

"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.

(4) The minister may rescind a designation under subsection (2).

Section 2 of the EAPWDR provides further clarification:

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 ministry acknowledges that the appellant meets 2 of the conditions for PWD designation in that she is at least 18 years of age and her impairment is likely to continue for 2 years or more. However, the ministry argues that she does not meet the 3 other criteria.

Severe physical impairment:

The ministry argues that while the appellant does suffer from serious ailments, the evidence is not sufficient to establish a severe physical impairment. The evidence that shows limitations in terms of walking, climbing stairs, lifting, sitting as well as continuous assistance in lifting, carrying and holding and periodic assistance with walking outdoors, climbing stairs and standing is insufficient because it provides no information as to how often she requires assistance and because she is independent indoors. The ministry argues that the evidence is only consistent with a moderate degree of impairment that does not establish a severe physical impairment.

At the outset, the appellant argued that the ministry failed to take into consideration the evidence provided by the appellant in the documentation she provided, but focused only on the physician's reports. She argues that her evidence should be considered as a complement to the doctor's evidence as he did not have much time to dedicate filling the 2 reports and she was not able to explain fully her condition and the impacts on her DLA. She argues that her condition is much worse than what the physician indicated. She stresses that the doctor qualified her condition in terms of back pain as severe and that this is supported by her own evidence.

The panel notes that while the ministry mentioned the fact that the appellant's physician considered

her condition in terms of low back pain as “severe and limiting” and getting worse, it did not really explain why this medical opinion was rejected, other than by arguing the remaining evidence did not substantiate the doctor’s opinion. The panel also notes that in each report did the doctor mention the appellant’s low back pain was severe: In the PR, the physician writes “Low back pain severe and limiting” and “chronic problems unlikely to improve”, and in the AR he writes “severe back pain”, “help needed to obtain goods and transport them”; this is confirmed by limitations walking outdoors, lifting, carrying, getting in and out of a car and climbing stairs. Thus, the panel finds it was unreasonable for the ministry to determine the appellant had not established a severe physical impairment.

Severe mental impairment:

The ministry argues that while there are some limitations to the appellant’s cognitive and emotional functions, they do not provide enough evidence to establish a severe mental impairment. According to the ministry, the evidence shows deficits in the areas of emotional disturbance, poor motivation and attention or sustained concentration and in terms of daily functioning, there are major impacts to bodily functions and motivation; moderate impact to emotion, attention / concentration and executive; minimal impact to memory and no impact to the remainder 8 functions.

The appellant argues that she suffers from a severe level of depression, exacerbated by Hepatitis C. She argues that her depression led to significant weight loss and she goes for extended periods of time without eating much of anything. She argues that her physician noted significant cognitive and emotional deficits in emotional disturbance, motivation, attention and sustained concentration consistent with severe cognitive impairment.

The panel accepts the evidence that the appellant went through significant emotional difficulties since she was diagnosed with Hepatitis C and the end of her 20 years marriage. Yet, the doctor’s description of her condition suggests a moderate mental impairment. Of the 14 indicators of cognitive and emotional functioning, 8 have no impact, 1 has minimal impact, 3 have moderate impact and 2 with major impact. In the moderate range, there are “emotion” that includes depression, which is the doctor’s diagnosis, attention/concentration and executive. In the major range, there are “bodily functions” that include “eating problems, toileting problems, poor hygiene, sleep disturbance”: of those, there are no indications in these reports of any problem with toileting or hygiene, quite the contrary where the report says that she is independent in all respects. For the 2 other identified problems, the eating problem is not discussed by the physician but by the appellant in her testimony and sleep disturbance is qualified by the physician as “Insomnia now a problem”. The panel finds the ministry reasonably determined the appellant had not established a severe mental impairment, as the evidence is more consistent with a moderate impairment.

Daily Living Activities (DLA):

The ministry argues that it relies entirely on the physician reports to determine the extent of the appellant’s impairment on her DLA. While she needs continuous assistance getting in and out of a vehicle, periodic assistance with going to and from stores and carrying purchases home, no information is provided on how often she requires assistance. She is independent for the remainder of her DLA and there is no indication by the physician that they take her significantly longer to perform. The ministry also argues that there is insufficient information in terms of her being able to

deal appropriately with unexpected demands and being able to secure assistance from others.

The appellant argues that she is significantly restricted in performing 4 of the DLA identified in the legislation:

- Shop for personal needs: She states she needs continuous assistance and that her evidence is somewhat different from the doctor's evaluation.
- Use public or personal transportation facilities: She requires assistance in getting in and out of a vehicle and she cannot use public transit.
- Move about indoors and outdoors: She argues that she rarely leaves her home and when she does, she is accompanied at all times by a member of her family amounting to continuous assistance.
- Relate to, communicate or interact with others effectively: she argues she has difficulty securing support from her family because she is used to be independent and does not want to be a burden on her children. She is aware they would not say no to her and does not want to force them into helping her.

The appellant therefore argues that at least 2 of the DLA are impacted and that it was unreasonable for the ministry to determine they were not significantly restricted because of her impairment.

In terms of DLA, s. 2(2)(b)(i) states that the minister must be satisfied that the person has a severe mental or physical impairment that, in *the opinion of a prescribed professional* (in this case, the appellant's physician), directly and significantly restricts the person's ability to perform DLA either continuously or periodically for extended periods. The panel examined all the activities mentioned and noted that in some respects, the appellant's evidence differs somewhat from the physician's opinion. The panel takes into consideration the appellant's evidence to the extent it can clarify the AR but ultimately the opinion of the prescribed professional prevails.

The panel finds that for most DLA, the appellant is independent. She has difficulties shopping and according to the AR, she needs periodic help going to and from stores and carrying purchases home, with the comment "help with shopping needed" and "help needed to obtain goods and transport them" but there is no indication from the prescribed professional as to the extent of that periodic assistance. The appellant testified that she was not going shopping anymore and if she would go, she would stay in the car. For the other shopping activities, she is independent, according to the AR and this suggests it is the difficulty in getting in and out of a car that is the main cause of her need for assistance as mentioned by the prescribed professional where he indicates she has difficulties getting in and out of a vehicle because of back pain and needs continuous assistance from another person. In terms of public transit, the physician provides no evidence while the appellant testified she does not use transit. While the panel acknowledges that the appellant needs continuous assistance to use personal transportation, the panel finds the ministry reasonably concluded that there was not enough evidence to demonstrate that her physical impairment directly and *significantly* restricted her ability to shop for personal needs either continuously or periodically for extended periods.

Another area of daily functioning where she needs help is for social functioning where the physician indicated that she needs periodic support / supervision to be able to deal appropriately with unexpected demands but there is no explanation nor any indication as to whether this periodic support is for extended period of times and her evidence does not provide any clarification. The other activity where she needs help is her ability to secure assistance from others and while the physician

did not comment, she explained that she did not want to impose on her children but again, no information on the extent of periodic support or even what kind of support would be appropriate in those circumstances. In this case though, these DLA are connected with severe mental impairment under s. 2 (1)(b) of the EAPWDR and not to the physical impairment that the panel found existed. Thus, the panel finds the evidence does not support a significant restriction of a DLA that would result from a severe physical impairment and the ministry reasonably determined it did not meet the legislative requirements.

The only other activities mentioned in the AR that are impacted by her physical impairment are mobility and physical ability (moving indoors and outdoors in the legislation). According to the AR, she is independent walking indoors but needs periodic assistance walking outdoors, again without mentioning the extent of periodic assistance: The physician did not provide any explanation while the appellant described her walks with her grandchildren to school where there is no evidence that the children are providing her with any help or assistance – she says she walks slower and she stops and sits in the middle of the walk and they wait for her: the evidence suggests she is rather moderately restricted as she can walk independently.

According to the AR, she also needs periodic assistance climbing stairs (she mentioned using handrails but the physician does not provide any additional information) and standing (“30 minutes maximum” according to the physician is indicated in the area where he is asked to provide information on assistive devices) without any information of the extent of this assistance. Yet, in his PR, the prescribed professional indicated that she could climb more than 5 steps “unaided”. She needs continuous assistance lifting, carrying and holding without any further explanation from the physician as he did not mention a need for an assistive device other than a general comment “gets help” at the bottom of the page, referring to all those activities while in his PR, he indicated a limitation to lifting between 2 and 7 kg. The appellant shed more light on this in her testimony, referring to not being anymore able to lift her youngest granddaughter or carrying anything from stores but those are only a few particular aspects of a broader category of activities lumped under “mobility and physical ability” or “move about indoors and outdoors” (s. 2 (1)(a)(vi) of the EAPWDR) that, in general, do not suggest the ministry was unreasonable in determining there was not enough evidence establishing they are significantly restricted.

Given the evidence provided by the appellant’s physician, the prescribed professional, and taking into account the appellant’s explanations, the panel concludes that the ministry reasonably determined that the evidence was not sufficient to determine that the appellant’s physical impairment directly and significantly restricted her ability to perform DLA either continuously or periodically for extended periods.

Help required to perform DLA:

The ministry argues that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons and that no assistive devices are required or assistance animal.

The appellant argues that, based on her testimony, there is ample evidence to show that she needs help for many of her DLA, like shopping, use of personal transportation, move about indoors and

outdoors and relate to, communicate or interact with others effectively, as mentioned above.

The panel found that the evidence was not sufficient to determine that the appellant's physical impairment directly and significantly restricted her ability to perform DLA either continuously or periodically for extended periods, based in part by the fact that her need for help in a few areas was not significant enough to meet the legislative test. Further, the panel notes that one assistive device that was mentioned would help the appellant, the handrails, is not an assistive device as the definition of assistive device at s. 2(1) of the EAPWDA clearly states it is a device *designed* to enable a person to perform a DLA while handrails are not designed for that purpose but are generally found to enhance public safety. Thus, the panel finds that although the appellant needs help of another person for a few particular activities, the ministry reasonably determined it did not meet the legislative test of the need for help arising from significant restrictions to perform DLA either continuously or periodically for extended periods.

Conclusion:

The panel comes to the conclusion that the ministry unreasonably determined that the appellant did not establish she had a severe physical impairment but reasonably determined she did not establish having a severe mental impairment. Further, the panel finds that although the appellant did establish a severe physical impairment, the ministry reasonably determined she did not establish that this physical impairment directly and significantly restricted her ability to perform DLA either continuously or periodically for extended periods and that, as a result of those restrictions, she required help to perform those activities. Consequently, the panel finds the ministry's decision was reasonably supported by the evidence and confirms the decision.