

PART C – Decision under Appeal

The decision being appealed is the Ministry of Social Development and Social Innovation (the “Ministry”) May 21, 2014 reconsideration decision in which the Ministry determined that the Appellant was not eligible for Persons with Disabilities (“PWD”) designation because she did not meet all the requirements for PWD designation in section 2(2) of the Employment and Assistance for Persons with Disabilities Act. Based on the information provided, the Ministry was not satisfied that the Appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions she requires help to perform those activities.

The Ministry was satisfied that the Appellant has reached 18 years of age and in the opinion of a medical practitioner her impairment is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (“EAPWDA”) Section 2(2) and 2(3).
Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) Section 2.

PART E – Summary of Facts

With the oral consent of the Appellant, a representative from the Appellant's advocate office appeared at but did not participate in the hearing.

For its reconsideration decision, the Ministry had the following evidence:

1. Appellant's PWD application consisting of:
 - Her self-report dated November 3, 2013.
 - A Physician's Report ("PR") and an Assessor's Report ("AR") both completed on December 3, 2013 by the same doctor who indicated that he has known the Appellant for 7 years and had seen the Appellant 11 or more times in the past year.
2. Appellant's April 30, 2014 request for reconsideration with:
 - Written argument from her advocate.
 - A letter from her daughter about help provided to the Appellant.
 - A revised PWD application with changes to the PR and the AR by the same doctor.

The Panel has summarized the relevant evidence from the reconsideration record as follows.

Diagnoses

In the PR, the doctor diagnosed the Appellant with depression, bursitis, sleep apnea and osteoarthritis.

Physical Impairment

In her self-report, the Appellant wrote that:

- She cannot stand for long periods and she cannot sit because her hips hurt.
- Usually she uses a cane when outside and a walker at home.
- Her hips sometimes hurt so bad that she cannot get around at all.
- She cannot shop for any longer than 10-15 minutes.
- She has trouble going up stairs.

In the PR, the doctor reported that the Appellant's impairment was likely to last 18 months and she had been referred to an orthopedic surgeon. The doctor also report that the Appellant:

- Has degenerative disease of the hips as shown in x-ray and clinical evidence.
- Requires a walking cane for her impairment.
- Has been referred to an orthopedic surgeon.
- Can walk unaided for less than 1 block, cannot climb stairs unaided, can lift 5-15 lbs., the length time she can remain seated is unknown.
- Has poor mobility; is unable to work

In the first AR, the doctor reported that the Appellant:

- Has hip pain impacting her ability to manage daily living activities.
- Has good ability to communicate in all areas; that is, speaking, reading, writing and hearing.
- Uses assistive devices for walking indoors and outdoors, and climbing stairs; also takes significantly longer with these activities – she "uses a cane to move around and stand".
- Needs periodic assistance with lifting, and with carrying and holding.
- Has hip pain and "[The Appellant] suffers from several medical problems. Her hip pain is her biggest problem right now".

In the revised PR, the doctor changed the degree and course of impairment to indicate it would last 2

years or more and deleted the reference to 18 months.

In the revised AR, the doctor added that the Appellant:

- When walking indoors and outdoors, and climbing stairs, standing, lifting, carrying and holding “she takes up to five times longer to perform these tasks” and “she uses pain medication to get around”.

Mental Impairment

In the PR, the doctor reported that the Appellant has no difficulties with communication. He did not complete the section for significant deficits with cognitive and emotional function in this report, but did so in the AR. In the first AR, the doctor reported the following impacts to the Appellant’s cognitive and emotional functioning:

- No impact to bodily function, consciousness, impulse control, insight and judgement, attention/concentration, executive, memory, motivation, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems.
- Moderate impact to emotion (e.g., excessive or inappropriate anxiety, depression, etc.).

In the revised AR, the doctor wrote, regarding impacts to cognitive and emotional functioning: “Her hip pain has a significant impact on her ability to move around. This makes her sad and frustrated.”

Daily Living Activities

In the PR, the doctor reported that the Appellant:

- Has not been prescribed any medication and/or treatments that interfere with her ability to perform daily living activities.

In the AR, the doctor reported that the Appellant:

- In areas of personal care, is independent and takes significantly longer with dressing and grooming; is independent feeding herself and regulating her diet; takes significantly longer bathing and toileting, and with transfers in/out of bed and on/off chairs – “[The Appellant] has joint pain 100% of the time. This interferes with her mobility.”
- Uses assistive devices and takes significantly longer with laundry and basic housekeeping – “[The Appellant] has pain 100% of the time. This interferes with mobility”.
- Takes significantly longer and uses assistive devices going to and from stores; takes significantly longer reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home – “[The Appellant] has difficulty performing these tasks due to pain”.
- Independently manages meal planning and safe storage of food; takes significantly longer with food preparation and cooking – “[The Appellant] has joint pain that interferes with her ADLs”.
- Independently manages all areas of paying rent and bills, and medications.
- Takes significantly longer with all areas of transportation (getting in/out of a vehicle, using public transit, using transit schedules and arranging for transportation) – “[The Appellant] has joint pain interfering with her mobility”.
- Independently manages all areas of social functioning, and has good functioning with her immediate and extended social networks; and “NA” [not applicable] regarding help the Appellant needs to maintain her in the community.

In the revised AR, the doctor wrote that:

- “[The Appellant] uses strong pain medication to remain mobile. She requires help with daily activities. Her daughter helps her clean the house”.

- Regarding food preparation and cooking – “She takes 5 times longer to perform these tasks.”
- “[The Appellant] requires pain medication to remain mobile. She requires help from her daughter”.

Help with Daily Living Activities

In the first AR, the doctor reported that the Appellant:

- Uses a walking cane for her impairment and uses assistive devices for walking indoors and outdoors, and for climbing stairs – “she uses a cane to move around”.
- Uses assistive devices for laundry and basic housekeeping; and for going to and from stores.
- Uses the following assistive devices – cane, crutches, walker, adding “she uses a cane”; but does not use an assistive animal.
- Is provided assistance by family and friends.

In the revised AR, the doctor reported that the Appellant:

- “[The Appellant] uses strong pain medication to remain mobile. She requires help with daily activities. Her daughter helps her clean the house” and “She requires help from her daughter”.

In her letter, the Appellant’s daughter wrote that:

- She does all her mother’s vacuuming since she cannot stand for very long.
- She does her mother’s laundry because she has lots of problems with stairs and the laundry room is downstairs (at least 15 stairs).
- She helps her mother with shopping, either shopping for her or helping her in the store.
- Her mother needs her to be with her when she showers; she has trouble getting in and out of the bathtub and is afraid of falling.

The Appellant’s advocate submitted oral and written arguments at the hearing, which are summarized in section F of this decision. The advocate also explained that the doctor completed the revised AR on about April 30, 2014 so that it could be submitted with the request for reconsideration.

At the hearing, the Appellant’s daughter described the help she gives to her mother, including doing her mother’s housework, sweeping and mopping the floors, and vacuuming. She also does the laundry because the laundry facilities are down stairs. The daughter stated that she supervises while her mother has a shower because of fear of falls. She also helps with grocery shopping because her mother can’t walk through stores; she does whatever her mother needs. The daughter said that it can take her mother a long time to walk the length of a room and up to 45 minutes to walk up to her house, which is on a bit of an incline.

At the hearing, the Appellant confirmed the information given by her daughter about the help she receives and added that her daughter now has to help with nail care because she can’t get her legs up. The Appellant said that she now uses a device to help put her socks on. She stated that she does not have grab bars or a seat in her shower, but she often takes her cane into the shower. The Appellant also said she once spent about 2 weeks at home because she couldn’t get out. She couldn’t get down the stairs from her home. The Appellant said that recently she couldn’t walk for 4-5 days, even with 2 canes or a walker. She tried to push the walker ahead, lifting one foot at a time. At home she uses a cane or walker all the time and when she goes out she uses 2 canes. The Appellant said that she cannot go anywhere without using the canes. She clarified that she has never used crutches, as the doctor had reported. When she climbs the steps to her home, she uses

the stair rail on one side and her cane on the other side, but it is a very slow climb.

When preparing meals, the Appellant said she can stand for only a certain length of time and then she has to sit. She also stated that when she sits for awhile, she gets cramps. So, she can't sit or stand for long. The Appellant said that when she shops she can choose her items as long as she doesn't have to bend for them. Also, she can't unload the lower rack of her dishwasher, because she has to bend. The Appellant said that she once went 3 weeks without laundry because her daughter was unable to come and help. She said that her daughter usually stops in more than twice a week for laundry, to help her shower and help with housework, and her daughter telephones every day to make sure she is OK.

The Appellant described her pain as feeling like a knife being stabbed into her hip bone. The Appellant said she takes prescription medications for her hip pain and a prescription rub. However, it takes a long time, up to 45 minutes, for the medications to provide relief and the medications only work for about 1 hour. She also said that because of the pain, she waits until the very end before getting up to go to the bathroom. The Appellant said that she had a cortisone shot about a month ago and has had other strong pain killers administered by injection.

The Appellant said that her doctor has referred her to an orthopedic surgeon to have both hips replaced, but the doctor told her there is a 3-4 year waiting list for the surgery. The Appellant is also worried about having the surgery because of her other health conditions, such as her sleep apnea. The Appellant said that the doctor told her one hip is affected by bursitis and the other by arthritis.

Pursuant to section 22(4) of the Employment and Assistance Act, the Panel admits the testimony from the Appellant and her daughter as being in support of the evidence the Ministry had at reconsideration because their testimony was consistent with the information about the Appellant's impairment that the Ministry had at reconsideration.

At the hearing, the Ministry relied on and reaffirmed its reconsideration decision.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant was not eligible for PWD designation because she did not meet all of the requirements in section 2(2) of the EAPWDA, and specifically, that the Appellant does not have a severe mental or physical impairment that in the opinion of a prescribed professional (i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and, (ii) as a result of those restrictions she requires help to perform those activities.

The eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:

2 (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.

The “daily living activities” referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

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.

The Panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severe Physical Impairment

The Appellant's position is that the evidence establishes that she has a severe physical impairment. Her advocate referred to the doctor's description of the Appellant's limitations with all aspects of physical mobility and her need to use a cane and walker whenever she walks and stands. For example, the advocate cited the doctor's report that the Appellant is able to walk less than a block using a cane and takes up to five times longer to perform physical tasks. The advocate submitted that a cane is an assistive device within the meaning of the EAPWDA. She also argued that mobility is a basic requirement for being able to do almost all daily living activities. The advocate referred to

the Appellant's descriptions of her impairment, including her statements that her hip hurts so much that she cannot get around at all without an assistive device and sometimes it is so bad she cannot go out.

In its reconsideration decision, the Ministry wrote that it considered the information provided, including the reports of the Appellant's physical functioning. It determined that the Appellant's limitation is caused by chronic pain in the joints for which remedial measures are available, such as the pain medication the Appellant uses to allow her to mobilize. Based on the information provided, the Ministry was not satisfied that there is evidence of a severe physical impairment.

The Panel's Findings

The diagnosis of a medical condition is not in and of itself evidence of the severity of impairment. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how and the extent to which a medical condition restricts daily functioning must be considered. This includes the evidence from the Appellant and from a prescribed professional regarding the nature of the impairment and its impact on the Appellant's ability to manage the daily living activities listed in section 2(1) of the EAPWDR. As for finding work and/or working, the Panel notes that employability is not a criterion for PWD designation in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

The Appellant's doctor completed both the PR and the AR, and then provided an amended AR for the reconsideration. Because the second AR, from about April 30, 2014, provides the more recent information about the Appellant and because it is consistent with the physical limitations originally reported, the Panel gives that second AR more weight. The Appellant's doctor diagnosed the Appellant with bursitis, sleep apnea and osteoarthritis. The Appellant said that the doctor told her one hip is affected by bursitis and one by osteoarthritis. He has referred her to an orthopedic surgeon to have both hips replaced. She also said that she takes medications for the pain, but the medications take time to work and then only relieve her pain for a short time. She cannot stand or sit for long because of the pain. The Appellant only mentioned sleep apnea with respect to her worries about hip replacement surgery. The doctor provided no other information about this latter condition.

In the PR and the amended AR, the doctor focused on the effects of the Appellant's hip pain on her daily functioning. The doctor reported the following limitations to the Appellant's physical functioning and mobility: she can walk less than 1 block unaided and uses a cane; she cannot climb stairs unaided; and, she takes significantly longer walking indoors and outdoors, and climbing stairs. She also uses an assistive device to stand and needs periodic assistance with lifting, carrying and holding. The doctor wrote that the Appellant takes up to five times longer to perform these tasks. As for the impact of the Appellant's hip pain on her ability to manage other daily activities requiring physical ability, the doctor noted that the Appellant takes significantly longer with dressing, grooming, bathing, toileting, transfers in/out of bed, transfers on/off a chair, laundry, basic housekeeping, all aspects of shopping, food preparation, cooking, and all aspects of transportation. In addition, the doctor provided numerous comments, such as the Appellant has joint pain 100% of the time that interferes with her mobility, she has difficulty performing shopping tasks due to pain, she has joint pain that interferes with her ADLs (activities of daily living), she takes 5 times longer to perform tasks associated with meals. The doctor also noted that the Appellant requires help from her daughter and uses assistive devices.

The evidence from the Appellant and her daughter is consistent with all of the information that the doctor provided. The Appellant described how her hip pain impacts her ability to sit, stand, walk, climb stairs and shower. She said there have been times that she was unable to leave her home because of the pain. The Appellant also said that she cannot stand, walk or climb stairs without using a cane and when she goes outside she uses two canes. Inside, she also sometimes uses a walker. Both the Appellant and her daughter confirmed the same mobility and physical restrictions reported by the doctor with respect to impairments in the Appellant's ability to manage daily living activities. These include the Appellant taking significantly longer with areas of personal care, basic housekeeping, shopping, meal preparation and transportation. The Appellant and her daughter also confirmed and further explained the help the Appellant needs and receives for laundry, basic housekeeping, bathing and shopping. Therefore, when all of this evidence from the doctor, the Appellant and her daughter is considered, the Panel finds that it was not reasonable for the Ministry to determine that the Appellant does not have a severe physical impairment.

Severe Mental Impairment

In her PWD application the Appellant stated that the pain from her hip has a significant impact on her mobility, causing her to feel depressed. The Ministry was not satisfied that the information provided is evidence of a severe mental impairment.

The Panel's Findings

Although the doctor diagnosed the Appellant with depression, there was no information from the doctor about any treatment for that condition or effects from it on the Appellant's functioning. Also, the doctor reported only one moderate impact to emotion, which he attributed to the Appellant's hip pain having a significant impact on her ability to move around, thus making her sad and frustrated. The doctor reported no impact to the other 13 aspects of cognitive and emotional functioning listed in the AR and that the Appellant independently manages all aspects of social functioning. In addition, the Appellant referred only to feeling depressed about her hip pain and constrained mobility, but did not explain how feeling depressed affected her daily functioning. Therefore, the Panel finds that the Ministry reasonably determined that the evidence did not establish a severe mental impairment.

Restrictions to Daily Living Activities

The Appellant's advocate submitted that the majority of the daily living activities for which the Appellant either receives assistance from her daughter or must use an assistive device are in the definition of daily living activities in the EAPWDR. The advocate submitted that, in the revised AR, the doctor reported only a few daily living activities as being independently managed. She also referred to the narrative statements from the doctor, including notes that the Appellant has difficulty performing tasks due to pain, that she requires help with daily living activities and that she takes five times longer to perform these tasks. The advocate submitted that the Appellant's need for help is supported by the evidence from the Appellant and her daughter, including the tasks the daughter does and the assistive devices the Appellant uses.

The Ministry determined that because the majority of daily living activities are performed independently or require little help from others, the information from the prescribed professional does not establish that the Appellant's impairment significantly restricts daily living activities either continuously or periodically for extended periods.

The Panel's Findings

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that the Appellant's severe impairment directly and significantly restricts her daily living activities, continuously or periodically for extended periods. Daily living activities are defined in section 2(1) of the EAPWDR, and are also listed in the PR and in the AR. In this case the Appellant's doctor is the prescribed professional, therefore the Panel will consider the evidence he provided about the Appellant's restrictions, especially in the revised AR

At the hearing, the Appellant said that her doctor prescribed pain medications. In the PR, the doctor reported that medications and/or treatments do not interfere with the Appellant's ability to perform daily living activities. In the original AR and in the revised AR, the Panel notes that the doctor specifically checked the box "independent" for the following listed daily living activities: dressing, grooming, feeding self, regulating diet, meal planning, safe storage of food, all aspects of paying rent and bills, medications and social functioning. For several activities, the doctor noted that the Appellant takes significantly longer, but he did not report whether or not the Appellant independently manages these or that she needs periodic or continuous assistance. These latter activities are bathing, toileting, transfers in/out of bed, transfers in/out of chair, reading prices/labels, making appropriate choices, paying for purchase, carrying purchases home, food preparation, cooking, and all aspects of transportation. The doctor did add comments such as the Appellant's joint pain interferes with her ability and she takes 5 times longer with the meal tasks.

With respect to areas of mobility and physical ability, the doctor reported that the Appellant needs periodic assistance with lifting and with carrying and holding. However, for walking indoors and outdoors, climbing stairs and standing, again he did not indicate whether the Appellant is independent, or needs either periodic or continuous assistance. He did report that the Appellant uses an assistive device and that she takes up to five times longer to perform these tasks.

The Panel notes that both the Appellant and her daughter provided details of the help the Appellant requires and obtains as well as how often the Appellant uses cane or a walker. However, the Panel also notes that the legislation requires that the prescribed professional, the Appellant's doctor, must provide his opinion that the Appellant's severe impairment directly and significantly restricts her daily living activities, continuously or periodically for extended periods. Based on the reports from the doctor, the Panel finds that the Ministry reasonably determined that the information from the prescribed professional does not establish that the Appellant's impairment significantly restricts daily living activities either continuously or periodically for extended periods.

Help with Daily Living Activities

The Appellant's advocate submitted that the Appellant requires help from her daughter with many of her daily living activities as well as the use of assistive devices, especially canes and a walker. The advocate specifically referred to the definition of assistive devices in the EAPWDA. The advocate also cited the doctor's reports of all of the activities for which the Appellant requires help as well as the information from the daughter and the Appellant confirming the help the Appellant needs.

The Ministry's position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot determine that significant help is required from other persons.

The Panel's Findings

Section 2(2)(b)(ii) of the EAPWDA also requires the opinion of a prescribed professional confirming that because of direct and significant restrictions in her ability to manage daily living activities, the Appellant requires help with those activities. Section 3 of the EAPWDA states that for the purposes of section 2(2) of the EAPWDA, a person requires help in relation to a daily living activity if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person or the services of an assistance animal.

In this case, the doctor reported that the Appellant does not use an assistance animal. He did report that the Appellant uses assistive devices for walking indoors and outdoors, and for climbing stairs and for basic housekeeping. He noted that she uses a cane to move around and stand. The doctor also wrote that the Appellant requires help from her daughter, but he did not specify how often or with which tasks except for cleaning. The information from the Appellant and her daughter provided further details of the help the Appellant needs and gets, but as the Panel noted above, it is the opinion of the doctor that is required to satisfy this part of the legislation. Because the doctor specified the use of assistive devices for only basic housekeeping and mobility, because he provided few details about the help the Appellant's daughter provides and because the Ministry reasonably determined that the evidence does not establish that daily living activities are significantly restricted either continuously or periodically for extended periods, the Panel finds that the Ministry reasonably found that section 2(2)(b)(ii) was not satisfied.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the Panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation, was reasonably supported by the evidence. Therefore the Panel confirms that decision