

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of February 18, 2014, which found that the appellant did not meet three of five statutory requirements of section 2 of the Employment and Assistance for Persons With Disabilities Act (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of 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 appellant and the ministry were not in attendance at the hearing. After confirming that both parties were notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

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

- The appellant's application for designation as a PWD which was submitted to the ministry on September 24, 2013 and included the appellant's handwritten self-report (SR) dated June 26, 2013.
- A physician's report (PR) and an assessor's report (AR) dated August 16, 2013, completed by the appellant's physician who has indicated that she has attended the clinic for years and that he has reviewed her records.
- The appellant's request for reconsideration, dated February 7, 2014.

Diagnosis

In the PR the physician, who has seen the appellant 2-10 times in the last 3 months, diagnosed the appellant with cervical myofascial strain (post high speed MVA) - onset of June 2012, longstanding depression, nasal septal perforation and recent persistent MRSA. The physician reports the appellant has severe neck pain/headaches that were aggravated while performing CPR at a cardiac arrest. She has not been able to return to her regular work because of use of analgesics, antidepressants and Citalopram. The appellant is noted to have traumatic nasal septal post cocaine abuse and persistent infections. She has been referred to ENT for ongoing management.

In response to the question; Has the applicant been prescribed any medication and/or treatments that interfere with her ability to perform DLA? The physician indicated no.

In the AR, the physician noted that the appellant's impairments are longstanding depression, dysphoria/anxiety, social withdrawal and chronic neck pain and fatigue.

Physical Impairment

- In terms of Functional Skills, the physician reported that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 15 to 35 pounds, and has no limitation to remain seated.
- In the PR, it was indicated the appellant does not require aids or prostheses for her impairment, and in the AR it was indicated that the appellant does not have an assistance animal.
- In the AR, under Mobility and Physical Ability, it was noted that the appellant is independent in all areas however, takes significantly longer than typical for standing, lifting and carrying/holding due to fatigue and neck pain.

Mental Impairment

- In the PR, the physician indicated that the appellant has a significant deficit with cognitive and emotional function in the area of emotional disturbance noting chronic longstanding depression and chronic pain disorder.
- The two sections in the AR that are to be completed only for applicants with an identified mental impairment or brain injury contained the following:
Under Cognitive and Emotional Functioning, the physician reported a major impact for 3 of 14 items – emotion, motivation and other emotional or mental problems, 3 moderate impacts – bodily functions (sleep disturbance), attention/concentration (distractible, unable to maintain concentration, poor short

term memory), motor activity (decreased goal-oriented activity) and 1 minimal impact – language (racing speech), with no impact on the remaining 7 categories.

The physician commented that due to anxiety, the appellant sometimes has pressured racing speech that fatigue affects her ability to concentrate and her short term memory, that she has very significant disruption emotionally and struggles with motivation/concentration and ongoing distraction and anhedonia produces lack of initiative and diminished interest in normal activity.

Under Social Functioning; the appellant was described as requiring periodic support to be able to develop and maintain relationships as she socially isolates herself, due to depression. She was also reported as having marginal functioning with both her immediate social network and extended social networks.

In the PR, under additional comments, the physician stated that the appellant is motivated to retrain and consider alternate employment realizing her mental health would be enhanced by being productive and independent. The physician further stated that he is supportive of such retraining and that this could occur anytime in the future including within the next 6 months.

In the AR, under ability to communicate, the physician notes that the appellant has some hearing loss.

Daily Living Activities

- In the PR, the physician reported that the appellant's impairments do not directly restrict her ability to perform 9 of the 10 listed DLA: Personal self-care, Meal preparation, Management of medications, Basic housework, Daily shopping, Mobility inside the home, Mobility outside the home, Use of transportation, and Management of finances. The PR indicated the appellant is periodically restricted with respect to 1 DLA, Social functioning. The physician provided the following explanations;
 - under "Periodic" dysphoria/anxiety - occasional withdrawal and social impairment,
 - under Social Functioning is impacted" consistent and depressive disorder - some anhedonia withdrawal and low motivation, anxiety especially regarding legal issues and her ongoing infection of nasal tissues, and
 - under "Regarding the Degree of Restriction" when overwhelmed - marked restrictions and when relaxed and or at ease - no significant restrictions.
- In the AR, the physician indicated that the appellant independently manages all aspects of DLA; Personal Care, Basic Housekeeping, Shopping, Meals, Pay Rent and Bills, Medications and Transportation. It was explained that dressing, grooming and bathing take twice as long as a normal person due to pain, as does basic housekeeping and that the appellant also sometimes needs assistance from her daughter when carrying purchases home.
- In the SR, the appellant noted that she has difficulty remembering or having the motivation - for daily basic hygiene, to eat regular meals and healthy food, to vacuum, dust, clean windows and to keep her home clean. She also indicated difficulty with making decisions, planning, going out without being anxious or scared, stopping herself from buying things she doesn't need, prioritizing, making good, rational choices, remembering appointments and information, socializing without becoming anxious and scared, interacting with friends, family, her partner and strangers in public, establishing and maintaining relationships, asking for help, dealing with unexpected situations, understanding what others say and hearing in person or on the phone. The appellant also experiences sensitivity to light sounds and motion.

Help Required with DLA

- In the PR, it is noted that the appellant requires ongoing support/counselling and some personal assistance when overwhelmed/stressed to assure she does things required for daily living (e.g. shopping/social interaction).
- In the AR, it is noted that the appellant requires continued assistance from family, friends and community resources.
- In the PR the prescribed professional indicated the appellant does not require aids or prostheses for her impairment, and in the AR, the prescribed professional indicated that appellant does not have an assistance animal.

PART F – Reasons for Panel Decision

The issue under 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 authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

(e) physical therapist,

(f) social worker,

- (g) chiropractor, or
- (h) nurse practitioner.

Severe Physical Impairment

The appellant's position is that she has neck pain due to a car accident a year ago, and suffers from osteoarthritis, numbness and tingling in right arm, cellulitis and stiffness in her shoulders. Her physician notes that the appellant has some hearing loss.

The ministry's position, as set out in its reconsideration decision, is that the appellant's functional skills as reported by the physician are that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided and can lift 15 to 35 pounds and has no limitation to remain seated. The AR noted that the appellant is independent in all aspects of mobility and physical ability however, the appellant takes significantly longer with standing, lifting and carrying and holding due to fatigue and neck pain without further information provided on how much longer is required by the appellant. The ministry concludes that there is not enough evidence to establish that the appellant has a severe physical impairment.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. Accordingly, to assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage her DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA.

The determination of severity of impairment is at the discretion of the minister – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, the professional evidence has to be weighed and assessed like any other evidence.

In the appellant's case, the physician has confirmed the diagnoses as cervical myofascial strain, nasal septal perforation, and persistent MRSA. Under Functional Skills, the physician has not indicated that the appellant has any difficulties with walking unaided on a flat surface, climbing stairs or remaining seated and the reported limitation of 15-35 lbs for lifting indicates a reasonable level of independent functioning. The PR indicated the appellant is independent with all DLA except for Social Functioning. In the AR, the physician further explained that dressing, grooming and bathing for the appellant take twice as long as a normal person due to pain, as does basic housekeeping and that the appellant also sometimes needs assistance from her daughter when carrying purchases home.

The panel finds that while the appellant's diagnosis of cervical myofascial strain and chronic neck pain may limit her ability to function; the evidence does not establish that the symptoms restrict the appellant's ability to function independently, effectively, appropriately or for a reasonable duration. The information provided by the physician respecting physical Functional Skills and the appellant's ability to manage DLA as well as the description of the appellant's Mobility and Physical Ability are not reflective of a severe impairment of daily functioning.

Based on the evidence, the panel finds that the ministry reasonably determined that the information provided did not establish a severe physical impairment.

Severe Mental Impairment

The appellant's position is that she suffers from depression, anxiety, panic attacks due to stress, insomnia and fatigue. In the SR, she also indicated having difficulty with making decisions, planning, going out without being anxious or scared, stopping herself from buying things she doesn't need, prioritizing, making good, rational choices, remembering appointments and information, socializing without becoming anxious and scared, interacting with friends, family, her partner and strangers in public, establishing and maintaining relationships, asking for help, and dealing with unexpected situations.

The ministry's position, as set out in its reconsideration decision, is that while the appellant's physician reports that she has a deficit with cognitive and emotional functions in the area of emotional disturbances and that she has major impacts to emotion, motivation and other emotional or mental problems, these impacts as described by the appellant's physician are more in keeping with a moderate degree of impairment. Therefore, based on the information provided by the physician the ministry finds there is not enough evidence to establish a severe mental impairment.

Panel Decision

In the appellant's case, the physician has confirmed the diagnosis of depression. The physician has not reported that the appellant has been prescribed any medication and/or treatments that interfere with her ability to perform DLA. The appellant has been reported to have a deficit with cognitive and emotional functions in the area of emotional disturbances and she has major impacts to emotion, motivation and other emotional or mental problems. Under Social Functioning, the appellant was described as requiring periodic support to be able to develop and maintain relationships due to socially isolating herself when depressed and as having marginal functioning with both her immediate social network and extended social networks. The panel has also noted explanations provided in the PR under "Periodic", dysphoria/anxiety - occasional withdrawal and social impairment, under "Impact on Social Functioning", consistent and depressive disorder - some anhedonia withdrawal and low motivation, anxiety especially regarding legal issues and her ongoing infection of nasal tissues, and under "Degree of Restriction", when overwhelmed - marked restrictions and when relaxed and or at ease - no significant restrictions at all.

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).

In the AR, it was indicated that the appellant is independent with respect to making decisions about managing her finances, managing her medications, making appropriate social decisions, interacting appropriately with others, able to deal appropriately with unexpected demands and being able to secure assistance from others.

Considering the evidence as a whole, the panel finds the evidence establishes that despite the major impact identified for some aspects of cognitive and emotional functioning and the appellant's self-reported difficulties, the physician's evidence is that, except for requiring periodic assistance with 1 of 5 aspects of social functioning (develop and maintain relationships), the appellant independently manages all other cognitive DLA tasks, including decision-making. Further, the physician's narrative indicates that the appellant is only occasionally withdrawn and socially impaired. For these reasons, the panel finds that the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that she has difficulty remembering or having the motivation for daily basic hygiene, to eat regular meals and healthy food, to vacuum, dust, clean windows and to keep her home clean. She also indicated difficulty with making decisions, planning, going out without being anxious or scared, stopping herself from buying things she doesn't need, prioritizing, making good, rational choices, remembering appointments

and information, socializing without becoming anxious and scared, interacting with friends, family, her partner and strangers in public, establishing and maintaining relationships, asking for help, dealing with unexpected situations, understanding what others say, and hearing in person or on the phone. The appellant also experiences sensitivity to light sounds and motion.

The ministry's position is that it relies on the medical opinion and expertise from the appellant's physician to determine that the appellant's impairments significantly restrict her ability to perform daily living activities either continuously or periodically for extended periods. The ministry makes its decision regarding PWD eligibility based on physical, mental and daily living assessments provided by the physician. Based on the information provided by the appellant's physician, the ministry does not have enough evidence to confirm that the appellant's impairment significantly restricts her ability to perform daily living activities continuously or periodically for extended periods. Therefore, the ministry is not satisfied that the information demonstrates a severe mental or physical impairment that, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform daily living activities continuously or periodically for extended periods.

Panel Decision

The legislation – Section 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. This doesn't mean that other evidence – such as that from the appellant – shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied". In the appellant's case, the prescribed professional has supplied little in the way of narrative to establish the requisite degree of restriction to DLA.

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. There is also 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. In circumstances where the evidence indicates that a restriction arises periodically, it is entirely 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.

The onus is on the appellant to prove on the balance of probabilities that she satisfies the legislative criteria with respect to direct and severe restrictions to her ability to manage her DLA independently.

The evidence provided in the PR indicated that the appellant's impairments do not directly restrict her ability to perform 9 of the 10 listed DLA [the panel notes that the PR lists mobility inside the home and mobility outside the home as 2 separate DLA though they are defined in the legislation as comprising 1 DLA] and the appellant is periodically restricted with respect to 1 DLA, Social functioning. Additionally, her physician has not reported that she has been prescribed any medication and/or treatments that interfere with her ability to perform DLA. In the AR, the physician indicated that the appellant independently manages all aspects of the DLA; Personal Care, Basic Housekeeping, Shopping, Meals, Pay Rent and Bills, Medications and Transportation. It was explained that dressing, grooming and bathing take twice as long as a normal person due to pain, as does basic housekeeping and that the appellant also sometimes needs assistance from her daughter when carrying purchases home.

While, the appellant noted that she has difficulty remembering or having the motivation for a variety of DLA and her physician has reported that anhedonia produces lack of initiative and diminished interest in normal activity, the degree of independence with almost all tasks of all DLA reported by the physician does not substantiate the extent of such restrictions as described by the appellant. Additionally, that the appellant takes twice as long for some aspects of personal care and housekeeping, requires some assistance with lifting though she can lift 15-35 lbs., and is occasionally socially withdrawn, was reasonably viewed by the ministry as not establishing a significant restriction in the ability to perform DLA.

In the panel's view, while the evidence indicates that the appellant has some difficulty with her DLA, it does not establish that in the opinion of a prescribed professional her impairments directly and significantly restrict her ability to manage her DLA either continuously or periodically for extended periods. Accordingly, the panel finds that the ministry reasonably found that this legislative criterion is not satisfied.

Help with DLA

The appellant's position is that she requires help with DLA.

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

Findings that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period are a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA.

In the PR, it is noted that the appellant requires ongoing support/counselling and some personal assistance when overwhelmed/stressed to assure she does things required for daily living. In the AR, it is noted that the appellant requires continued assistance from family, friends and community resources. Also in the PR, the prescribed professional indicated the appellant does not require aids or prostheses for her impairment, and in the AR, the prescribed professional indicated that appellant does not have an assistance animal. The panel finds that the ministry reasonably concluded that since it has not been established that the appellant's DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by the legislation.

Conclusion

The panel acknowledges that the appellant's medical conditions affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonably supported by the evidence. The panel therefore confirms the ministry's decision.