

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 26, 2014 which found that the appellant did not meet three 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 her 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,
- 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

A ministry representative did not attend the hearing. The panel received confirmation from the Tribunal that the ministry had been notified of the date, time and location of the hearing. Accordingly, under section 86(b) of the *Employment and Assistance Regulation*, the panel heard the appeal in the ministry's absence.

The evidence before the ministry at the time of the reconsideration decision included the appellant's Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated September 25, 2013, a physician report (PR) dated October 21, 2013 and prepared by the appellant's general practitioner ("the GP") of approximately 3 years and an assessor report (AR) dated November 5, 2013 and completed by a registered nurse ("the RN") who has known the appellant since approximately one week prior to the AR being completed.

Also included were the following:

- 1) A two page undated document entitled "Persons With Disability Application" and completed by the appellant ("the PWD Document"); and,
- 2) The appellant's Request for Reconsideration ("RFR") dated March 18, 2014.

Prior to the hearing, the appellant sought to have admitted into evidence a one page medical letter dated April 15, 2014, prepared by an advocate and signed by the GP ("the GP Letter"). The GP Letter purports to "clarify information presented previously and add information not included in the original application for PWD." The appellant explained that after it was prepared, she delivered the GP Letter to her GP and that she witnessed him read it and discuss it with her prior to signing it. The panel notes that the information contained in the GP Letter reflects that which is set out in the PR and does not add any new diagnoses. The panel therefore admits the GP Letter as written testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

Diagnoses

In the PR, the appellant has been diagnosed by her GP as suffering from osteoarthritis, chronic pain and a mood disorder noted as "depression." The panel notes that the date of onset for these diagnoses has not been set out in the PR.

Physical Impairment

- In the SR, the appellant states that she has "severe ongoing Osteo-Arthritis" as well as pain in her hands, back, legs and feet.
- In the PWD Document, the appellant states that she has osteoarthritis in her hands, back, hips, legs and feet and diagnosed in 2008 and chronic pain, swelling and stiffness all the time with average pain level at 8 out of 10.
- In the PR, the GP indicates in the health history that the appellant's "current medical condition is extremely severe and limiting, she is unable to work due to chronic pain and limited mobility which is rapidly deteriorating."
- The GP reports in the PR that the appellant does not require any prostheses or aids for her impairment.
- In response to the question as to whether the appellant's impairment is likely to continue for two years or more the GP checks "yes" and provides the further comment as follows: "Worsening osteoarthritis limiting mobility and severe chronic pain. Impairment is permanent."
- Functional skills reported in the PR indicate that the appellant can walk 1 to 2 blocks and climb 5 or more steps unaided, she can lift under 2kg (5lbs) and remain seated for less than one hour.
- In the additional comments to the PR, the GP reports that the appellant "has advanced osteoarthritis which will deteriorate further. She is currently unable to work, obtain or retain any type of employment

due to severe chronic pain and mobility problems.”

- In the GP Letter, the GP confirms the appellant's diagnosis of “severe osteoarthritis” and “severe chronic pain syndrome.”
- In the AR, the RN summarizes the appellant's impairments that impact her ability to manage daily living activities as “...chronic pain – worsens with poor, cold weather. Osteoarthritis in legs, lower back and hands (cannot use fingers), flares with decrease or increase of activity. November to March 2/7 in bed, poor mobility.”
- The RN indicates that the appellant's ability to communicate through speaking, reading, writing and hearing is satisfactory in each respect and adds the comment, “very short note only” to writing.
- The RN indicates that the appellant is independent walking indoors but notes “1/2 speed.” The RN further indicates that the appellant requires periodic assistance from another person walking outdoors (“1/2 speed”), climbing stairs (“2 steps only – avoids ++”) and standing (“5 min. maximum”).
- The RN notes that the appellant requires continuous assistance from another person or is unable to lift (“less than 10lbs with right hand, none in left”) or carry and hold (“1 small grocery bag only.”)
- The RN adds further comments with respect to the appellant's mobility and physical ability stating “Walking outside – 5 blocks max, in good weather (warm), no hills, slopes, no uneven ground – then has to nap. Uses cart to move groceries.”

Mental Impairment

- In the PWD Document, the appellant notes that she has depression.
- In the PR, the GP reported difficulties with communication with no identified cause, and significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation, motor activity and attention or sustained concentration adding the comment “due to chronic pain.”
- The GP reported that there are no restrictions to the appellant's social functioning with a note added, “N/A”, or not applicable.
- In the GP Letter, the GP confirms the diagnosis of depression and adds the comment “I confirm that the mental impairments are both permanent and severe and will continue for more than two years.”
- In the AR, the RN assesses the appellant's speaking, reading, writing and hearing as satisfactory but adds the comment for writing “very short note only.”
- In the AR, the RN notes major impact to daily functioning in the area of bodily functions adding the comment “poor appetite – eats once/day only. Sleep interrupted by pain. Sleeps 5hr/night.”
- In the AR, the RN notes moderate impact on daily functioning in the area of consciousness (“drowsy, sleeps in day”), emotion (depressed – mood 5/10 – Feels very anxious about life and how it will affect her in the future”), attention/concentration (“poor short term memory – writes everything down, forgets appointments”), motivation (“poor”), other neuropsychological problems (“very cautious at curbs and steps”) and other emotional or mental problems (“irritability a problem”).
- The RN notes no impact on daily functioning in the areas of impulse control, insight and judgment, executive, memory, motor activity, language and psychotic symptoms.

Daily Living Activities (DLA)

- The GP reports in the PR that the appellant has not been prescribed medications or treatments that interfere with her ability to perform her DLA.
- In the PR, the GP confirms that the appellant's impairment directly restricts her ability to perform DLA and specifically notes that the appellant is continuously restricted in meal preparation, basic housework and mobility outside the home while experiencing no restrictions with personal self care, management of medications, daily shopping, mobility inside the home, use of transportation, management of finances and social functioning. The GP adds the comment that the appellant needs assistance with housework and meal preparation.
- In the GP Letter, the GP notes that the appellant's mental and physical impairments “directly and significantly restrict [the appellant's] ability to perform DLA periodically and continuously and as a result of those restrictions; [the appellant] requires the significant assistance of another person to perform

those activities, specifically:

- Meal preparation
 - Basic housework
 - Mobility outside the house – rapidly deteriorating
 - Daily shopping
- In the AR, the RN indicates that the appellant is independent with all tasks of the DLA personal care aside from dressing and transfers on and off a chair for which she requires periodic assistance from another person. The RN comments that with respect to dressing, three days each week she either doesn't or can't because she is too tired. With respect to transfers on and off of a chair, the RN comments that the appellant cannot rise from a soft seat and uses chair arms as an assistive device.
 - Continuing in the AR, the RN indicates that the appellant is independent with laundry but requires periodic assistance from another person with basic housekeeping and adds the comment that the appellant "cannot wash floors, windows, vacuum or clean bath – sons help ++."
 - For shopping, the appellant is assessed in the AR as independent in all aspects other than carrying purchases home which the RN describes as requiring continuous assistance from another person or unable and comments that the appellant uses a car to her car and uses a cart from her car to home.
 - For meals, the appellant is assessed as independent with meal planning and safe storage of food but requires periodic assistance from another person with food preparation and cooking and the RN comments that the appellant "starts supper at noon" and "cannot pare, peel, problems with jars/tins – sons open. No heavy pots, cannot lift, drain."
 - For paying rent and bills and managing her medications the appellant is assessed as independent in all aspects without further comment.
 - For transportation, the appellant is assessed as requiring periodic assistance getting in and out of a vehicle ("needs help in small car if very long, cannot get into large vehicles") and requiring continuous assistance from another person or unable to use public transportation ("cannot stand while waiting for bus").
 - With respect to social functioning, the appellant is assessed as independent in making appropriate social decisions and interacting appropriately with others but requiring periodic support/supervision in her ability to develop and maintain relationships ("very seldom sees friends"), dealing appropriately with unexpected demands and securing assistance from others. The appellant is further described by the RN as functioning marginally with her immediate and extended social networks.
 - In the additional comments to the AR, the RN wrote that the appellant's pain and reduced mobility reduce her ability to manage her DLA.

Need for Help

- In the PR, the general practitioner did not indicate that the appellant requires an assistive device.
- The RN reported in the AR that the assistance provided by other people for DLA includes family. The RN recommended that the appellant receive physiotherapy and access support that could be offered by swimming, and that she needs a shower seat.

In the RFR the appellant states that her disease has progressively worsened since December 2013 and that she is taking prescription medicine to manage her chronic pain. She says that her GP has told her she can no longer be in the work force and she further comments that she has not worked since 2012. Continuing in the RFR submissions, the appellant states that her children have helped her until now but they no longer help.

At the hearing, the appellant stated that she has chronic pain which gets worse every year, that she cannot stand for long periods of time nor can she sit for extended periods. She also noted that she can't make a fist or lift anything heavy and that she is in chronic pain. The appellant commented that she is in no condition to work

and in fact has not worked since October 2012.

The panel finds that the appellant's oral testimony did not raise any new conditions or information beyond that before the minister at the time the reconsideration decision was made and was related to that in the PWD application. The panel therefore admits the appellant's oral evidence as oral testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the *Employment Assistance Act*.

In response to questions, the appellant stated that she has met with a specialist on two occasions, once in 2008 and a second time in 2013 and that he advised her that there is nothing she can do to treat her osteoarthritis and that he has prescribed her pain and anti-inflammatory medication which she takes twice per day. With respect to the completion of the AR, the appellant stated that she saw the RN who completed it three or four times and they met for a couple of hours each time.

In response to questions, the appellant stated that her condition is worse in the winter at which time she only eats and stays in bed. She noted that her car is broken down and as a result one of her sons takes her grocery shopping. When her car was working she could drive to the store to pick up a few things.

In response to a question, the appellant stated that her son that lives close to her helps her with grocery shopping and that if she needs anything lifted or opened he would come over to help. The appellant continued that her son does not help with household cleaning aside from cleaning her deck but rather she will do it and spread out the tasks over time rather than do it all at once.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her DLA are not, 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, it could not be determined that 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.

The criteria for being designated as a PWD are set out in Section 2 of the *EAPWDA* as follows:

Persons with disabilities

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.

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

Section 2(1)(a) of the *EAPWDR* defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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.

In her Notice of Appeal dated February 1, 2014, the appellant states that she cannot work full time and cannot support herself working part time. The work that she is qualified to do is too difficult for her to do now.

Severity of impairment

Section 2(2)(a) of the *EAPWDA* is clear that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

While section 2(2)(a) requires that a defined medical practitioner provide evidence that the impairment is likely to continue for at least 2 years, the minister may take into consideration the evidence of the appellant, the PR and the AR in determining the severity of impairment. In the present case, the AR was completed by the RN who meets the definition of "prescribed professional" as set out in section 2(1)(c) of the *EAPWDR*. The appellant gave evidence at the hearing that she met with the RN on three or four occasions and for a couple of hours each time. It was therefore open to the minister to consider the evidence of both the GP and the RN in determining the severity of the appellant's physical and mental impairment.

Severity of mental impairment

The appellant stated that her chronic pain and the impact that it has had on her life has left her suffering from depression.

In the Reconsideration Decision, the ministry states that the appellant appears to suffer from anxiety related to her life situation and that the evidence does not support a finding that she suffers from a severe mental impairment.

Panel Decision

In the PR, the appellant's GP diagnoses her as suffering from "mood disorder/depression" and notes that she experiences significant deficits with cognitive and emotional function including emotional disturbance, motivation, motor activity and attention or sustained concentration. However, the GP adds the comment in the PR that the appellant's deficits with cognitive and emotional function are "due to chronic pain." The GP finds that the appellant has difficulties with communication with no cause identified and the RN indicates that the appellant's ability to communicate is satisfactory. The GP reported the appellant experiences no impact on social functioning. Although the RN reported a requirement for periodic support/supervision in 3 of 5 aspects of social functioning, the only comment provided is "very seldom sees friends," which does not describe the degree and duration of the support or supervision required.

In the AR, while the RN notes that the appellant's mental impairment has a major impact on her bodily functions ("appetite/sleep") and a moderate impact on her consciousness, emotion, attention/concentration, motivation, other neuropsychological problems ("very cautious at curbs and steps") and other emotional or

mental problems ("irritability a problem"), no impact is noted on the appellant's impulse control, insight and judgment, executive, memory, motor activity, language or psychotic symptoms.

While the GP does diagnose the appellant in the PR with "mood disorder/depression", he clearly describes the deficits with the appellant's cognitive and emotional function as being due to chronic pain as opposed to depression. Further, the RN does not include a mood disorder or depression in the AR as a listed mental impairment but rather restricts her comments to the appellant's chronic pain. The panel notes that the GP confirms the appellant's diagnosis of depression and describes the appellant in the GP Letter as having "mental impairments" that are "both permanent and severe" but he provides no further comments in support of that finding.

As both the GP and the RN have commented that the appellant's various cognitive and emotional impacts are caused by her chronic pain as opposed to her diagnosed mental impairment of depression and a mood disorder, the panel concludes that the ministry was reasonable in determining that the evidence did not establish that the appellant has a severe mental impairment under section 2(2) of the *EAPWDA*.

Severity of physical impairment

The appellant takes the position that she has a severe physical impairment which includes osteoarthritis and chronic pain.

The ministry takes the position in the Reconsideration Decision that the appellant's functional skill limitations are in keeping with a moderate as opposed to a severe physical impairment and employability is not an eligible criterion for designation as a PWD.

Panel Decision

The panel notes that the appellant's GP, who has treated the appellant since 2011 and between 2 and 10 times in the 12 months prior to completing the PR, has described her "current medical condition" in the PR as extremely severe related to an inability to work due to chronic pain and limited mobility. In the additional comments to the AR, the GP reiterates that the appellant is currently unable to work, obtain or retain any type of employment due to severe chronic pain and mobility problems." As for the ability to work, the panel finds that the ministry reasonably determined that employability is not a criterion in section 2(2) of the *EAPWDA* nor is it listed among the prescribed daily living activities in section 2 of the *EAPWDR*. He describes the appellant as able to walk 1 to 2 blocks unaided on a flat surface, climb more than 5 steps unaided, lift under 2 kg and sit for less than 1 hour.

In the AR, the RN comments that the appellant is independent walking indoors but requires periodic assistance walking outdoors, climbing stairs and standing. She comments that the appellant can only climb 2 steps and can walk a maximum of 5 blocks on a flat surface in good weather after which she must nap.

The appellant gave evidence at the hearing that in terms of her functional abilities, she is able to prepare meals and do housework albeit with the tasks done over time rather than all at once. The evidence of the GP describes the appellant as experiencing continuous restrictions with meal preparation and basic housework whereas the evidence of the RN itemizes particular tasks of these DLA for which the appellant requires periodic assistance from another person. The AR similarly indicates that those DLA that require functional capabilities such as personal care, shopping and basic housekeeping are largely independent.

While the panel recognizes that the GP Letter describes the appellant's physical impairments as "severe osteoarthritis" and "severe chronic pain syndrome", the GP does not provide any further comment as to the basis for these conclusions and as such, the panel looks to the PR and AR as evidence upon which the ministry made its determination in the Reconsideration Decision.

Despite the GP's narrative description of the appellant's physical impairment as severe, he relates the impact primarily to her ability to work and the evidence of the appellant's functional abilities as set out in the PR, the AR and in her own evidence lead the panel to conclude that the ministry was reasonable in determining that the evidence did not establish that the appellant has a severe physical impairment under section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

The appellant takes the position that she has significant restrictions with her DLA.

The ministry's position as set out in the Reconsideration Decision is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by her physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that in the opinion of a prescribed professional, a person's DLA are directly and significantly restricted by their severe impairment either continuously or periodically for extended periods.

In the PR, the GP reports the appellant as experiencing no restrictions with personal self care, management of medications, mobility inside the home, use of transportation, management of finances and social functioning. The appellant is described as being continuously restricted with meal preparation, basic housework, daily shopping and mobility outside the home and the panel notes that the appellant's evidence at the hearing that she is able to prepare meals for herself and do housework and the RN assessed the need for periodic assistance in some specific tasks of these DLA.

Considering the evidence of the RN as set out in the AR, the appellant is described as independent in 19 of 28 tasks of DLA. Those tasks for which the appellant requires periodic assistance include dressing, transfers on and off chairs, basic housekeeping, food preparation and cooking and getting in and out of a vehicle. As noted above, the panel heard from the appellant at the hearing that she is able to cook her own meals and do her own basic housekeeping and, as described by the RN, requires some assistance with heavier tasks such as lifting heavy pots, washing floors and vacuuming.

The PR and AR must be considered in conjunction with the additional evidence as set out in the GP Letter. For example, with respect to DLA, while the GP agrees with the statement that the appellant is directly and significantly restricted in meal preparation, basic housework, mobility outside the house and daily shopping there is no further detail provided with respect to whether these restrictions are either continuous or periodic and, if periodic, are restricted for extended periods of time.

In the present case, the evidence of two prescribed professionals, the appellant's GP and RN, is that the appellant is able to perform the majority of her DLA independently. Based on the evidence, the panel concludes that the ministry was reasonable in finding that there is not sufficient evidence to establish that the appellant's mental and physical impairments directly and significantly restrict her ability to perform DLA, either continuously or periodically for extended periods under section 2(2)(b) of the *EAPWDA*.

Help with DLA

The appellant's position is that she requires assistance to perform DLA.

The ministry's position as set out in the Reconsideration Decision is that as it has not been established that the appellant's DLA are directly and significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA 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.

As noted above, the panel has found the ministry's conclusion that the evidence of the prescribed professional does not establish that the appellant requires assistance with her DLA either continuously or periodically for extended periods of time to be reasonable.

The panel therefore finds that as the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined in section 2(3)(b) of the *EAPWDA*.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration which determined that the appellant was not eligible for PWD designation was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.