

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of June 20, 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 a 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

With the consent of the appellant, the ministry had an observer attend the hearing.

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

- The appellant's PWD application form consisting of the appellant's self-report (dated September 12, 2013) along with a physician's report ("PR") and assessor's report ("AR") completed by a general practitioner who had been the appellant's physician since April, 2013 (both dated January 26, 2014).
- Copies of the PR and AR forms as completed by the appellant and her advocate and submitted to the appellant's physician prior to completion of the PR and AR by the physician.
- An advocate-prepared form dated June 10, 2014 in which the appellant's physician indicated her agreement or disagreement with various statements made by the appellant.

The panel reviewed the evidence as follows:

Diagnosis

- In the PR the physician diagnosed the appellant with cervical degenerative disc disease, C6-7 neuropathy, hyperlipidemia, depression/anxiety and sleep apnea. In the Additional Comments section of the PR the physician also referred to "shortness of breath".
- In response to the question "What are the applicant's mental or physical impairments..." in the AR, the physician wrote "Pain in neck + back makes it painful to do her [DLA] in a timely manner + needs assistance from others for household duties."

Physical Impairment

- In the Health History portion of the PR the physician described "severe neck discomfort aggravated by lifting", "mod-severe degenerative disc disease, and decreased hearing.
- In terms of physical functioning, the physician reported in the PR that the appellant can walk 1 to 2 blocks unaided on a flat surface, climb 5+ steps unaided, lift 5 to 15 pounds, and has no limitations to how long she can remain seated.
- In the AR the physician indicated that the appellant requires periodic assistance with most aspects of mobility and physical ability, and continuous assistance climbing stairs.
- In the advocate-prepared form of June 10, 2014 the physician was asked to agree or disagree with a number of statements made by the appellant. The physician disagreed with the appellant's statement that she cannot walk than one half block independently – the physician commented "able to walk 2-3 blocks". The physician agreed that the appellant can't sit for more than 30 minutes, and that it takes her 20 minutes to get dressed.
- In her self-report, the appellant wrote that:
 - She can walk 2-4 blocks before pain prevents her going any further;
 - She can climb 5 stairs before stopping to rest;
 - Lifting is limited to 10 pounds, but she can't carry that much because of neck pain.
 - Sitting is limited to no more than 1 hour because of back pain.
 - Her hearing is terrible and she has not been tested to determine the cause.

- She is not able to vacuum, sweep the floors or clean the bathroom.
- She has help to carry her groceries because of neck and back pain.
- In her oral testimony the appellant said that she has to start each day with pain medication which just barely makes the pain bearable.

Mental Impairment

- In the PR the physician indicated that the appellant has no difficulties with communication and no significant deficits with cognitive and emotional function.
- In the AR the physician reported the appellant's communication skills are good in all respects, except the physician indicated she is unsure about the appellant's hearing.
- In the AR, the physician left the section of cognitive and emotional functioning blank except for writing the comment "N/A".

DLA

- In the PR the physician indicated that the appellant has been prescribed medication or treatment that interferes with her ability to perform DLA.
- In the PR the physician indicated that the appellant's impairment directly restricts her ability to perform 5 of the 10 prescribed DLA: *personal self-care* (able to do self-care intermittently during the day), *management of medications*, *basic housework*, *daily shopping*, and the outdoor aspect of *mobility indoors and outdoors*.
- In the AR the physician reported the appellant as independently managing all tasks related to the DLA of *meal preparation*, *management of personal finances* (pay rent and bills), *management of personal medications*, *use of transportation*, and *social functioning* (relate to, communicate or interact with others effectively). She also indicated the appellant independently manages most aspects of the DLA of *personal self-care* (takes longer than typical with transfers on/off bed and chair due to pain/stiffness and need to support herself), *basic housekeeping* (uses an assistive device - unable to vacuum and sweep due to pain in neck) and *daily shopping* (needs help carrying purchases home).
- The physician's completion of the PR and AR essentially mirrors the input provided by the appellant and her advocate in their preliminary version of the forms.
- In the advocate-prepared form of June 10, 2014 the physician indicated her agreement or disagreement regarding a number of statements made by the appellant regarding her ability to perform DLA. With respect to *meal preparation* the physician indicated agreement that the appellant has about 2 good days a week when she can prepare simple meals, and that her roommate does the cooking most days.
- In response to a question in the advocate-prepared form "Would you agree that the combination of [the appellant's] conditions is severe, that she has significant restrictions with many of her [DLA] and as a result requires continuous assistance (most of the time) as mentioned above?" the physician indicated neither agreement nor disagreement. She commented "no assistive devices but requires help of roommate + daughter with carrying items/housework".
- In her oral testimony, the appellant said that she is in bed the majority of the time. She said that the physician was wrong to indicate that she can walk 2-4 blocks independently.
- In response to a question from the panel, the appellant said that she did not agree with the physician's assessment in the AR that she can perform virtually all tasks of all DLA

independently.

- In response to another question from the panel, the appellant said that she sat with her advocate and provided information to complete the draft copies of the PR and AR that were provided to the physician. The appellant said that while she may have been able to walk 2 to 4 blocks at the time the forms were filled in she can't do so anymore.
- In response to a question from the ministry, the appellant said that she'd sat with the physician while the physician responded to the advocate-prepared form dated June 10, 2014. She said that she objected when the physician wrote that she could walk 2-3 blocks, but the physician wouldn't listen to her. She acknowledged that according to the cover letter with which her advocate sent the draft PR and AR forms to the physician, the appellant and the advocate had completed the drafts together.

Help with DLA

- In the PR the physician indicated that the appellant does not require aids or prostheses for her impairment, but commented "hearing aids". In the AR she wrote that the appellant uses a cane to support herself while dressing and for mobility to alleviate back pain; also that she needs a CPAP machine.
- In the AR the physician indicated that the appellant does not have an assistance animal.
- The physician commented that neighbours and friends help with carrying/lifting/doing grocery runs, and that without this help she does without, as she cannot afford to make multiple trips with lighter weights.

Admissibility of Additional Information

In her oral testimony the appellant provided additional information regarding her impairments and related restrictions. This information generally provides additional detail with respect to matters raised in the original PWD application. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that 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 the appellant does not require help to perform DLA as a result of those restrictions?

The relevant legislation is as follows:

EAPWDA:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

EAPWDR section 2(1):

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

Severe Physical Impairment

The appellant's position is that the combination of her diagnosed conditions, including degenerative disc disease and associated severe pain, constitutes a severe physical impairment. She said that she is in pain continually from her neck to her feet, and has to spend the majority of her time in bed. The appellant argued that she simply is not able to work at paid employment.

The ministry's position, as set out in its reconsideration decision, is that the functional skill limitations are more in keeping with a moderate degree of impairment with some age-related factors. The ministry argued that the information provided is not evidence of a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

In this case the appellant disagreed with the level of functional skills indicated by the physician. The panel notes that the appellant's assessment substantially reflects the information submitted to the physician by the appellant and her advocate. The appellant acknowledged that her condition may have been as reflected in the forms at the time the forms were completed, but that it has deteriorated since then. According to the appellant, and as is evident from the advocate-prepared form of June 10, 2014 the physician disagreed with the appellant's assessment of her mobility.

As discussed in more detail in a subsequent section of this decision under the heading Significant Restrictions to DLA, any limitations resulting from the appellant's impairments do not appear to have translated into significant restrictions in her ability to manage her DLA independently.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe physical impairment.

Severe Mental Impairment

The appellant advanced no argument with respect to severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not demonstrate a severe mental impairment.

Panel Decision

While the physician did provide a diagnosis of depression/anxiety, she also indicated in both the PR and the AR that the appellant has no significant deficits in cognitive and emotional functioning.

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*).

The evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that – according to the physician’s evidence - independently manages the decision-making tasks related to the DLA of *meal preparation* (meal planning), *daily shopping* (making appropriate choices), *management of personal finances* (banking, budgeting), and *management of personal medications* (filling/refilling/taking as directed).

Regarding *social functioning*, the evidence indicates that the appellant is not impacted by her impairment.

With respect to functional skills, the evidence indicates that the appellant’s ability to communicate is good in all respects, except perhaps for poor hearing.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant’s position is that her ability to perform DLA is significantly restricted by pain. She argued that pain limits virtually all of her physical activities, and that the physician has provided evidence of this.

The ministry’s position is that the appellant’s functional skills are not significantly restricted. The ministry acknowledged that activities involving lifting are significantly impacted, but suggested that a personal shopping cart would assist to transport purchases. The ministry argued that the information from the prescribed professional does not establish that impairment significantly restricts the appellant’s DLA either continuously or periodically for extended periods.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant’s general practitioner. This doesn’t mean that other evidence 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”.

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. The direct restriction must also be significant. Finally, there is 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. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is 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 appellant referred to her inability to engage in paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

The panel notes that there are conflicts in the evidence which cause it not to present a coherent and convincing picture of significant restrictions to the appellant's ability to perform DLA. The physician's evidence in AR essentially agrees with the evidence that the appellant herself provided in the draft copies of the application forms. These documents indicate that the appellant independently manages almost all tasks related to virtually all DLA. The only restrictions indicated are pain and stiffness in transfers causing them to take longer than typical, use of an assistive device for housework, and continuous assistance required for carrying purchases home from the store. The only additional restriction noted by the appellant is in her self-report where she noted that she is unable to vacuum or sweep the floors and cannot clean the bathroom.

The physician also agreed with most of the other restrictions described by the appellant in the advocate-prepared form of June 10, 2014, but did not provide any explanation for the differences between this information and the information in the PR and AR. The appellant said that her condition has worsened since the PR and AR were completed but there is no medical confirmation of this. Finally, the panel notes that when asked to confirm in the advocate-prepared form of June 10, 2014 that "[the appellant] has significant restrictions with many of her [DLA]", the physician declined to indicate her agreement. The physician simply wrote that the appellant requires help from her daughter and roommate to carry items and do housework. While the physician indicated in the PR that the help required by the appellant is "periodic", her evidence on the frequency or duration of the help required is either inconsistent or nonexistent.

Considering the evidence as a whole – and while acknowledging a degree of restriction - the panel concludes that the ministry reasonably determined that the evidence is insufficient to show on the balance of probabilities that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires help from her friends and roommate to perform most 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

A finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

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 a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.