

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated July 25, 2014 which found that the appellant did not meet the 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 she has a severe mental impairment that 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 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

The evidence before the ministry at the time of the reconsideration decision included the appellant's PWD Application comprised of the applicant information and self-report ("SR") dated January 6, 2014, a physician report (PR) dated January 13, 2014 and prepared by the appellant's general practitioner ("the GP") of 3 ½ years and an assessor report (AR) dated January 6, 2014 and prepared by a Substance Abuse Clinician ("Clinician") who has known the appellant for 4 years.

Further evidence before the ministry at the time of the reconsideration decision included the following:

- 1) A letter dated June 24, 2014 prepared by the appellant's GP indicating that she concurs with the comments made by the Clinician in Section C of the AR ("the GP Letter");
- 2) The certification page from a blank AR that has been signed by the appellant's GP;
- 3) A letter dated July 17, 2014 and prepared by the appellant's psychiatrist ("the Psychiatrist Letter"); and
- 4) The appellant's Request for Reconsideration ("RFR") dated July 10, 2014 which refers to the Psychiatrist Letter.

Admissibility of Oral Evidence

The appellant gave oral evidence at the hearing of her impairments, their treatment and the impact that they have on her DLA. This evidence was consistent with that in the PWD application. Therefore, the panel is satisfied that the oral evidence of the appellant is admissible 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 and Assistance Act*.

Diagnoses

In the PR, the GP indicates that the appellant has been diagnosed with Chronic Severe Anxiety and Chronic Pain but she has not noted the date of onset of either condition.

Physical Impairment

In the SR, the appellant describes her physical impairment and symptoms as including the following:

- Sleep apnea, chronic fatigue, neurological and sensory disorder, arthritis, myofascial and fibromyalgia, chronic pain disorder and sensory overload to her central nervous system, fatigue, shaking and the inability to concentrate.
- She says that her brain and body do not communicate with each other and that on days where her pain is high, she is in tears and frustrated as her body goes into sensory overload to her central nervous system making it difficult to carry out basic life skills such as standing and walking.
- She is often bedridden and has days of flare-ups which include dizziness, slurred speech, lack of muscles strength and going into a "fibrofog."
- She lives every day in discomfort and her flare-ups make it difficult to leave her home.

In the PR, the GP reported that:

- The appellant's description gives a very clear account of how her chronic pain and anxiety impair her function.
- The appellant requires no aids or prostheses for her impairment and her impairment is likely to continue for two years or more.

- The GP comments further that the appellant's pain is chronic soft tissue pain with an unclear prognosis.
- Functional skills reported indicate that the appellant can walk 4 or more blocks and climb 5 or more steps unaided, lift under 2 kg and remain seated for 1 to 2 hours. The appellant is not restricted with mobility inside the home but is periodically restricted with mobility outside the home.

In the AR, the Clinician reported that:

- The appellant experiences chronic pain "apparently from fibromyalgia and wear and tear on body over the years. Pain exacerbated by stress and anxiety."
- The appellant is independent walking indoors and outdoors depending on her pain level and independent climbing stairs.
- The appellant requires continuous assistance from another person or is unable to stand and lift and with carrying and holding. The Clinician comments that when standing, the appellant experiences hip pain and needs to lay down for hours. The appellant's lifting difficulties are above the shoulders and reaching in front. For carrying and holding, the appellant is unable to carry more than approximately 8lbs as this pulls her shoulder and neck and she occasionally uses wrist and right elbow supports.
- Further comments are that the appellant has a lift on her toilet and plans to have her fridge lifted due to bending difficulties.
- The Clinician comments further that the appellant is affected in some manner by her physical impairments on a daily basis and lists examples including bending, turning and walking which she describes as "normal functions that become painful and cause applicant to spend a lot of time resting or in bed. Pain can last for hours or a whole day. Applicant often does not leave apt. for days, sometimes running low on food and necessities."
- The Clinician comments further that in the course of their 4 year relationship, she has seen the appellant's condition go from one of being a highly motivated woman to having great difficulty managing her physical condition and being in tears frequently and unable to function well due to pain issues.

At the hearing, the appellant gave evidence that her physical condition is worsening which in turns impacts her emotional and mental health. She stated that she spent much of the previous week in bed and that she is in pain as well as stiff and sore. She stated that she gets headaches, has poor circulation and has fallen on the floor or collapsed due to a lack of motor skills.

In response to questions, the appellant stated as follows:

- that since the PR was completed her functional skills have worsened and that currently, she can only walk two to four blocks and climb two to 5 steps unaided, that her lifting ability remains unchanged and that she can only now sit for less than an hour.
- That she's lucky if she has 2 or 3 good days each week.
- That she has been taking different pain medications for approximately 5 years and she receives injections to manage her pain and that she is hoping to increase the frequency of the injections.
- That in the past week, her muscles and joints have been too stiff to get moving and that the medications she takes haven't been helping with the pain.

Mental Impairment

In the SR, the appellant describes her mental impairment and symptoms as including the following:

- Anxiety disorder, emotional depression and suppression, inability to concentrate and make decisions, thoughts of suicide, lack of social interaction, social isolation, confusion and inability to think clearly, daily mental and emotional discomfort making it difficult to interact socially, short term concentration,

fear of public anxiety attacks resulting in self-isolation.

In the PR, the GP indicates that:

- The appellant's description gives a very clear account of how her chronic pain and anxiety impair her function.
- The appellant experiences significant deficits with cognitive and emotional function in the area of emotional disturbance with the further comment "severe lifelong anxiety."

In the AR, The Clinician notes that:

- The appellant's physical pain is exacerbated by stress and anxiety and that her speaking, reading, writing and hearing are good.
- With respect to cognitive and emotional functioning, the appellant experiences major impacts to daily functioning in bodily functions (sleep disturbance is circled), emotion, other neuropsychological problems and other emotional or mental problems. Moderate impacts are found in the areas of attention/concentration and motivation and minimal impacts are found in consciousness. There are no impacts listed in the remaining 7 areas of cognitive and emotional functioning.
- The Clinician comments further that the appellant is affected by her mental impairment on a daily basis in some manner.

In the Psychiatrist Letter, the appellant's psychiatrist states that she has met with the appellant on four occasions and that she has been diagnosed with chronic recurrent depressive illness with severe comorbid generalized anxiety and a social anxiety disorder. There is a further suggestion that the appellant may also suffer from a bipolar disorder which will be the subject of further exploration. The psychiatrist continues that the appellant is currently taking multiple medications to target her mood, anxiety, disturbed sleep and chronic pain and that she is having significant difficulties functioning.

At the hearing, the appellant gave evidence that her chronic pain impacts her mental and emotional condition and she referred to the Psychiatrist Letter.

In response to questions, the appellant confirmed that she is taking multiple medications for her condition and that emotionally she has been set back and quite disturbed.

Daily Living Activities (DLA)

In the PR, the GP reports that:

- The appellant is noted as being periodically restricted with daily shopping and mobility outside the home and not restricted in all other categories of DLA including social functioning.
- With respect to the appellant's periodic restrictions, the GP adds the comment "she will sometimes get assistance with shopping" and she further comments that the assistance the appellant needs with DLA is "support and encouragement to go outside and get her shopping done."

In the AR, the Clinician reports with respect to the appellant's DLA that:

- The appellant is independent with all tasks of personal care (although no indication is given for bathing) and that the appellant uses assistive devices for toileting ("toilet lift") and bathing ("tub has grab bars").
- For basic housekeeping, the appellant is noted as independent but that she requires periodic assistance from a neighbour with laundry which takes significantly longer than typical.

- The appellant is independent reading prices and labels, making appropriate shopping choices and paying for purchases but requires periodic assistance going to and from stores (“for rides”) and carrying purchases home (“assistance in carrying”).
- The Clinician notes that the appellant is independent in all aspects of meals although food preparation sometimes takes a little longer when chopping and peeling. The appellant is independent in all aspects of paying rent and bills, medications and transportation.
- With respect to social functioning, the appellant is assessed as independent interacting appropriately with others but that she does not always communicate needs well. The appellant is assessed as requiring periodic support or supervision in making appropriate social decisions (“re: attending to mental health, willingness to interact and manage anxiety, avoid social isolation – biweekly for years”) and in her ability to secure assistance from others.
- The appellant’s social functioning is further assessed as requiring continuous support or supervision in the ability to develop and maintain relationships (“avoids risk taking”) and dealing appropriately with unexpected demands (“re: employment, family, other tenants”).
- The appellant is further described by the Clinician as having marginal functioning with her immediate and extended social networks.

In the AR, the Clinician comments further that the support and supervision required by the appellant includes continued mental health substance use counselling and a possible psychiatric referral. The Clinician notes that the appellant has made major progress mentally and emotionally but physical impairments have become significant impediments to employability and functioning.

In the Physician Letter, the GP states that she concurs with the Clinician’s findings concerning the appellant’s DLA as set out in Section C of the AR.

In the Psychiatrist Letter, the psychiatrist comments that the appellant is having “significant difficulties functioning and, at this time, is only functioning marginally.”

At the hearing, the appellant stated that she has difficulty some days in dressing herself and that during the past week, she spent most of her time in bed and was not capable of doing anything. She stated further that she uses a pole or stick to assist her in getting out of bed as she can’t afford a cane.

In response to questions, the appellant stated that her ability to perform DLA has changed from that as set out in the PR and the AR and she cited the following examples:

- There are days when her meal preparation is restricted.
- For bathing she uses a grab bar and has a chair.
- Her toilet seat has been raised and she needs a higher one.
- A friend helps her with her laundry.
- She wears glasses so it is difficult sometimes to read labels while shopping.

The appellant was questioned as to how the Physician Letter came to be prepared. The appellant stated that she was advised prior to the reconsideration decision that as the Clinician was not a prescribed professional as required by the *EAPWDR*, it was necessary for the GP to confirm the AR. The appellant further stated that she then attended at her GP’s office and went over the AR with her although no further physical examination was conducted.

Need for Help

- In the PR, the GP did not indicate that the appellant requires an assistive device.

- In the AR, the Clinician indicates that the appellant lives alone and that she requires continued counseling and possible psychiatric referral. She further indicates that neighbours help her when they are needed and available and that the appellant utilizes a toilet seat lift, bathtub grab bars, tensor wraps on her wrist and elbow and that a fridge lift is in progress.

The ministry relied on the Reconsideration Decision.

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 while the appellant does have a severe mental impairment, she does not have a severe 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 July 29, 2014, the appellant states that she and her medical and counseling support disagree with the decision that she does not meet the legislative requirements for impact on DLA and requirement for help. She says that she needs an animal to keep her spirits up and a bed that lifts her up as she has many days each month when she is bedridden with chronic physical pain. The appellant continues that she requires assistance with meal preparation on days that she is bedridden and that she experiences mental confusion on most days in which it is difficult making decisions as her phobia and anxiety are extremely high. She continues that she requires physiotherapy and chiropractic treatment on a regular basis which she cannot afford. The appellant concludes by saying that she receives injections for pain every three months and she barely makes it as her condition is worsening.

In response to questions, the ministry indicated that it would not object to the panel considering the evidence as set out in the AR despite the fact that the Clinician did not satisfy the legislative definition of "prescribed professional" as set out in section 2(2) of the *EAPWDR*. The panel notes that the GP in the Physician Letter has confirmed that she has reviewed Section C of the AR and concurs with the Clinician's findings.

Severity of impairment

Section 2(2)(a) of the *EAPWDA* provides 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.

Severity of mental impairment

The ministry determined in the Reconsideration Decision that the evidence supports a finding that the appellant has a severe mental impairment.

Severity of physical impairment

The appellant takes the position that a severe physical impairment is established by the evidence of her chronic myofascial pain and the manner of their impact on her functional skills and ability.

The ministry takes the position that the appellant's functional skill limitations do not support a finding that she suffers from a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition or conditions 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. In making its determination, the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the GP.

On January 13, 2014, the appellant's GP completed the PR and diagnosed the appellant as suffering from "chronic pain" which is later described by the GP as "chronic soft tissue pain." She describes the appellant as able to walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift under 2kg and sit for 1 – 2 hours although the appellant, citing a deterioration of her condition since the PR was completed, stated at the hearing that she could only walk 2 – 4 blocks and climb 2 – 5 steps unaided and sit for less than one hour. The GP reported that the appellant requires no aids to help compensate for her impairment. For a number of DLA that require physical functional skills such as personal self care, basic housework and mobility inside the home the GP indicates that the appellant has no restrictions while restrictions on daily shopping and mobility outside the home are periodic in nature.

The AR was completed by the Clinician on January 6, 2014. In it, she comments that the appellant is independent walking indoors and outdoors which may take longer depending on her pain level and that she is also independent climbing stairs. The appellant is further described as requiring continuous assistance standing, lifting, carrying and holding. For those DLA which are of a physical nature, the appellant is independent in most aspects of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications and transportation.

The panel acknowledges the evidence of the appellant that her condition has worsened since the GP prepared the PR. However, the panel notes the evidence of the appellant that prior to seeking reconsideration of her PWD application, she attended at her GP's office and discussed her condition and the GP prepared the Physician Letter which is dated June 24, 2014 which is some five months subsequent to the completion of the PR. While the GP indicates her concurrence with the Clinician's findings with respect to the appellant's DLA in the AR, she makes no comment in the Physician Letter as to the appellant's physical condition. Further, in confirming the Clinician's findings, the panel notes that there are no comments by the GP that those DLA that are of a physical nature have changed or have become more difficult for the appellant to complete. For these reasons, the panel finds that the ministry reasonably determined that there is not sufficient evidence to 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's position is that her physical and mental impairments directly and significantly restrict her ability to perform DLA on an ongoing basis to the point that she requires the significant assistance of another person.

The ministry's position 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 a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In this case, the GP is a prescribed professional and, while the Clinician is not, the GP has concurred with her findings in the AR with respect to the appellant's DLA by way of the Physician Letter.

DLA are defined in section 2(1) of the *EAPWDR* and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if

any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the PR, the GP reports the appellant as experiencing no restrictions with personal self care, meal preparation, management of medications, basic housework, mobility inside the home, use of transportation, management of finances and social functioning. The GP comments that the appellant is periodically restricted with daily shopping and mobility outside the home and further describes the periodic nature of the restriction as the appellant sometimes receiving assistance with shopping.

In the AR, the Clinician describes the appellant as independent in 24 of the 28 listed tasks of DLA and for the three tasks in which the appellant was not independent, she is described as requiring periodic assistance. These findings were confirmed by the GP in the Physician Letter.

In the Psychiatrist Letter, while the psychiatrist comments that the appellant is "having significant difficulties functioning" she does not provide any specific details of those difficulties.

Considering the evidence of the GP in the PR and her confirmation of the Clinician's evidence in then AR and considering the evidence of the appellant's psychiatrist, the panel finds that the appellant is able to perform the majority of her DLA independently. While the appellant made submissions that as a result of her impairments she was unable to work, 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 DLA in section 2 of the *EAPWDR*.

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 that her physical and mental impairments affect her DLA to a severe enough extent that assistance from others is necessary. Specifically, she points to assistive devices she uses in her home and assistance she receives from others.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

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.

In the PR, the GP does not indicate that the appellant requires any aids or prostheses for her impairment. In the AR, the Clinician indicates that the appellant lives alone and that she requires continued counseling and possible psychiatric referral. She further indicates that neighbours help her when they are needed and available and that the appellant utilizes a toilet seat lift, bathtub grab bars, tensor wraps on her wrist and elbow and that a fridge lift is in progress.

The panel finds that 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 by 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.