

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated July 22, 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* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that the appellant's impairment was likely to continue for at least two or more 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, 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 reconsideration consisted of:

- 1) The appellant's Request for Reconsideration (RFR) dated June 11, 2014 requesting an extension of time to gather more information;
- 2) Letter from the ministry to the appellant and PWD Designation Decision Summary dated May 21, 2014;
- 3) A PWD application comprised of a Self-report (SR) signed by the appellant on October 15, 2013; a Physician Report (PR) dated September 30, 2013 and an Assessor Report (AR) dated February 19, 2014 both completed by the appellant's general practitioner. On the PR the general practitioner notes that the appellant's first visit was September 6, 2013 and she has seen the appellant 2-10 times in the last year;
- 4) Appellant's letter regarding her citizenship, undated, in which she states that when she was advised that her citizenship was denied in 2011 she broke down emotionally, quit college and lost her self-confidence; and
- 5) Facsimile from the appellant's advocate dated June 27, 2014 stating that there is sufficient information to grant the appellant PWD designation.

In the Notice of Appeal the appellant states that she cannot move her left shoulder and hand, cannot walk properly because of her right knee, has "high depression" for which she takes anti-depressants, and has a bladder problem. The appellant states that she also has neck pain and her parents are helping her with everything.

Admissibility of New Evidence

At the hearing the appellant provided additional oral testimony regarding her impairment and circumstances. The appellant stated that she lives with her parents and has never lived on her own. She has pain in her left shoulder and cannot move her shoulder and left hand. She attended two physiotherapy treatments but they did not help. She has right knee pain with swelling and has to lie down most of the day. She can only walk 2 to 5 minutes then has to stop for one hour. She uses over the counter analgesics for pain. She has a bladder problem requiring her to use the washroom approximately 30 times per day and she has been seeing a urologist about this problem. She has "big depression" and takes anti-depressants but has not yet attended for any counseling. She states that she has memory problems, her parents have to take her everywhere and help with everything including dressing, cooking, and shopping.

The appellant stated that her family doctor is "not so nice to me because she's from my culture" and her doctor did not believe her about the severity and extent of her impairments. She stated that people have to believe her and understand that she cannot use her left arm and that she cannot do everything with her right hand. She reports that she began seeing a new doctor two months ago.

The panel admitted the oral testimony into evidence as it was in support of the information before the ministry at the time of reconsideration in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the oral testimony provided additional information regarding the appellant's physical impairment and the impact on her functioning.

The ministry did not provide any new information and relied on the reconsideration decision.

Physical Impairment

In the SR, the appellant states that she has "big pain" in her left shoulder and cannot carry anything. She states that she has enormous pain in her right knee and cannot sit or stand for even 20 minutes. She states

that she does not have enough sleep during the night, cannot eat properly, always has bad headaches and takes medication for her headaches.

In the PR, the general practitioner reports that the appellant has a painful shoulder and right knee. She has not been prescribed any medications that interfere with her daily living activities (DLA) and does not require any prostheses or aids for her impairment.

Functional skills reported in the PR indicate that the appellant can walk less than 1 block, cannot climb any stairs unaided, cannot perform any lifting and can remain seated less than 1 hour.

In the AR, completed 4.5 months after the PR, the general practitioner reports that the appellant is independent with walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding.

Mental Impairment

In the SR the appellant states that she has "high depression", memory loss and aggression. She states that she has lost 90% of her memory because of her depression, has become aggressive and cannot handle anyone, has lots of stress and emotionally broke down and cannot work. She states that she quit college because she lost her self-confidence.

In the PR, the general practitioner reports that the appellant has depression, suffers from mood instability, is not able to concentrate and work as a team member. The physician reports that due to the appellant's low mood and her physical pains she is losing her self-confidence and self-esteem. The physician reports that the appellant has significant deficits with cognitive and emotional function in the areas of executive, memory, emotional disturbance, motivation, impulse control, motor activity and attention. Under additional comments the physician reports that due her low self-esteem, confidence and energy, the appellant is isolated.

In the AR, the physician reports that the appellant's ability to communicate in speaking, reading, writing and hearing is good. For section 4, cognitive and emotional functioning, to be completed for an applicant with an identified mental impairment or brain injury, the appellant's physician reports that there is no impact to the following areas: bodily functions, consciousness, language, psychotic symptoms, other neuropsychological problems or other emotional or mental problems. There is minimal impact reported to impulse control, insight and judgment, executive, and memory. There is moderate impact reported to emotion, attention/concentration, motivation, and motor activity.

DLA

In the SR, the appellant states that she cannot lift or carry anything with her left shoulder and that she cannot sit or stand for 20 minutes.

In the PR, the general practitioner reports that the appellant's impairment continuously restricts her ability to perform DLA of personal self-care, meal preparation, basic housework, daily shopping, mobility outside the home, use of transportation, and social functioning. The physician reports that the appellant is not restricted with DLA of management of medications, mobility inside the home or management of finances. In relation to her social functioning the physician reports that due to the appellant's low mood and energy she has no motivation to perform her own DLA. She also reports that the appellant has pain in her left shoulder and right knee that stop her functioning such as lifting and carrying.

In the AR, the physician reports that the appellant is independent with the following tasks: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed), transfers (on/off of chair), laundry, basic housekeeping, going to and from stores, reading prices and labels, making appropriate choices, paying for

purchases, carrying purchases home, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking prescriptions as directed, safe handling and storage of medications, getting in and out of a vehicle, using public transportation, using transit schedules and arranging transportation.

In the AR, the physician reports that the appellant requires periodic assistance from another person with the following tasks: meal planning, food preparation and cooking.

With respect to social functioning, the general practitioner reports in the AR that the appellant is independent with making appropriate social decisions and securing assistance from others but requires periodic support/supervision with developing and maintaining relationships, interacting appropriately with others and dealing appropriately with unexpected demands. By way of explanation the physician reports that the appellant's mood and instability impact her ability to form and maintain relationships. The physician reports that the appellant has marginal functioning with respect to her immediate and extended social networks.

Need for Help

In the SR, the appellant does not provide any information about her need for help.

In the PR the physician reports that the appellant needs assistance 2 days per week at home until her pain in her knee and shoulder get better. Under additional comments, the physician reports that the appellant needs financial support until she can go back and get her education and find a job.

In the AR, in response to the question about the help required to maintain the appellant in the community the physician reports none at this point. Under Part D, assistance provided for applicant the physician reports "she is doing it". There is no further information about the type of assistance required. When asked to provide details on any equipment or devices used by the appellant, the physician notes "not limited". The physician reports that no assistance is provided through the use of assistive devices and that the appellant does not have an assistance animal.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision denying the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable legislation 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;
- that the appellant's DLAs 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, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA?

The criteria for being designated as a person with disabilities (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.

Severe physical impairment:

The appellant's position is that she has severe physical impairments including headaches, pain in her neck, left shoulder and hand, and right knee causing constant, daily pain that limits her from all activities, and prevents her sitting or standing for more than 20 minutes. She states that she requires help from her parents with all activities.

The ministry's position is that there is not enough evidence to establish a severe physical impairment. The ministry notes that on the PR the physician reported that the appellant can walk less than one block; cannot climb stairs, cannot lift any amount and can remain seated less than one hour but on the AR completed 4 months after the PR, the physician reports that the appellant is independent in all aspects of mobility and physical abilities. The ministry states that it is difficult to develop a clear and cohesive picture of the degree of restrictions the appellant has with her mobility and physical abilities given the inconsistent information from the physician.

The ministry also states that while the physician states that the appellant needs financial support until she can get her education and find a job the PWD application is not intended to assess employability or vocational abilities and employability is not an eligible criterion for designation as a PWD.

Panel Decision

The panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with shoulder and right knee pain.

The panel notes that there are significant inconsistencies between the PR and AR, even though the same physician completed both forms. For example, on the PR, the physician reports that the appellant can walk less than one block; cannot climb stairs, cannot lift any amount and can remain seated less than one hour; however, on the AR the physician reports that the appellant is independent in all aspects of mobility and physical abilities. The panel notes that the PR, which contains more functional limitations, was completed just three weeks after the appellant began seeing the physician whereas the AR, completed six months after the physician started seeing the appellant, indicates that the appellant is independent in all aspects of mobility and physical ability. In the RFR the appellant requested more time to obtain further medical information but no additional medical information has been provided. In particular, the panel notes that there is no additional information from the physician to explain the inconsistencies between the PR and the AR.

While the panel appreciates that the appellant's physician may not have a clear understanding of the appellant's daily struggles and functional limitations, and while the legislation provides that the determination of

severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. The panel finds that the functional limitations described by her general practitioner indicate that the appellant's functional limitations are in the mild to moderate range rather than severe.

Although the appellant may be unemployable, the panel notes that employability is not a legislated criterion for designation as PWD.

The panel concludes that based on all of the evidence, but particularly that of the prescribed professional, the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe physical impairment under section 2(2) of the EAPWDA, was reasonable.

Severity of mental impairment:

The appellant's position is that she is significantly depressed, has memory loss due to her depression, and has difficulties with focus, concentration and aggression. She also states that she quit college due to her low self-esteem and confidence.

The ministry notes that the physician indicates that the appellant has deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation, impulse control, motor activity and attention or sustained concentration. The ministry also states that while the physician reports moderate impact with emotion, attention/concentration, motivation and motor activity, the appellant is independent with the remainder of her cognitive and emotional functioning. The ministry also states that the physician indicates that the appellant's speaking, reading, writing, and hearing are good. The ministry's position is that based on the information provided by the general practitioner, there is not enough information to establish a severe mental impairment.

Panel Decision

The physician has diagnosed the appellant with depression and reports that she suffers from low mood, energy and concentration. The physician reports that the appellant's ability to communicate in speaking, reading and hearing is good. On the PR, the physician has identified deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation, impulse control, motor activity and attention or sustained concentration. However, on the AR, for part 4, cognitive and emotional functioning, the physician has only noted 4 of the 14 listed areas in which the appellant has moderate impact, namely: emotion, attention/concentration, motivation and motor activity. For the remaining 10 listed areas, the physician reports minimal impact to impulse control, insight and judgment, executive and memory and there is no impact to the remaining areas (bodily functions, consciousness, language, psychotic symptoms, other neuropsychological problems or other emotional or mental problems).

Although the appellant reports significant functional limitations due to her depression and requested additional time to provide more medical information, the panel notes that the appellant has not provided any additional information, either from the physician that completed the PR and AR, or from her new physician.

The panel finds that the ministry's decision, which found that there are some impacts to the appellant's functioning, but not enough evidence to establish a severe mental impairment under section 2(2) of the EAPWDA, was reasonable.

Restrictions in the ability to perform DLA

The appellant's position is that she cannot use her left shoulder, arm and hand for anything and that although she is right handed she is not able to perform her DLA with her right hand. She reports that due to her physical impairments and her depression, she spends a significant amount of her day in bed and that her parents help her with everything.

The ministry's position is that based on the information provided by the appellant's physician, there is not enough evidence to establish that the appellant's impairments directly and significantly restrict her DLA continuously or periodically for extended periods. The ministry notes that on the PR, the physician indicates that the appellant requires continuous assistance with personal self-care, meal preparation, basic housework, daily shopping, mobility in/outside the home, use of transportation and social functioning with the explanation that due to low mood and low energy she has no motivation to do things on her own and the pain in her shoulder and knee limit her from lifting and carrying. However, the ministry also notes that on the AR the physician indicates that the appellant requires periodic assistance with meal planning, food preparation and cooking but no information is provided on how often she requires assistance. The ministry notes that the rest of the DLA are considered independent and there is no indication that they take the appellant significantly longer to perform than typical. The ministry's position is that it finds it difficult to develop a clear and cohesive picture of the degree of restrictions the appellant has with her DLA due to the conflicting information provided by the physician.

The ministry also notes that although the physician indicates that the appellant requires periodic assistance with being able to develop and maintain relationships, interact appropriately with others and being able to deal appropriately with unexpected demands, no information is provided on how often assistance is required. In addition, the ministry notes that the physician further indicates that the appellant is independent in being able to make appropriate social decisions and securing assistance from others.

Panel Decision

The legislation requires that, in the opinion of a prescribed professional, 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 – it must be more than trifling and more than merely an inconvenience. 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, an analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises a few times a year is less likely to be significant than one that occurs several times a week. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably satisfy the ministry that they have been met.

The panel finds that the evidence in the PR and AR has significant inconsistencies even though the same physician completed both forms. On the PR the physician indicates that the appellant requires continuous assistance with personal self-care, meal preparation, basic housework, daily shopping, mobility in/outside the home, use of transportation and social functioning with the explanation that due to low mood and low energy she has no motivation to do things on her own and the pain in her shoulder and knee limit her from lifting and carrying. However, on the AR out of 34 listed areas of DLA, the physician only notes 3 as requiring periodic assistance, namely meal planning, food preparation and cooking. The physician does not provide any information on how often the appellant requires assistance. The other listed areas of DLA are all noted as independent and the physician does not provide any indication that the appellant takes significantly longer with these aspects of DLA.

The panel finds that as the information from the physician is inconsistent and does not provide the ability to form a clear understanding of the restrictions to the appellant's DLA's, the ministry was reasonable in finding that the appellant's impairment does not significantly restrict her ability to perform DLA, either continuously or periodically for extended periods.

Therefore, the panel finds that the ministry reasonably determined that, based on the evidence provided by the prescribed professional, the noted restrictions in the appellant's ability to perform some aspects of some DLA did not constitute a direct and significant restriction of the appellant's ability to perform DLA thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA.

Help with DLA

The appellant's position is that she needs help with all tasks and is unable to do anything on her own. She states that her parents help her with everything and her brothers also provide some assistance.

The ministry's position is that as it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is required from other persons, and no assistive devices are required.

Section 2(2)(b)(ii) of the EAPWDA requires that, in the opinion of a prescribed professional, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) of the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The panel accepts that as a result of her physical impairments, namely her left shoulder and right knee, she has some difficulties with DLA that require assistance. The panel also accepts that as a result of her depression, the appellant has difficulty with motivation and difficulty being around people. However, the evidence does not establish that the appellant requires the significant help or supervision of another person in order to perform DLA. For example, on the PR the physician notes that the appellant requires assistance two days per week until the pain in her knee and shoulder get better, yet on the AR the physician reports that the appellant is independent with almost all listed areas of DLA except meal planning, food preparation and cooking. For those three areas the physician does not provide any additional information as to the amount, frequency or duration of help or supervision performed by anyone. In addition, the AR was completed almost five months after the PR and in the AR the physician reports that the appellant does not require help to maintain herself in the community. In addition, in the AR the physician does not indicate that the appellant requires assistance from anyone.

Based on the evidence, 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 significant help to perform DLA as a result of those restrictions as required by EAPWDA section 2(2)(b)(ii).

Conclusion

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