

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 17, 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 July 10, 2014 with attached handwritten letter, 2 pages, and consult report from an orthopedic surgeon dated September 12, 2012;
- 2) Handwritten statement of the appellant, 6 pages, undated;
- 3) Letter from the ministry to the appellant and PWD Designation Decision Summary dated June 4, 2014;
- 4) A PWD application comprised of a Self-report (SR) signed by the appellant on February 18, 2014; a Physician Report (PR) dated February 7, 2012 and an Assessor Report (AR) dated February 7, 2014 both completed by the appellant's general practitioner. On the PR and the AR, the general practitioner notes that she has known the appellant for one month and has seen the appellant 2-10 times in the last year;

In the Notice of Appeal the appellant states that she wants the ministry to consider her physical limitations of pain and immobility. The appellant states that the ministry should "look inside the body as well" and not just consider a disability to be a missing body part.

Admissibility of New Evidence

At the hearing the appellant provided additional oral testimony regarding her impairment and circumstances. The appellant stated that she did not complete the SR as it is not mandatory that she do so. She stated that her pain fluctuates and that with increased activity she may suffer the next day or for up to three to five days. The appellant stated that she tried to increase her exercise and take medications as recommended by the orthopedic surgeon in 2012 but that more intense exercise aggravates her symptoms and she is only able to do mild exercise such as yoga. The appellant takes analgesics and prescribed medication but states that they do not help much and her condition has not improved. She has not yet had hip replacement surgery. The appellant stated that she agreed with her general practitioner's reports of her functional limitations and DLA. The appellant stated that she went to see her general practitioner with a draft of the application and that her general practitioner copied most of the information onto the form so the information reported by the general practitioner is as described by the appellant. The appellant reports that she worked in daycare for years but cannot do that work anymore and is currently looking for retail work although she does not have experience in that area. The appellant states that the ministry's comments, particularly with respect to mental impairment are insulting and she does not feel that the ministry has reviewed her application fairly.

The appellant's sister was a witness at the hearing. Her evidence was that the appellant has a hard time walking and often has to lean on someone or something and that she requires assistance with carrying and lifting heavy items such as groceries, as well as some DLA such as vacuuming or cleaning her bathroom. The witness stated that she helps the appellant with groceries 2 to 3 times per month. She also drives the appellant to look for a job approximately 4-6 times per month as the appellant is looking for retail or sales work. The appellant's sister stated that she cannot provide much financial assistance as she has her own family and requests that the ministry help her financially or help her find a job that she can perform so that she can support herself.

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 PR, the general practitioner diagnoses the appellant with osteoarthritis, date of onset 2002. Under Health History the general practitioner indicates that the appellant has severe osteoarthritis and that the orthopedic surgeon who evaluated her in 2012 recommended hip replacement. The general practitioner reports that x-rays show significant acetabular dysplasia of the bilateral hips with deformities of the femoral heads. Because of this, the appellant's hip joints do not articulate well and she cannot walk without a great deal of pain. The general practitioner reports that the appellant walks with assistance but is not yet wheelchair bound, but likely will be soon. The general practitioner notes that the appellant is 152 cm and weighs 63 kg. She has not been prescribed any medications that interfere with her daily living activities (DLA) and she requires walking assistance via cane, walker, etc.

Functional skills reported in the PR indicate that the appellant's ability to walk unaided on a flat surface is unknown, her ability to climb stairs unaided is unknown, she cannot lift, and can remain seated less than 1 hour. Under part F, Additional Comments, the general practitioner indicates that the appellant has such severe osteoarthritis she needs her hips replaced and is almost completely disabled. The general practitioner indicates that the appellant cannot work as a childcare provider. She notes that the appellant is apprehensive about surgery because of information about how long artificial joints may last and she is going to try and delay surgery for a few more years. The general practitioner indicates that the appellant is disabled for the foreseeable future.

In the AR, the general practitioner reports that the appellant takes significantly longer with walking indoors, walking outdoors and standing, requires continuous assistance climbing stairs and lifting and requires periodic assistance with lifting and carrying and holding. Under comments the general practitioner reports that these activities take longer because of pain and immobility but it is unknown how much longer. She also reports that the appellant cannot use stairs without handrails.

The consult report of the orthopedic surgeon indicates that the appellant has severe osteoarthritis of both hips as a result of severe acetabular dysplasia and femoral head deformities. He notes that the appellant has been doing reasonably well but has got significant limitation of motion of her hips and he recommended range of motion exercises like swimming. He states that the appellant was apprehensive about surgery but decided to sign up for it but that if she did well with an exercise program and analgesic medication then the surgery could be held off.

In the appellant's handwritten letters, she indicates that most of the pain is in her left hip and knee, sometimes with numbness. She describes the pain as "a very sharp pain, feeling like cutting the edge of my hip". She indicates that she cannot climb stairs, it's difficult to balance herself and even sitting on a chair to put on socks or boots is difficult. The appellant indicates that sitting causes pain; she cannot walk continuously and needs to take frequent breaks.

At the hearing the appellant states that she can walk on a flat surface unaided and it is difficult for her to estimate how far she can walk because sometimes she can walk "okay" and sometimes she has to stop. If she walks a lot then she suffers the next day. She states that she has sharp pain and numbness in her hips, particularly the left side. Walking indoors and outdoors takes the appellant longer but she could not estimate how much longer. She states that she requires assistance walking up stairs and always needs help with carrying and lifting heavy items, such as groceries. The appellant states that heavy exercise or if she performs a movement incorrectly aggravate her condition, but mild exercise such as yoga helps a little.

The appellant's sister stated that the appellant has a hard time walking and needs to lean on someone or something, and that she requires assistance with driving, as well as lifting and carrying heavy items.

Mental Impairment

In the PR and the AR the general practitioner does diagnose the appellant with a mental impairment. In the PR the general practitioner reports that there are no significant deficits with cognitive and emotional function. In the AR the general practitioner indicates that the appellant's ability to communicate in the areas of speaking, reading, writing and hearing is good.

In the appellant's handwritten letters she states that she is fighting for her physical impairment not a mental impairment.

DLA

In the PR, the general practitioner did not complete section E -- DLA and as the general practitioner is also the assessor there is no requirement to do so.

In the AR, the physician reports that the appellant is independent with the following tasks: dressing, grooming, bathing, toileting, feeding self, regulating diet, going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, meal planning, food preparation, cooking, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking prescriptions as directed, safe handling and storage of medications, using transit schedules and arranging transportation.

In the AR, the physician reports that the appellant takes significantly longer with the following tasks: transfers (in/out of bed – 15 seconds), transfers (on/off of chair- 12 seconds), laundry, basic housekeeping, getting in and out of a vehicle (15 seconds) and using public transit (20 seconds).

In the AR, the physician reports that the appellant requires periodic assistance with carrying purchases home, and safe storage of food (assistance if heavy).

Under additional comments the general practitioner indicates that assistance is required for all heavy lifting.

As no mental impairment was identified the general practitioner did not complete the area regarding social functioning.

The appellant states that she requires assistance with heavy lifting, difficulty putting on socks or boots, and that although she can perform housework and cooking she must do so in segments and pace herself. She states that if she does too much of anything at one time or on one day she suffers afterwards for up to 3 to 5 days. The appellant agreed with the information in the AR with respect to her ability to perform the listed activities. She reports that vacuuming is difficult and that she will often lie on the carpet afterwards because of pain.

Need for Help

In the PR the physician reports that the appellant needs walking assistance via cane, walker etc.

In the AR, the general practitioner indicates that the appellant requires assistance for all heavy lifting. She indicates that the appellant receives help from her family and arrangements are discussed ahead of time. There is no further information about the type of assistance required. The physician reports that no assistance is provided through the use of assistive devices and that the appellant does not have an assistance animal.

The appellant stated that she always asks for help with heavy lifting approximately four times per month.

The appellant's sister stated that she helps the appellant with groceries 2-3 times per month and drives her 4-6 times per month to look for a job. The appellant's sister stated that she helps to put heavy items away and helps clean her bathroom.

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 impairment due to severe osteoarthritis in her hips that causes her sharp pain and numbness and limits her mobility, ability to lift and carry heavy items or work. She states that she requires assistance with all heavy lifting. She also states that sitting on hard chairs is very difficult but if it is a softer material such as leather she can sit a bit longer. The appellant's position is that the ministry did not read her application carefully. In particular the appellant questions the ministry's note that the appellant's physician indicated that the appellant requires use of a railing when using stairs. In her handwritten letter the appellant states that the ministry did not answer her question in that regard. The appellant's position is that the information from her general practitioner and the orthopedic surgeon establishes that she has a severe physical impairment.

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 it is unknown how far the appellant can walk unaided on a flat surface, or how many stairs she can climb unaided. The ministry also notes that the physician reports that walking in and outdoors takes longer than typical, climbing stairs requires continuous assistance, lifting is noted to require both continuous and periodic assistance, and that carrying and holding require periodic assistance. The ministry notes that although the general practitioner indicates that these activities take longer because of pain and immobility, it is unknown how much longer and that the appellant cannot use stairs without handrails.

The ministry states that although the general practitioner recommended an exercise program and analgesic medications, no further information has been provided to confirm if this treatment was followed up on or whether it was successful and no further information was provided with respect to the appellant's surgery. The ministry's position is that the recommended treatment should help ameliorate the appellant's hip pain and allow for more physical functionality while awaiting surgery.

The ministry's position is that the appellant's handwritten information provided with the RFR did not vary significantly from the information provided at the time of the initial application. The ministry's position is that although the appellant experiences limitations to her physical functioning, particularly in the areas of lifting and climbing stairs, the assessments indicate a moderate degree of physical impairment.

The ministry also states that the PWD application is not intended to assess employability or vocational abilities and employability is not an eligible criterion for designation as a PWD.

The ministry also notes that the date of the PR is listed as 2012 but the date on the AR, completed by the same general practitioner is dated 2014. The ministry notes that as the general practitioner reports in 2014

that the appellant had only been her patient for one month that the reference to 2012 on the PR is a typographical error and should read 2014.

Panel Decision

Although the general practitioner reports that the appellant is unable to work and the appellant states that she cannot work in daycare and is looking for retail work, the panel notes that employability is not an eligible criterion for designation as PWD.

To assess the severity of an impairment, one must consider the nature of the impairment and its impact on the appellant's ability to manage her DLA as evidenced by functional skills limitations, the restrictions to DLA, and the degree of independence in performing DLA.

The determination of severity of impairment is at the discretion of the minister – the minister must be “satisfied” that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant, although the legislation is clear that the fundamental basis for the analysis is the evidence from the prescribed professionals.

In the appellant's case, the panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with osteoarthritis, which is confirmed by the orthopedic surgeon, both of whom state that the appellant will require hip replacement surgery. The panel finds that the date on the PR was an inadvertent error and should read 2014, not 2012.

The PR and AR indicate that the appellant has limitations with respect to lifting and carrying, climbing stairs and walking, the information provided indicates that it is unknown and the appellant's oral testimony confirms this information as the appellant states that her ability to walk varies. Although the general practitioner indicates that the appellant is unable to lift and can remain seated for less than one hour, the majority of her DLA are independent. Although the appellant questions where the ministry obtained the information about her requirement for handrails the panel notes that on the AR under section B Mental or Physical Impairment, section 3, under additional comments, the general practitioner states that the appellant cannot use stairs without hand rails.

Although the general practitioner and the orthopedic surgeon both describe the appellant's osteoarthritis as severe, the functional limitations described by the general practitioner and confirmed by the appellant are in the 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 does not have a mental impairment. The appellant states that she is insulted by the ministry's references to mental impairment and that she is fighting for her physical impairment.

The ministry's position is that no mental impairment has been diagnosed so this section is not applicable. The

ministry's position is that a PWD application is reviewed section by section in its entirety and it is common practice to state that "a mental impairment has not been diagnosed".

Panel Decision

As the general practitioner has not diagnosed a mental impairment and as the appellant's evidence is that she is fighting for her physical impairment, not a mental impairment 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 has difficulty walking, sitting, putting on socks or boots because of her severe osteoarthritis. She requires continuous assistance with heavy lifting and help with groceries.

The ministry's position is that all of the appellant's DLA of personal care are managed independently although transfer in and out of bed can take 12-15 second longer. Laundry and basic housekeeping are reported to take longer than typical, but it is not indicated how much longer. All shopping is managed independently; however, carrying purchases home requires periodic assistance for all heavy lifting. The ministry's position is that options are available for the purchase and delivery of groceries. The ministry notes that meals are managed independently, but storage of food may require assistance if items are heavy. All bill paying and medication management is completed independently. Getting in and out of a vehicle is reported to take the appellant 15 seconds longer, and using public transit takes her 20 seconds longer, but arranging transit and schedules is managed independently.

The ministry's position is that it reviewed the appellant's self-reported information at reconsideration and based on all of the evidence it is not satisfied that a severe impairment significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

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 indicates that the appellant is independent with the majority of DLA. Out of 34 listed areas of DLA on the AR, the physician only notes 2 as requiring periodic assistance, namely carrying purchases home and safe storage of food, with the note that assistance required if heavy. Only 6 of the 34 listed areas are noted as taking significantly longer, namely transfers (in/out of bed – 15 seconds), transfers (on/off of chair -12 seconds), laundry, basic housekeeping, getting in and out of a vehicle (15 seconds) and using public transit (20 seconds). The physician does not provide any information on how much longer than typical it takes the appellant to perform laundry and basic housekeeping.

The appellant's evidence was consistent with the AR and the appellant explained that she must do housekeeping in segments but is able to perform most household tasks except heavy lifting, independently.

Although the appellant takes longer with transfers, the panel finds that 12 to 15 seconds longer is not a significant amount of time and there is no information from the prescribed professional as to how much longer than typical it takes the appellant to perform laundry and basic housekeeping.

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 heavy lifting and carrying. She states that her sister helps her with groceries 3 to 4 times per month and helps with heavy lifting and tasks around the house up to six times per month. The appellant's sister confirmed that she helps the appellant to obtain groceries 3 to 4 times per month, drives her to look for jobs around six times per month and helps clean her bathroom.

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 osteoarthritis and hip pain, that the appellant has some difficulties with mobility and requires assistance with some DLA particularly heavy lifting and requires the assistance of hand rails when climbing stairs. However, the evidence does not establish that the appellant requires the significant help or supervision of another person in order to perform DLA.

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.