

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of July 9, 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 January 21, 2014) along with a physician's report ("PR") and assessor's report ("AR") completed by a general practitioner ("GP") who had been the appellant's physician since May, 2008 (both dated January 19, 2014).
- Reports prepared by a specialist who assessed the appellant at an outpatient orthotic clinic (the "Specialist").
- A report dated May 29, 2013, prepared by an occupational therapist ("OT") after conducting a functional capacity evaluation of the appellant.
- A disability parking tag issued to the appellant by a local disability resource centre.
- The appellant's written submissions dated January 21, 2014 and June 10, 2014.

The panel assessed the relevant evidence as including the following:

Diagnoses

- In the PR the GP diagnosed the appellant with painful feet (osteoarthritis and painful calluses); recurrent back pain, depression, and idiopathic thrombocytopenia.

Physical Impairment

- In the PR the GP described the appellant's conditions as "chronic". In terms of functional skills she reported that the appellant can walk 2-4 blocks unaided, climb 5+ stairs unaided, lift 5-15 pounds, and remain seated less than 1 hour.
- In the AR the GP reported that the appellant takes significantly longer than typical with walking outdoors and climbing stairs, and that she requires periodic assistance with lifting/carrying/holding.
- In a report dated April 18, 2013 the Specialist described extreme tenderness, tremendous callus buildup, and bilateral hallux valgus deformities. The Specialist stated that the appellant "urgently requires foot orthotics and silicone toe spacers."
- In her report of May 29, 2013 the OT reported that:
 - the appellant's spinal flexion range of motion was limited, and that the longest period of continuous sitting tolerated by the appellant was 31 minutes, with a declining tolerance as the day progressed.
 - the appellant demonstrated an above-normal right grip strength and normal left grip.
 - the appellant was able to maintain a primary standing/weight bearing posture for up to 18 minutes, and was able to statically stand for one period of up to six minutes, with a declining tolerance for standing as the day progressed.
 - the appellant demonstrated the ability to ascend/descend 1 of 2 flights of stairs, each

flight consisting of 11 steps.

- the appellant was able to carry 5 pounds in each of her right and left hands for 50 feet, and was able to carry 10 pounds bilaterally for 50 feet.

- In his letter of August 27, 2014, the Specialist wrote that "Without [custom foot orthotics and silicone toe spacers the appellant's] condition will worsen and she will lose more of her mobility."

Mental Impairment

- In the PR the GP reported that the appellant has no difficulties with communication, and indicated that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance and motivation.
- In the AR the GP indicated that the appellant's ability to communicate is satisfactory or good in all respects.
- In the AR the GP confirmed that the appellant experiences major impacts in terms of emotion and motivation, as well as moderate impacts with bodily functions (poor sleep) and attention/concentration (difficulty focusing and memorizing). The remaining categories of functioning showed minimal or no impact.
- With respect to social functioning, the GP indicated in the AR that the appellant independently manages all aspects, but that she is socially withdrawn and doesn't have a desire to develop and maintain relationships. She reported that the appellant functions marginally with her immediate and extended social networks.
- In her self-report the appellant reported that she has no motivation to get out of bed in the mornings and that she feels anxious and stressed.
- In her letter of August 22, 2014 the GP wrote that the appellant's social functioning is "very disrupted" and that she "would benefit from continuous support in securing assistance with her [DLA]."
- In her oral testimony the appellant stated that she had recently obtained the support of an advocate, though the advocate was unable to attend today's hearing.

DLA

- In the PR the GP did not indicate whether the appellant has been prescribed any medication or treatments that interfere with her ability to perform DLA.
- In the AR the GP noted that the appellant independently manages all aspects of the following DLA:
 - *personal self-care* (though she avoids showers because of pain with standing).
 - *manage personal finances.*
 - *manage personal medications.*
 - *daily shopping* (though she takes significantly longer than typical with going to and from stores, and carrying purchases home).
 - *meal preparation* (doesn't eat enough fruits and vegetables because she can't afford them).
 - *use of transportation* (standing and waiting for a bus is painful).

- With respect to *basic housekeeping*, the GP noted that the appellant “Does not have anyone to help. Tries to manage on her own, but takes longer to do.”
- With respect to *social functioning*, the GP indicated that the appellant independently manages all aspects, except that with respect to the ability to develop and maintain relationships the GP commented “Socially withdrawn, lives alone, doesn’t have a desire to develop and maintain relationships”. The GP reported that the appellant is marginally functional with respect to both her immediate and extended social networks.
- In the GP’s letter of August 22, 2014 she wrote that the appellant reports taking twice as long as typical to dress herself, she can walk less than a block and climb less than 5 stairs, and that the appellant is unable to prepare meals since she can’t stand for more than 2 or 3 minutes without experiencing pain.
- In the Specialist’s letter of August 27, 2014 he wrote that “[The appellant] is unable to perform many [DLA] independently...”
- In her oral testimony, in response to a question, the appellant said that she drives a vehicle, though the amount of time she can drive at any one time is limited.

Help

- In the AR the GP reported that the appellant requires assistive devices in the form of a cane and orthotics.
- In her oral testimony the appellant advised that she relies on her roommate for basic housekeeping, laundry, and meal preparation.

Admissibility of Additional Information

Prior to the hearing the appellant submitted two supplementary documents to the Tribunal’s offices:

1. A letter from the GP dated August 22, 2014.
2. A letter from the Specialist dated August 27, 2014.

At the hearing, the ministry stated that it had no objection to the admissibility of these documents. The ministry also stated that if it had had these two letters at the time of reconsideration it likely would have resulted in an approval of the appellant’s application.

The panel is limited by section 22(4) of the *Employment and Assistance Act* (“EAA”) to admitting as evidence only the information and records that were before the minister at the time of reconsideration, and “oral or written testimony in support...” Since the panel is an appellate decision-maker rather than a decision-maker at first instance, information “in support” must be information that tends to corroborate the evidence that was before the ministry at the time of reconsideration. With respect to the new physicians’ letters proffered by the appellant, the GP’s letter of August 22, 2014 states in part that that the appellant’s medical conditions have “significantly deteriorated” in the six months since she submitted her PWD application, and that the appellant “is no longer able to live her life as an independent person; therefore her overall level of impairment should be described as severe.” This information is significantly different that that provided by the GP to the ministry in the AR (wherein the GP indicated that the appellant independently manages virtually all tasks related to all DLA). However, it does tend to corroborate the information provided by the appellant in her written reconsideration submission where she wrote that “[The Specialist] says...that my feet are getting

worst (*sic*) every day” and that “Because of the way I walk I cannot do stairs anymore.” Accordingly, the panel finds that under the criterion provided in section 22(4) of the EAA, the GP’s letter of August 22, 2014 is admissible as evidence.

Similarly, the Specialist’s letter of August 27, 2014 speaks of a “significant deterioration” and states that the appellant is now “unable to walk even as far as one block and avoids using stairs at all times”. This information differs significantly from the professional evidence which was before the ministry at the time of reconsideration, where the appellant’s physical functional skills were described in the PR as being able to walk 2 to 4 blocks unaided on a level surface, and being able to climb 5+ stairs unaided. However, it tends to support the evidence of deterioration in the appellant’s conditions as reported by the appellant and is admissible in accordance with section 22(4).

The appellant’s oral testimony primarily offered more detail with respect to the restrictions she experiences with DLA, tending to corroborate the information that had been before the ministry at reconsideration. Accordingly, the panel has admitted it as oral testimony in support in accordance with section 22(4).

With respect to the ministry’s submissions, 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 constitutes a severe physical impairment. She said that her mobility is significantly restricted by pain, and that both the GP and the Specialist have clearly described her impairments as being "severe".

The ministry's position, as set out in its reconsideration decision, is that the functional skill limitations described by the GP in the PWD application forms are more in keeping with a moderate degree of 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 exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In the appellant's case the evidence indicates that the appellant suffers from painful osteoarthritis and calluses of the feet, as well as recurrent back pain, which limit her mobility and her physical functioning. The Specialist and the GP confirm that the appellant's condition has deteriorated significantly since she submitted the PWD application and that the prognosis is for it to continue to deteriorate unless she receives custom foot orthotics and silicone toe-spacers. The physicians have not, however, provided any opinion as to the effect that the orthotics and toe-spacers may have on mitigating the restrictions caused by the appellant's impairments.

As discussed in the subsequent section of these reasons under the heading **Significant Restrictions in DLA**, the appellant's impairment does not seem to have translated into significant restrictions to her ability to manage her DLA.

Considering the evidence as a whole the panel finds that the ministry's decision with respect to severe physical impairment was reasonably supported by the evidence.

Severe Mental Impairment

The appellant's position is that her depression restricts her ability and her motivation to perform DLA. She referred to the GP's evidence that she is severely withdrawn and isolated from her social relationships.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to establish a severe mental impairment. The ministry emphasized the GP's evidence that the appellant has no difficulty with communication.

Panel Decision

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 GP's evidence in the AR – she 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), *management of personal medications* (filling/refilling/taking as directed), and *social functioning* (appropriate social decisions).

Regarding *social functioning*, the GP's evidence in the AR is that the appellant is marginally functional with respect to immediate and extended social networks. In her August 22, 2014 letter the GP indicated that the appellant's social functioning is "very disrupted", however has provided no evidence as to how this is manifested differently than it was at the time the AR was completed.

With respect to functional skills, the evidence indicates that the appellant's ability to communicate is satisfactory or good in all respects.

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, as expressed in its reconsideration decision, is that the appellant's DLA are not significantly restricted. The ministry argued that the GP provided no information as to how much longer than typical it takes the appellant to perform DLA. The ministry stated that the information from the prescribed professionals does not establish that impairment significantly restricts the appellant's DLA either continuously or periodically for extended periods.

Panel Decision

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 panel notes that there are a number of similarities in the two supplementary letters provided from the GP and the Specialist in August and has concluded that they appear to have been substantially prepared by the appellant's advocate. Because both letters provide little detail with respect to the nature of the DLA restrictions caused by the appellant's impairments compared to the level of detail in the AR, the panel has generally given less weight to these letters in terms of assessing the significance of the restrictions.

The GP's evidence from the AR indicates that while the appellant does experience some restrictions, she independently manages almost all tasks related to virtually all DLA. The statements by the GP in her August 22, 2014 letter that the appellant "is no longer able to live her life as an independent person", and by the Specialist in his August 27, 2014 letter that the appellant "is unable to perform many [DLA] independently" are too generalized to assist in determining the significance of the restrictions to individual DLA or the extent to which this may have changed since the original PWD application forms were completed.

On balance, while acknowledging a degree of impairment, 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 manage her DLA is significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires the assistance of her roommate to manage her DLA, and that she would not be able to get by on her own.

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

Findings 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.