



PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated July 23, 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 an 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 and/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,
- 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

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment Assistance Act*.

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 February 18, 2014 as well as a physician report ("PR") and assessor report ("AR") both dated February 25, 2014 and prepared by the appellant's general practitioner ("the GP") of approximately 4 years.

Further evidence before the ministry at the time of the reconsideration decision included the appellant's Request for Reconsideration ("RFR") dated July 13, 2014 and a letter written by the appellant dated July 4, 2014. While reference to these two documents will be referred to in more detail below, they are prefaced by the appellant's comment in the RFR that the information in the PWD Application does not accurately represent her current situation as her husband, who acted as translator, did not accurately communicate her health condition and DLA challenges during the interview with her GP. In the July 4, 2014 letter, the appellant says that her doctor's submission "may be missing crucial information which was not provided due to the limited time allotted for a patient visit."

Diagnoses

In the PR, the GP indicates that the appellant has been diagnosed with the following:

- Insulin dependent diabetes with date of onset as 2000;
- Severe obesity with date of onset as 2000;
- Obstructive sleep apnea with date of onset as 2000;
- Asthma with date of onset as 2000; and
- Bowel incontinence with date of onset as 1981.

In the RFR, the appellant says that her GP forgot to include her depression diagnosis. In the July 4, 2014 letter, the appellant writes that she suffers from severe anxiety which has escalated into major depression which has required her GP to double her anti-depressant medication dosage.

Physical Impairment

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

- Obstetric injury to anal sphincter classified as a third degree tear resulting in the inability to hold a bowel movement and leaking liquid stool;
- Low back pain;
- Frequent urination resulting in dehydration and weakness;
- Leg edema;
- Fatigue and shortness of breath;
- Tight feeling skin;
- Decreased flexibility in an effected joint;
- Difficulty fitting into clothes in one specific area;
- Breast pain;
- She cannot lift weight – bending 10lbs, standing 15lbs;
- Discomfort and pain affect limb;
- Insulin dependent diabetes;
- Hypertension;

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- Sleep apnea and use of a machine;
 - Asthma attacks with coughing resulting in chest infection and shortness of breath;
 - Very near to a lung collapse.

In the PR, the GP reported that:

- The appellant is disabled by chronic rectal incontinence since childbirth in 1981 and chronic stool leakage.
- The appellant is noted as being 65 inches tall, 279 lbs and with a body mass index of 47.
- The appellant requires no aids or prostheses for her impairment and her impairment is likely to continue for two years or more.
- Functional skills reported indicate that the appellant can walk 2 - 4 blocks and climb 5 or more steps unaided, lift under 2 kg and remain seated without limitation.

In the AR, the GP reported that:

- The appellant lives with family, friends or a caregiver and that her chronic severe incontinence impacts her ability to manage DLA.
- The appellant's ability to communicate through speaking, reading, writing and hearing are all good.
- The appellant is independent walking indoors and requires periodic assistance with standing.
- The appellant requires continuous assistance from another person or is unable to lift and with carrying and holding and the GP adds the comment "husband helps."
- The appellant is noted as taking significantly longer than typical while walking outdoors and climbing stairs with the added note that she is limited due to stool incontinence.

In the July 4, 2014 letter, the appellant writes that as a result of her bowel incontinence, she is unable to move about her home without great difficulty and that any exertion causes incontinence which has been occurring for the past 16 years and has become worse over time. The appellant writes that she is morbidly obese and requires oxygen treatment throughout the day to remain conscious. She writes that she is unable to up or down stairs unaided, she must use railings or a person as support and she can only walk a maximum of ½ a block with great difficulty and strain.

Mental Impairment

In the SR, the appellant describes her mental impairment saying that emotionally, her life is useless due to her physical condition.

In the PR, the GP has indicated that the appellant does not experience any significant deficits with cognitive and emotional function while in the AR, the GP has written "N/A" as to the whether the appellant has a mental impairment that restricts or impacts her functioning.

However, in the RFR the appellant says that her doctor failed to indicate that she suffers from significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance and motivation and that on weeks where her oxygen is affected greatly she suffers from bad short term memory. She writes further that her ability to communicate varies between satisfactory and poor and that her GP did not confirm to what degree her mental impairment restricts or impacts her functioning in the following areas:

- Bodily function, emotion, attention/concentration and motivation (major impact);
- Consciousness and executive (moderate impact); and
- Motor activity (moderate to major impact).

In the July 4, 2014 letter the appellant writes that she suffers from severe anxiety which has escalated into major depression which has resulted in her anti-depressant medication dosage being doubled one year ago.

Daily Living Activities (DLA)

In the PR, the GP makes no comment as to the whether the impairment directly restricts the appellant's ability to perform DLA.

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

- The appellant is independent with all tasks of personal care.
- For basic housekeeping, the appellant is noted as requiring periodic assistance from another person although no further comments are provided to indicate from who or the frequency of assistance.
- The appellant is independent reading prices and labels, making appropriate shopping choices and paying for purchases but requires continuous assistance from another person or is unable to carry purchases home or to go to and from the store ("husband helps").
- The appellant is independent in all aspects of meals although she requires periodic assistance from another person with food preparation. No further comments are provided for this task.
- The appellant is independent in all aspects of paying rent and bills, medications and transportation although the GP comments that the appellant cannot use public transit due to her bowel condition.
- With respect to social functioning, the GP comments "N/A".

However, in the RFR the appellant writes that she requires continuous assistance with dressing, bathing, toileting, regulating her diet, laundry, housekeeping, going to and from stores and carrying purchases. She writes further that she forces herself to do what she can on her own and does not always ask for assistance due to embarrassment, anxiety and depression. She writes that she requires continuous assistance with food preparation, cooking and safe storage of food, that she does not do any banking, budgeting or paying of rent or bills due to the resultant anxiety and incontinence, and that her family picks up her medication as it is difficult for her to get in and out of vehicles and that she does not take public transit.

The appellant writes in the RFR that with respect to social functioning, she has lost many friendships due to her condition and her inability to cope with her condition in public and deal appropriately with unexpected demands. She continues that her immediate social functioning is marginal and her extended social networks are very disrupted as she is withdrawn and isolated.

Further, in the July 4, 2014 letter, the appellant writes that cooking, cleaning and household chores are primarily done by her husband and family and that going to and from stores is done primarily by other members of her family. She writes that she requires daily help from her family and that her state of cleanliness is suffering as all members of her family are male and she is unable to obtain assistance with bathing, bathroom and changing.

The appellant continues in the July 4, 2014 letter to write that in the PWD Application there is no mention of her ongoing need for assistance with changing clothes, bathing, bed sheets, cooking, cleaning and laundry and that her lack of assistance has led to further bowel incontinence which occurs up to six times per day on some days and results in high levels of anxiety and severe episodes of depression.

Finally, the appellant writes in the July 4, 2014 letter that she is unemployable due to her condition and that she is unable to rely entirely on her family for support as her husband and son both work and her son also attends school. The appellant writes that her family does not have discretionary income to hire needed help.



Need for Help

- In the PR, the GP did not indicate that the appellant requires an assistive device.
- In the AR, the GP indicates that the appellant lives with family. He does not indicate that she requires the use of assistive devices and she does not have an assistance animal.

In her Notice of Appeal which is not dated but marked as received by the Tribunal on August 8, 2014, the appellant states that she thinks that her medical condition has been overlooked and she lists her medical problems as follows:

- Severe anxiety resulting in major depression for which she is on medication
- Sleep apnea
- Bowel incontinence – obstetric injury to anal sphincter classified as third degree tear with resulting inability to hold bowel movements and stool leakage
- Lower back pain, frequent urination, leg edema, fatigue, shortness of breath
- Excessive coughing due to respiratory infection
- Asthma worsened by lung collapse of 10-15 second duration
- She is diabetic and on insulin
- Her husband helps her with vacuuming, cleaning, dusting, kitchen cleaning, dishwashing, groceries and picking up medication
- She cannot walk a maximum of one block – this affects her oxygen which gets low and due to restricted movement she has gained weight which causes further problems.

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 the appellant met the age requirement and that she has an 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 and/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,
- 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.

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.

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.

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.

Severity of mental impairment

The appellant takes the position that she suffers from major depression and anxiety.

The ministry takes the position that the evidence does not support a finding that the appellant has a severe mental impairment.

Panel Decision

On February 25, 2014, the appellant's GP of some four years completed both the PR and the AR following an office interview with the appellant. The panel notes that in neither did he diagnose or otherwise indicate that the appellant suffers from a mental impairment.

However, in the RFR and the July 4, 2014 letter the appellant describes a history of depression and anxiety that she says the GP failed to properly report in the PR and the AR. She writes in the RFR that she suffers from significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance and motivation and that on weeks where her oxygen is affected greatly she suffers from bad short term memory. She writes further that her GP failed to note that her depression has had major impacts on her bodily

functioning, emotion, attention/concentration and motivation, moderate impacts on her consciousness and executive and moderate to major impacts on her motor activity.

She writes in the July 4, 2014 letter that that she suffers from severe anxiety which has escalated into major depression which has resulted in her anti-depressant medication dosage being doubled one year ago.

In cases where there are variations in evidence, the panel must look to the evidence to determine what those variances are, why they have occurred and what weight to attach to the evidence. In this case, the appellant says in the RFR that her GP forgot to list her diagnosis of depression and did not fully complete the PR and the AR due to her husband, who served as translator, not properly communicating the appellant's medical condition and impacts to the GP. In the July 4, 2014 letter, the appellant says that the GP's submission was missing information due to the limited time allotted for her visit with him. There is no evidence to suggest that the appellant returned to her GP to ask that he revise the PR and/or AR either after he completed them or after the appellant received the Reconsideration Decision. Rather, the appellant prepared the July 4, 2014 letter and attached it to the RFR.

The panel notes however that in the SR which was witnessed by the GP, the appellant makes no reference to depression or anxiety but rather limits her submissions as they relate to a mental impairment by saying emotionally, her life is useless due to her physical condition. The panel further notes that in completing the AR, the GP appears to have turned his mind to the question of whether the appellant suffers from a mental impairment by writing "N/A" above the section that asks for comments regarding cognitive and emotional functioning as well as social functioning.

After considering the evidence as set out in the PR and AR by the appellant's GP of four years and after considering the appellant's evidence in the SR, the RFR and the July 4, 2014 letter, the panel places greater weight on that evidence contained in the PR and AR and finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe mental impairment under section 2(2) of the *EAPWDA*.

Severity of physical impairment

The appellant takes the position that a severe physical impairment is established by the evidence of her chronic bowel incontinence, diabetes, asthma and a host of other physical ailments 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

On February 25, 2014, the appellant's GP completed the PR and the AR, diagnosing the appellant as suffering from diabetes, severe obesity, sleep apnea, asthma and incontinence. He describes the appellant in the PR as able to walk 2 – 4 blocks unaided on a flat surface, climb 5 or more steps unaided, lift under 2kg and sit for without limitation.

In the SR, the appellant describes a variety of physical conditions that she says she suffers from including those diagnosed by the GP in the PR.

In the AR, the GP notes that the appellant is independent walking indoors, requires periodic assistance from another person while standing and continuous assistance lifting, carrying and holding while walking outdoors and climbing stairs are limited due to her incontinence. The GP reported that the appellant does not require an

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aid for her impairment. For those DLA which are of a physical nature, the appellant is noted by the GP as being independent in all aspects of personal care, most aspects of meals and requires periodic assistance with all aspects of basic housekeeping.

As with the consideration of the appellant's mental impairment, the appellant notes in the RFR and the July 4, 2014 letter that the GP's evidence in the PWD Application does not accurately represent her current situation and failed to include crucial information. She states that as a result of her bowel incontinence, she is unable to move about her home without great difficulty and that any exertion causes incontinence which has been occurring for the past 16 years. The appellant writes that she is morbidly obese and requires oxygen treatment throughout the day to remain conscious. She writes that she is unable to climb up or down stairs unaided, she must use railings or a person as support and she can only walk a maximum of ½ a block with great difficulty and strain.

While it is open to the panel to consider the evidence of the appellant as to her physical condition, as with the consideration of the appellant's mental impairment above, there is a significant variation and significant inconsistencies between the PR and AR prepared by the GP, and the SR, RFR and July 4, 2014 letter prepared by the appellant. As previously indicated, the appellant says that this variation is due to information being lost in translation during her appointment with the GP and due to a limited amount of time being allotted for that appointment.

However, after taking into consideration all of the evidence, the panel placed more weight on the evidence of the GP as set out in the PR and AR than that of the appellant. The GP, a medical professional, has treated the appellant since 2010 and did so between 2 and 10 times in the 12 months prior to the PR and AR being completed. In completing the PR and the AR, the GP provides written comments in addition to checking the various boxes which indicates that he did in fact turn his mind to the appellant's physical condition and functional capacity. As referenced previously, there is no evidence to suggest that the appellant returned to the GP to raise concerns about the PR and/or the AR and there is no evidence to suggest that the variation in reporting is due to a deterioration in the appellant's physical condition. The appellant's explanation as to the variation is essentially that it is due to a problem with translation and an appointment that did not provide enough time.

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, in this case the GP, provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods.

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 AR, the GP describes the appellant as independent in 21 of the 28 listed tasks of DLA. The appellant is noted as requiring periodic assistance with 3 tasks of DLA (laundry, basic housekeeping and food preparation) and as requiring continuous assistance or unable to complete 2 tasks of DLA (going to and from stores and carrying purchases home). For those tasks requiring periodic assistance, the GP did not provide an explanation or description of the type or amount of assistance provided, other than to comment "husband helps."

As set out above, the appellant says in the RFR and the July 4, 2014 letter that the GP has omitted evidence that supports her position that her severe physical and mental impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. However, the panel notes that the evidence of the GP, a prescribed professional, indicates that the appellant is independent in the majority of tasks of DLA. Further, while the appellant says that the GP did not provide an accurate picture of the impacts on her DLA, the panel again notes that there is no evidence that she returned to his office to seek clarification but rather, wrote a letter providing her own clarification of the matter. There is no additional evidence from a prescribed professional commenting on how or whether the appellant's DLA are restricted

Based on the aforementioned and in accordance with the legislated requirement for the opinion of a prescribed professional, the panel prefers and places greater weight on the PR and the AR and finds 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 the extent that assistance from others, notably her husband and son, is necessary.

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 GP indicates that the appellant lives with family, receives help from her husband and requires no assistive devices.

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.