

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 9, 2014, which found that the appellant did not meet four 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. However, the ministry was not satisfied that:

- In the opinion of a medical practitioner the appellant has an impairment that is likely to continue for at least two years;
- 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

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

PART E – Summary of Facts

With the consent of the parties the hearing was conducting in writing, in accordance with section 22(3) of the *Employment and Assistance Act*.

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 9, 2014 along with a physician's report ("PR") completed by the appellant's general practitioner dated March 25, 2014 and assessor's report ("AR") completed by a social worker, dated May 6, 2014.
- The appellant's Request for Reconsideration form, dated September 24, 2014, stamped "Received" by the ministry on September 25, 2014.
- The appellant's two-page handwritten reconsideration submission, dated September 24, 2014.

With her Notice of Appeal the appellant submitted a letter written by the social worker dated September 24, 2014. The appellant wrote in her Notice of Appeal that she had submitted this letter to the ministry's office along with her Request for Reconsideration form, but that the letter appears not to have been considered by the ministry in its reconsideration decision. The panel notes that in her Request for Reconsideration form, which was received by the ministry on September 25, 2014 the appellant referenced the social worker's letter as follows: "Also attached is a letter from the assessor who had filled out that portion of my initial application to provide further information." This is consistent with the dates being the same on the Request for Reconsideration form, the appellant's reconsideration submission, and the social worker's letter. Based on this information, the panel concludes that the social worker's letter was before the ministry at the time of reconsideration.

Admissibility of Additional Information

Prior to the hearing, the appellant submitted to the Tribunal office a three-page handwritten statement dated November 7, 2014. This statement substantially reiterates the information that was in her reconsideration submission, and also includes written argument. The panel finds that the statement is consistent with, and tends to corroborate, information that was before the ministry regarding the effects of the appellant's impairment. Accordingly, the panel has admitted the above-noted statement partly as argument, and partly as written testimony in support, in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information.

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The panel reviewed the evidence as follows:

Diagnoses

In the PR the appellant's physician provided diagnoses of anxiety disorder, mood disorder/dysthymia, "? Personality Disorder (awaiting assessment by psychiatrist)", and patellofemoral syndrome, backache (MSK).

The physician commented “Her main impairment is her mood, lack of interest and motivation...is expected to see psychiatrist in early April. (initial appointment booked in February, she had to reschedule though.)...Her other complaints are backache & recurrent bilateral knee pain...Due to reported financial difficulties she was not able to engage in ongoing rehabilitation (attended ? about 2 physio tx [therapy] sessions) I don't believe her MSK – diagnoses are significant enough to prevent her from finding employment in the future.”

In the AR the social worker (who has known the appellant since January 2014 and has seen her two to ten times) described the appellant's impairment as “Social Anxiety Disorder – Diagnosed April 10/14 by [psychiatrist's name]. Query Borderline Personality Disorder – still assessing.”

In her letter of September 24, 2014 the social worker (who signed the letter as a clinical therapist at the local mental health centre) reported that:

- A psychiatric assessment completed on April 10, 2014 provided “a possible diagnosis of Borderline Personality Disorder.”
- At this time the appellant has not been given the full diagnosis, but at a minimum has Borderline Personality Disorder (“BPD”) traits. BPD requires a longer process to diagnose and therefore a diagnosis of a disorder rather than traits has not been ruled out.
- The appellant has declined pharmaceutical treatment at this time, but the social worker does not consider her to have declined treatment. The appellant is hoping to improve through counselling and is “pre-contemplative” regarding treatment.

Duration

In response to the question “Is the impairment likely to continue for two years or more from today?” in the PR, the physician did not mark either the “yes” or the “no” box. Instead the physician wrote “Patient would benefit from physiotherapy/counselling/CBT [cognitive-behavioural therapy] antianxiety/antidepressant therapy (medication) offered, patient declined at present. She is awaiting psychiatrist opinion.”

In her letter of September 24, 2014 the social worker wrote that:

- The appellant's social anxiety has been life long and the CBT treatment is not a quick fix.
- She considers the treatment to be long term, but “cannot state how long that would be.”
- Treatment for BPD has a target treatment time of minimum two years.

Physical Impairment

- In the PR the physician reported no limitations to the appellant's physical functional skills.
- In the AR the social worker reported the appellant independently manages all aspects of mobility and physical ability, except that she requires periodic assistance with carrying/holding, commenting “She has patellofemoral syndrome and although is independent with mobility, at times is limited.”

In her self-report the appellant wrote that:

- Pain in her knees comes and goes depending on her activities.
- Back pain can get very bad – standing or sitting for long periods makes it worse.
- She has been told to do exercises but even those can cause pain.

Mental Impairment

- In the PR the physician reported that the appellant has no difficulties with communication. She indicated that the appellant has significant deficits with three of twelve categories of cognitive and emotional function (emotional disturbance, motivation, and impulse control). She commented "Patient reports due to her social anxiety she is not able to function in a group of people, she has been avoiding to attend any group sessions even for the purpose of learning/further education."
- The physician described the appellant as being "known to me since 2010", and reported that she has seen the appellant 11 or more times in the past 12 months. She commented "was seen regarding different complaints, problems [with] anxiety/mood not reported until January 2014".
- The physician wrote "clinical improvement expected with therapy, patient needs to work on coping skills."
- In the AR the social worker reported that the appellant has good communication skills in all areas except for speaking, commenting "has much difficulty due to social anxiety."
- In terms of cognitive and emotional functioning, the social worker indicated that the appellant experiences major impacts in one of fourteen categories of functioning: emotion. She reported moderate impacts in the six categories of insight/judgment, attention/concentration, executive, memory, motivation, and motor activity. She commented "Anxiety has a substantial impact on sleep." In the remaining categories the social worker noted minimal or no impacts.

In her self-report the appellant wrote that:

- She is uneasy around groups of people and doesn't like going to the grocery store or eating in a restaurant.
- Her anxiety was so bad she missed going to her graduation, and she cannot do any kind of work involving being around people.

In her reconsideration submission the appellant wrote that:

- She had never fully discussed her issues with her physician.
- The physician completed the PR on her own and the appellant had only the briefest opportunity to discuss things with her beforehand.

In her written statement of November 7, 2014 the appellant wrote that:

- Her physician had been reluctant to complete the PR and did not consult the appellant once regarding any of the questions.
- Though the physician provided the diagnosis of social anxiety disorder, the physician was not aware of how serious it was since the appellant never really discussed things with her.
- She has suffered with social anxiety her entire life.
- She can't go anywhere or do anything without a close friend or relative going with her to keep her calm and focused.
- She suffers anxiety when she is not around people as well.

DLA

In the PR the physician reported that:

- The appellant has not been prescribed any medication or treatments that interfere with her ability to perform DLA.
- The appellant is not restricted in any DLA except for *social functioning*. She indicated that the appellant is periodically restricted with *social functioning* and explained “periodic” by commenting “no anxiety observed clinically on one-to-one basis.”
- The appellant is “coping by avoiding situations where more people involved/present/lack of motivation.”

In the AR the social worker reported that:

- The appellant independently manages all aspects of the six DLA of *personal self-care*, *basic housekeeping* (“back pain has some impact”), *daily shopping* (“although appellant is physically + intellectually capable of managing shopping, anxiety severely limits her abilities”), *management of personal finances* (“She does all her banking on line as anxiety limits her ability for social connection”), *management of personal medications* (“She is not on anything but could manage”), and *use of transportation*.
- With respect to the DLA of *meal preparation*, the appellant independently manages the task of safe storage of food, but requires continuous assistance with meal planning, food preparation, and cooking, commenting “does not have motivation or desire. Relies on roommates.”
- Regarding the DLA of *social functioning*, the social worker wrote that the appellant independently manages the task of making appropriate social decisions, but that she needs continuous support/supervision to develop/maintain relationships, interact appropriately with others, deal appropriately with unexpected demands, and secure assistance from others. She reported that the appellant has very disrupted functioning regarding her immediate social network, and marginal functioning regarding her extended social network.

In her letter of September 24, 2014 the social worker wrote that:

- High anxiety does not only limit the appellant’s ability to work and participate in normal activities, but it also limits her ability to quickly engage in counselling.
- Her anxiety and BPD traits are always restricting and limiting her ability to function and it is more than periodic.

In her reconsideration submission the appellant wrote that:

- She can’t go anywhere without a close friend or relative being with her.
- She is depressed at times and sometimes can’t get motivated to take a shower for days.
- Her BPD causes her to have a very hard time getting along with people who are in her life.

Help

- In the PR the physician reported that the appellant does not have any prostheses or aids for her impairment, but commented “She would benefit from financial assistance – for ongoing physiotherapy, getting a knee brace, assessment for custom made orthotics.”
- In the AR the social worker indicated that the appellant does not routinely use an assistive device, and that she does not have an assistance animal. She commented “Roommates

provide all the grocery shopping + cooking.”

- In her self-report the appellant wrote that if anything needs to be done that involves being around people she will have someone do it for her if she can, though she doesn't have many friends because she doesn't get out much to meet new people.
- In her reconsideration submission the appellant wrote that she needs constant support and help from her roommates and people in her life with managing day to day struggles. She also will need the help of counsellors and therapy.

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 that in the opinion of a medical practitioner is likely to last for at least two years;
- 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 as a result of those restrictions the appellant does not require help to perform DLA.

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.

Duration

The appellant's position is that she satisfies the duration requirement. She argued that her social anxiety has been life-long, and that she has been diagnosed with BPD traits and may yet be diagnosed with the disorder rather than traits. She relied on her social worker's letter of September 24, 2014 to argue that BPD has a target treatment time of a minimum of two years.

The ministry's position, as set out in its reconsideration decision, is that the physician has not indicated that the appellant's impairment is likely to continue for two years or more.

Panel Decision

Section 2 of the EAPWDA requires that a medical practitioner provide an opinion that an applicant's impairment is likely to continue for at least two years. The appellant's physician was equivocal with respect to duration of both the mental and physical impairments, and did not provide a direct response when offered the opportunity in the PR form. She indicated that she expected both types of impairment would benefit from treatment, but also indicated that the appellant has not followed up with physiotherapy and has so far decided not to accept the physician's recommendation of antidepressant/antianxiety medication.

The social worker referred to a psychiatric assessment of possible BPD, and then expressed her view that such a diagnosis indicates a minimum treatment time of two years. The panel notes that we have not been provided with the psychiatric assessment, and that there is no evidence that the social worker is a medical practitioner. Accordingly, the panel can give little weight to the social worker's evidence on duration. In the panel's view, the ministry reasonably concluded that the evidence does not show that it is a medical practitioner's opinion that the appellant's impairment is likely to last for at least two years.

Severe Physical Impairment

The appellant did not expressly advance an argument with respect to having a severe physical impairment, though she did argue that she has knee pain that comes and goes and that her back pain can be very bad.

The ministry's position is that the information provided is not evidence of a severe physical impairment. It argues that the physician reported no limitation to the appellant's physical functioning, and that the only limitation reported by the social worker is that the appellant needs periodic assistance with carrying/holding.

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. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the physician and the social worker.

The physician indicated virtually no limitations to the appellant's physical functional skills, but indicated that the appellant might benefit from financial assistance for physiotherapy, a knee brace, and assessment for custom made orthotics. The physician also offered her opinion that the appellant's MSK (musculoskeletal) diagnoses are not significant enough to prevent her from finding employment in the future. In the panel's view finding and maintaining employment generally requires a higher level of functioning than performing DLA. The only physical limitations noted by the social worker are that the appellant periodically needs help with carrying/holding, that she "at times" is limited with mobility even though she manages independently, and that back pain has "some impact" on her ability to manage basic housekeeping. The appellant wrote that she has knee pain that comes and goes, and back pain that can get "very bad", but there is no evidence that her activities are significantly restricted by her physical health.

The panel finds that the ministry reasonably concluded that the evidence does not demonstrate that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant's position is that she suffers from a life-long social anxiety disorder and possible BPD. She argued that these conditions cause her severe distress and significantly restrict her ability to function. She argued that the panel should give more weight to the social worker's evidence since the appellant had not shared as much information with her physician, and the physician completed the PR with minimal input from the appellant.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry argued that the evidence of both prescribed professionals indicated that the appellant does not have any significant difficulties with communication. The ministry also argues that the social worker identified a major impact to only one area cognitive and emotional functioning (emotion), and that all the remaining categories showed only moderate, minimal or no impact.

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 social worker's evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that she independently manages the decision making aspects of *daily shopping* (making appropriate choices), *manage personal medication* (filling/refilling/taking as directed), *manage personal finances* (banking, budgeting) and *social functioning* (appropriate social decisions). Both the physician and the social worker confirmed that the appellant is making her own decisions

with respect to whether to take antianxiety/antidepressant medication, with the social worker describing the appellant as being “pre-contemplative” regarding treatment.

With respect to the DLA of *social functioning*, the physician indicated that the appellant does experience periodic restrictions, but stated that she had observed no anxiety on a one-to-one basis. The evidence of the social worker and the appellant indicates that the appellant feels most anxious in group settings. The panel notes that while the social worker has indicated that the appellant requires continuous support and supervision with respect to most aspects of *social functioning*, and that she has “very disrupted functioning” with respect to her immediate social network, the appellant has indicated that whenever she goes out she does so in the company of a “close friend” or a relative, and that she relies heavily on her roommates for meal preparation because of a lack of motivation, and for grocery shopping. This indicates to the panel that the appellant is able to secure assistance from others when required, and that she does have a circle of supportive friends and relatives. The social worker’s evidence with respect to the appellant’s extended social network indicates that the appellant manages to fulfill her basic needs in this area.

With respect to the impacts to cognitive and emotional functioning, the social worker in the AR indicated that while the appellant does experience a major impact in terms of emotion, any other impacts are moderate to minimal.

Considering the evidence as a whole, including evidence that the appellant’s communication skills are good in virtually all respects, and that the appellant is still in the process of being assessed for BPD, 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 social anxiety and BPD traits significantly limit her ability to perform DLA, particularly those that require interaction with others. She argued that these factors, along with her knee and back pain, together significantly limit her ability to perform DLA.

The ministry’s position is that since the appellant manages virtually all DLA independently, except for *meal preparation* and some aspects of *social functioning*, she is not significantly restricted in her ability to manage DLA continuously or periodically for extended periods. The ministry argued that the professional evidence does not provide information to explain the type, degree and the duration of the support/supervision the appellant requires managing *social functioning*.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant’s physician and social worker. This doesn’t mean that other evidence shouldn’t be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional’s opinion is fundamental to the ministry’s determination as to whether it is “satisfied”.

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.

In the appellant's case, the evidence of the two professionals is consistent that the appellant independently manages virtually all tasks related to almost all DLA. Both professionals are consistent in finding that the appellant is restricted in aspects of *social functioning*. The social worker has also reported that the appellant requires continuous assistance with most aspects of *meal preparation* due to lack of motivation, and that she relies on her roommates for this function.

The panel notes that there is conflicting evidence with respect to the time or duration of the restrictions to the appellant's ability to perform DLA. The physician noted that the appellant requires periodic assistance with *social functioning*, since she appears to function well one-on-one. In the social worker's view, the appellant is continuously restricted by her impairments.

The evidence indicates to the panel that the appellant manages most aspects of DLA independently, that she is still in the process of being assessed for BPD, and that there is a prospect of improved functioning with treatment. Considering the evidence as a whole, the panel finds that the ministry reasonably determined that the evidence is insufficient to show on the balance of probabilities that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires constant help with DLA from roommates and relatives due to the restrictions she experiences.

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

A finding 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.