

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated November 13, 2014 which found that the appellant did not meet two of the five 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 a severe physical impairment that, in the opinion of a medical practitioner, 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 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

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the undated applicant information and self-report, a physician report (PR) and an assessor report (AR) both dated June 30, 2014 and completed by a general practitioner who had known the appellant for 1 ½ years.

The evidence also included the following:

- 1) Consultation Report from a hospital dated September 14, 2009;
- 2) Oculo-Visual Examination Summary dated September 8, 2013;
- 3) Radiology Report dated September 16, 2013;
- 4) Bone Density Report dated January 7, 2014;
- 5) Summary Report from a health clinic dated January 10, 2014;
- 6) Letter dated February 14, 2014 from the appellant's general practitioner;
- 7) Radiology Report dated June 30, 2014; and,
- 8) Request for Reconsideration dated October 30, 2014.

Diagnoses

In the PR, the appellant was diagnosed by the general practitioner with knee pain, osteoporosis, gastric acid reflux, visual disturbance due to cataracts, and anxiety disorder.

Mental Impairment

In the PR, the appellant's general practitioner reported that:

- The appellant does not have difficulties with communication and the general practitioner wrote that she speaks and understands well a language other than English, which she uses to communicate.
- The appellant has a significant deficit in her cognitive and emotional functioning in the areas of emotional disturbance. The general practitioner wrote: "she has episodes of anxiety attack, and she takes sedation for insomnia off and on."

In the AR, the general practitioner indicated that:

- The appellant is unable to communicate in any area, namely: speaking, reading, writing and hearing. The general practitioner wrote that the appellant does not speak and understand English and she is a non-English speaking immigrant. She speaks and understands only a language other than English and she is able to communicate with people well with this dialogue.
- There is a major impact in 1 of 14 listed areas of cognitive and emotional functioning, namely with language. There is a moderate impact in the area of bodily functions, including sleep disturbance. There are minimal impacts to emotion, attention/concentration and memory and no impacts in the remaining areas of functioning. The general practitioner wrote that the appellant "is a non-English speaking immigrant. She does not speak or understand English, so there is a difficulty for her to communicate with other people. Episodes of anxiety attack. Insomnia and takes sedation off and on."

In her self-report, the appellant wrote that:

- She suffers from frequent anxiety, depression and insomnia that she has to take sedation every night for sleep.
- Frequent anxiety attacks, depression, insomnia and stomach upset, in addition to the

continuous unemployment has made her anti-social, introverted and self-abased. She does not have the motivation to improve her life quality and she always feels anxious and helpless.

In her Request for Reconsideration, the appellant wrote that:

- She has to take sedation for insomnia on and off because of episodes of anxiety attack.
- She can only communicate in a language other than English.

In the Consultation Report from a hospital dated September 14, 2009, the physician wrote that:

- The appellant was seen in emergency for psychiatric assessment. She took an overdose of pain medication. Upon admission she was considered medically cleared as the pain medication level was not too excessive.
- The overdose and depression seem to be in relation to recent events. Because she was still quite upset and would probably resort to an impulsive act if she is home before she has settled, she is deemed involuntary and put on a waiting list for admission.

Daily Living Activities (DLA)

In the PR, the general practitioner indicated that:

- The appellant has been prescribed medications and/or treatments that interfere with her DLA. The general practitioner wrote that the appellant was given anti-inflammatory drugs which make her stomach upset. The medication helps her to alleviate the knee pain temporarily. She could not tolerate these medications.
- The appellant requires an aid for her impairment as she “wears the knee braces to give the support.”
- The appellant cannot walk at all unaided on a flat surface.

In the AR, the general practitioner reported that:

- The appellant uses an assistive device for walking indoors as she holds on to furniture to assist and with walking outdoors as she uses an umbrella to assist.
- The appellant is independently able to perform every task of the personal care DLA, namely: dressing, grooming, bathing, toileting, feeding self and regulating diet, and transferring in/out of bed and on/off of a chair.
- The appellant is independent with doing her laundry and basic housekeeping, with a note by the general practitioner that she is not able to wash her toilet and she is not able to do vacuuming.
- For shopping, the appellant is independently able to read prices and labels (note: “able to read the price only”), make appropriate choices and pay for purchases while requiring continuous assistance from another person for going to and from stores (note: “her niece takes her to shopping”) and for carrying purchases home (note: “her niece helps her to carry the grocery home”).
- Regarding the DLA of preparing her own meals, the appellant is independent in performing all of the tasks, namely: meal planning, food preparation, cooking and safe storage of food.
- For managing her personal finances, the appellant is independent with budgeting and paying her rent and bills and requires continuous assistance from another person with banking, with a comment by the general practitioner that she requires her niece to take her to the bank.
- The appellant independently manages all tasks of her personal medications, namely: filling/refilling prescriptions, taking as directed, and safe handling and storage.
- For use of transportation, the appellant is independent with getting in and out of a vehicle and

she never uses the public transit so it is unknown if she can use public transit or use the transit schedules and arrange transportation.

- The appellant is also independent in all 5 aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.

In her self-report, the appellant wrote that:

- Her knee pain has a serious impact on her daily life.
- She requires her niece to carry groceries.
- She cannot vacuum her house and clean the washroom.
- She cannot read, listen and write English at all.
- She requires her niece to manage documents from the bank and the government.

In her Request for Reconsideration, the appellant wrote that:

- It is almost impossible for her to find a job because of both the physical and language barriers.
- She really needs the financial support for her living expenses and her medication fees.

Need for Help

In the PR, when asked whether the appellant requires an aid for her impairment, the general practitioner indicated 'yes' and wrote: "wears the knee braces to give the support."

The general practitioner reported in the AR that the appellant lives with her adult son and the assistance required for DLA is provided by family, with a comment that "her niece helps her to shopping or going to bank." The appellant routinely uses an umbrella as an assistive device, with a note that "she uses the umbrella to assist her walking. She feels awkward to use a cane." The general practitioner noted: "it is better to use a cane to assist her walking whenever she needs."

In her Notice of Appeal dated November 20, 2014, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that, after reviewing the reconsideration decision, she believes that more information about her mental status should be indicated in her medical reports.

At the hearing, the advocate, who is the appellant's niece, stated:

- Although the appellant is not wheelchair bound, she relies on her cane and also a brace on her right knee. Without her cane and brace, it is impossible for her to do prolonged walking or standing or sitting for long.
- The appellant cannot speak English and she has been told many times to seek employment but the language barrier poses too many difficulties.
- The appellant is also suffering from depression and cannot sleep for prolonged periods and relies on sleep medication.
- Due to these physical and mental problems, she is not capable of seeking employment. She is incapable of working outside the home.
- The appellant has slow responses to the environment around her. Even communicating in her native language can be a challenge for her. This affects her ability to perform her DLA.
- The appellant suffers constant pain in her right knee and although acupuncture treatments have been recommended as an alternative, these treatments require funds that she does not have.

- For shopping, the appellant requires her niece to accompany her because she cannot lift or carry groceries.
- The appellant cannot handle heavy housework such as vacuuming.
- The appellant receives help through the use of her cane and knee brace. The appellant also requires help with documents, like bank statements.
- The appellant's niece cannot help her for the long term as her niece is seeking full-time employment.
- The Request for Reconsideration was completed by her niece, in her handwriting, and signed by the appellant.

At the hearing, the appellant stated:

- When the PR and the AR were completed, the general practitioner interviewed her in her native language and completed the reports. No one else participated in the interview.
- She uses braces on both knees all the time. The left knee has the more severe pain.
- She "burns her pots a lot" because of her poor memory.

Admissibility of New Information

The ministry did not raise an objection to the admissibility of the oral testimony on behalf of the appellant. The appellant's testimony regarding her mental and physical impairments and how they impact her ability to function is consistent with and tends to corroborate the information that the ministry had at reconsideration. Therefore, the panel has admitted this additional information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision, as summarized at the hearing. At the hearing, the ministry clarified that the ability to work and/or look for work is not one of the criteria for PWD designation.

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 PWD designation, 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 does not have a severe mental impairment and that her DLA 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, it could not be determined that 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.

At reconsideration, the ministry was satisfied that the information provided is sufficient evidence of a severe physical impairment, but was not satisfied that the information provided is evidence of a severe mental impairment.

Severe Mental Impairment

The appellant's position is that a severe mental impairment is established by the evidence of the impacts from her diagnosed anxiety disorder. At the hearing, the advocate argued that the definition of disability is too narrow and stringent and that the appellant's situation satisfies the criteria. In her Request for Reconsideration, the appellant wrote that she has to take sedation for insomnia on and off because of episodes of anxiety attacks. The appellant argued that she can only communicate in a language other than English.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry argued that while the general practitioner reported that the appellant has a significant deficit in her cognitive and emotional functioning in the area of emotional disturbance, the general practitioner commented that this relates to episodes of anxiety attacks with no further information regarding the frequency or duration of the anxiety attacks. The ministry argued that the general practitioner assessed a major impact to daily functioning in the area of language; however, this is because the appellant is a "non-English speaking immigrant" and is not as a result of a mental impairment or a brain injury.

Panel Decision

In the PR, the general practitioner diagnosed the appellant with anxiety disorder and reported that the appellant has a significant deficit in her cognitive and emotional functioning in the areas of emotional disturbance. The general practitioner wrote: "she has episodes of anxiety attack, and she takes sedation for insomnia off and on." In her self-report, the appellant wrote that she suffers from frequent anxiety, depression and insomnia that she has to take sedation every night for sleep. The panel finds that the evidence of the frequency of the appellant's anxiety attacks is not consistent as the appellant wrote in her Request for Reconsideration, that she has to take sedation for insomnia "on and off" because of episodes of anxiety attack. The Consultation Report from a hospital indicated that the appellant was seen in emergency for psychiatric assessment over 5 years ago and there was no other information of more recent hospitalization due to a mental health condition. In her self-report, the appellant wrote that her anxiety, in addition to the continuous unemployment, has made her anti-social, introverted and self-abased. She does not have the motivation to improve her life quality and she always feels anxious and helpless.

In the AR, the general practitioner reported that there is a major impact in 1 of 14 listed areas of cognitive and emotional functioning in the area of language. The general practitioner wrote that the appellant "is a non-English speaking immigrant," she does not speak or understand English and she

has difficulty communicating with other people. At the hearing, the advocate stated that the appellant has slow responses to the environment around her and even communicating in her native language can be a challenge for her. In the PR, however, the general practitioner reported that the appellant does not have difficulties with communication and she speaks and understands well a language other than English, which she uses to communicate. The panel finds that the ministry reasonably determined that the impact to language is linked to a language barrier rather than to a deficit in the appellant's cognitive or emotional functioning. The general practitioner indicated that there is a moderate impact in the area of bodily functions, including sleep disturbance, and wrote that the appellant has "episodes of anxiety attack; insomnia and takes sedation off and on."

With respect to the 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 in either. With respect to decision making, the general practitioner reported in the AR that the appellant independently manages her finances (budgeting and paying rent and bills) and her medications (taking as directed and safe handling). She is also reported as independent in the decision-making components of the DLA of daily shopping (making appropriate choices), meal preparation (meal planning and food storage), and with making appropriate social decisions as part of her social functioning.

Regarding the DLA of social functioning, the appellant is assessed by the general practitioner as independent in developing and maintaining relationships, interacting appropriately with others, and securing assistance from others. The appellant is also assessed with a good ability to communicate in her native language, as discussed above. Given the absence of reported impacts to the appellant's mental or social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that her severe physical and mental impairments directly and significantly restrict her ability to perform DLA on an ongoing basis to the extent that she requires the significant assistance of another person, namely her niece, and also the use of a cane and knee braces as assistive devices. The advocate argued that the doctor does not live with the appellant and cannot have 100% understanding of her situation.

The ministry's position is that the information from the prescribed professional does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry argued that the general practitioner reported that a majority of the appellant's DLA are performed independently or require little help from others.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the general practitioner is the prescribed professional. 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 appellant's circumstances, the general practitioner reported in the PR that the appellant has been prescribed medications that interfere with her DLA. The general practitioner wrote that the appellant was given anti-inflammatory drugs which make her stomach upset. The medication helps her to alleviate the knee pain temporarily but she could not tolerate these medications.

In the AR, the general practitioner assessed the appellant as using an assistive device for walking indoors as she holds on to furniture to assist and as using an assistive device for walking outdoors as she uses an umbrella to assist. At the hearing, the appellant's niece stated that the appellant relies on her cane and also a brace on her right knee and, without these assistive devices, it is impossible for the appellant to do prolonged walking or standing. At the hearing, the appellant clarified that she uses braces on both knees all the time. In the PR, the general practitioner reported that the appellant cannot walk at all unaided on a flat surface. He indicated that the appellant requires an aid for her impairment and that she wears knee brace for support.

In the AR, the general practitioner indicated that the appellant is independently able to perform every task of the DLA personal care, basic housekeeping, preparing meals, and managing personal medications. For shopping, the appellant requires continuous assistance from another person for going to and from stores (note: "her niece takes her to shopping") and for carrying purchases home (note: "her niece helps her to carry the grocery home"). At the hearing, the appellant's niece stated that the appellant requires assistance because she cannot do lifting or carrying of groceries. For managing her personal finances, the appellant is independent with budgeting and paying her rent and bills and requires continuous assistance from another person with banking, with a comment by the general practitioner that she requires her niece to take her to the bank. In her self-report, the appellant wrote that she requires her niece to manage documents from the bank and the government. For use of transportation, the appellant is independent with getting in and out of a vehicle and she never uses public transit so it is unknown if she can use public transit or use the transit schedules and arrange transportation.

In her Request for Reconsideration, the appellant wrote that it is almost impossible for her to find a job because of both the physical and language barriers. At the hearing, the appellant's niece stated that due to the appellant's physical and mental problems, she is not capable of seeking employment and she is incapable of working outside the home. The panel notes that one's ability to participate in paid employment is not a statutory criterion for designation as a PWD in Section 2(2) of the EAPWDA, nor is it listed in the definition of "daily living activities" in Section 2(1) of the EAPWDR. Rather, the focus of the legislation is whether a severe impairment significantly restricts a person from managing her DLA independently.

The panel finds that the evidence demonstrates that the appellant experiences restrictions with her mobility and in those tasks of the shopping and managing personal finances DLA that relate to lifting or proficiency with the English language. However, the prescribed professional reported the appellant is independent with most other DLA, including those tasks that require lifting such as housekeeping/laundry and food preparation/cooking, and, given the absence of impacts reported to the appellant's mental or social functioning, as discussed under "*severe mental impairment*," the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the significant assistance of another person and the use of assistive devices to perform DLA.

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 from other persons.

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. Help is defined in subsection (3) as 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 general practitioner reported in the AR that the assistance required for DLA is provided by family, with a comment that "her niece helps her to shopping or going to bank." In the PR, the general practitioner indicated that the appellant requires an aid for her impairment and that she "wears the knee braces to give the support." The general practitioner reported in the AR that the appellant routinely uses an umbrella as an assistive device, with a note that "she uses the umbrella to assist her walking. She feels awkward to use a cane." The general practitioner noted: "it is better to use a cane to assist her walking whenever she needs" and, at the hearing, the appellant and her niece stated that the appellant now uses a cane and braces on both knees. 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 decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.