

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 11 September 2014 determined that the appellant did not meet 3 of the 5 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 her impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant had a severe mental or physical impairment and that the appellant's mental or physical conditions, in the opinion of a prescribed professional, directly and significantly restricted her daily living activities (DLA) either continuously or periodically for extended periods. The ministry was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help 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 appellant was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under s. 86(b) of the Employment and Assistance Regulation (EAR).

The following evidence was before the ministry at the time of reconsideration:

- A 3 page PWD Application – Applicant Information dated 5 June 2014 and signed by the appellant before a witness and indicating that the appellant chose not to complete the self-report.
- A 8 page Physician Report (PR) dated 8 June 2014 completed and signed by the appellant's physician indicated the following:
 - Specific diagnosis: Depression, social phobia and anxiety disorder.
 - Health history: Long history of depression, social phobia and panic attacks that has worsened in the past few years. It impacts on her school attendance, social life etc. She seldom leaves the house and she is prone to frequent panic attacks. She has been seen by a number of therapists over the years, with limited success. Currently on high dose antidepressants, which have helped, but still leave her with significant disability.
 - No prescribed medication or treatment interferes with the appellant's ability to perform DLA but the anticipated duration of "medications / treatments" is indicated as "Indefinite".
 - In terms of functional skills the appellant does not have any limitation identified other than not being able to lift more than 7 kg and not being able to remain seated for more than 2 hours.
 - In terms of significant deficits with cognitive and emotional functions, the physician identifies 5 areas: Executive, emotional disturbance, motivation, motor activity and attention or sustained concentration but does not provide any comment.
 - Even though the physician completed the Assessor Report, which exempted him from completing the DLA portion of the PR, he nonetheless completed the section on DLA and at the question whether the appellant's impairment directly restricted her ability to perform DLA, he indicated "Unknown".
 - No DLA was indicated to be continuously restricted other than "Use of transportation" and "Social functioning".
 - At the question "If periodic, please explain", he wrote: "Cannot use public transit. Cannot interact in situations with more than a couple of people, especially if they are not well known to her."
 - For the type of assistance required, he indicated she needed help of family.
 - He indicated that the appellant had been his patient for 2 years and that he has seen her 2 to 10 times within the past 12 months.
- An 11 page Assessor Report (AR) also dated 8 June 2014, completed and signed by the same physician as the PR, indicating the following:
 - The appellant lives with family, friends or caregiver.
 - Social phobia and panic disorder are impairments that impact her ability to manage DLA.
 - The appellant's ability to communicate by speaking, reading, writing and hearing is good.
 - In terms of mobility and physical ability she is independent with all activities.
 - In terms of cognitive and emotional functioning when there is an identified mental impairment or brain injury, her mental impairment restricts or impacts her daily functioning as a major impact for emotion, moderate impact for attention/concentration and executive and minimal impact for impulse control, insight and judgment, motivation, motor activity and

“other emotional or mental problems”. There is no impact for the other areas. While the assessor is asked to explain if the impact is episodic or varies over time, he made no comment in that respect.

- In terms of DLA, she is independent except for the following activities:
 - She needs continuous assistance from another person or is unable to go to and from stores, to use public transit and for using transit schedules and arranging transportation (with a comment that she is afraid to be on a bus by herself) and with her ability to deal appropriately with unexpected demands.
 - She needs periodic assistance from another person to make appropriate choices, for appropriate social decisions, with her ability to develop and maintain relationships, interact appropriately with others and to secure assistance from others.
 - The assessor did not provide any comment or information as to the degree and duration of support / supervision required.
- Her mental impairment was described as impacting her relationships with her immediate and extended social networks as “marginal functioning”.
- For the question “if the appellant requires help, as indicated above [on the same page], please describe the support / supervision required which would help to maintain her in the community”, the assessor answered “No”.
- He indicated the appellant’s family provides the help required for DLA.
- The appellant did not have an assistance animal.
- The sole source of information used by the assessor to complete the AR was “office interview” with her.
- The assessor did not indicate how long he has known the appellant but it was not a first contact and in the past year, he had seen her 2 to 10 times and wrote “regular doctor-patient meeting”.
- In her Request for Reconsideration dated 20 August 2014 and signed by the appellant, she indicated that her anxiety, depression and social anxiety impair her ability to live a normal life as she is incapable of leaving her home, attending appointments or travelling without a family member or friend. She’s incapable of assuming on her own a number of adult responsibilities like daily shopping, doctor’s appointments, bank appointments, achieving and maintaining employment and many other typical DLA. She started taking medication at an early age and is still trying to find a medication that could work. She did not see her condition improving in the foreseeable future and felt being on disability would help her to be able to live a more normal and stable life.
- Along with the request, there is a letter from the appellant’s mother dated and signed on 20 August 2014 stating that she has seen the impact of her daughter’s medical condition and it is heartbreaking for her not being able to cure her. She finds that since her daughter’s condition is not a physical illness, the questions asked on the forms were more appropriate for a physical condition as opposed to a mental illness and she seeks direction from the ministry as to what exactly would prove that the appellant suffers from a mental impairment.

In her Notice of Appeal dated 23 September 2014, the appellant stated that she disagrees with criterion 3 because the information provided by her physician confirms mental impairment, as she cannot leave home by herself. As for the 4th criterion, she stated that she cannot work, bank, shop or attend appointments freely due to social phobia and anxiety. Finally for the 5th criterion, she stated that assistance is needed with activities outside her home.

Prior to the hearing, the appellant provided a letter from her physician dated 27 October 2014 stating that he filled the initial forms and wanted to elaborate on her condition. He indicated that the appellant had "a long history of depression, social phobia and panic disorder. She was unable to finish high school because of the difficulty she had being in a classroom. She is currently under treatment and has made some progress, and I do believe that things will improve substantially over the next few years with the current treatment. She is looking into finishing her high school diploma with online courses from home. Once she has a high school diploma, I do believe that she will go on to further education, if the right environment is in place." In terms of impairment, he wrote: "I do believe that she has a severe mental impairment which restricts her daily activities and limits her interaction with other people. She is unable to take transit and relies on her family for transportation to appointments and for shopping. She had numerous panic attacks when outside of the house. These are quite terrifying and involve sweating, shakes and nausea." He completed the letter by stating "It is likely that her PWD status will be temporary, likely for a couple of years, until she has completed further education. With medical treatment and possible cognitive behavioral therapy, I do feel that the prognosis is good. Currently however she does require support from her family and healthcare providers."

The ministry did not object to the admissibility of this new evidence and the panel determined the additional documentary evidence was admissible under s. 22(4) of the Employment and Assistance Act as it was in support of the records before the minister at reconsideration and provided more information about the medical condition of the appellant, consistent with the physician's previous information.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical and/or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR, which are set out below.

Section 2 of the EAPWDA states:

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;

"health professional" repealed

"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 of the EAPWDR provides further clarification:

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.

The ministry acknowledges that the appellant meets 2 of the conditions for PWD designation in that she is at least 18 years of age and her impairment is likely to continue for 2 years or more. However, the ministry argues that she does not meet the other 3 criteria.

Severe physical impairment:

The ministry argued that the evidence was insufficient to demonstrate a severe physical impairment since the only evidence offered was some limitation in lifting (2-7 kg) and remaining seated (1-2 hours).

The appellant did not argue that she had a severe physical impairment.

The panel finds there is little if any evidence supporting a physical impairment since the diagnosis from the physician is restricted to mental disorders and that the ministry reasonably determined there was not enough evidence to demonstrate the appellant suffered from a severe physical impairment.

Severe mental impairment:

The ministry argued that while there was evidence that the appellant suffered from a mental impairment, there was not enough evidence to determine that it was a severe mental impairment. The ministry based its argument on the PR and the AR that show the appellant can independently manage the majority of her DLA, some with periodic assistance, as well as managing the majority of her social functioning with periodic support or supervision. At the hearing, the ministry also suggested that a PWD designation could not address or even alleviate any of the restrictions mentioned in the

reports.

The appellant argued that her condition amounted to a severe mental impairment because she could not do any outside activities, being prone to panic attacks and social anxiety. She needs family members to go out with her wherever she goes and she cannot use public transit. She argued she could not perform many normal adult responsibilities, including achieving and maintaining employment. She finally argued that her physician determined she had a severe mental impairment that restricted her DLA.

The panel notes that the legislation determines it is for the minister to be satisfied that the appellant has a severe mental impairment (s. 2(2) of the EAPWDA) and that the opinion of a medical practitioner or a prescribed professional is not solely determinative of the issue. The panel notes that the evidence provided by the physician is often inconsistent. For instance, there are limitations as indicated above in terms of lifting and remaining seated in the PR but she is still independent in respect of mobility and physical ability in the AR. In the PR, there are many areas where the physician checked significant deficits with cognitive and emotional functions but there are no explanation, no comments, as to what they were. While he did not have to, he did complete the DLA questionnaire in the PR and indicated "Unknown" to the question "Does the impairment directly restrict the person's ability to perform DLA?" Yet, he does mention 2 DLA that are impacted: Use of transportation and Social functioning and that those restrictions are "continuous"; but then at the question "If 'periodic', please explain, he does provide the explanation that the appellant cannot use public transit or interact in situations where there are a couple of persons unknown to her.

Yet, in the AR, the same physician indicated only 1 area where there is a major impact (emotions) and only 2 where there is a moderate impact (attention/concentration and executive) while all the other areas of cognitive and emotional functioning are assessed as no or minimal impact and, where there is a major or moderate impact, he did not provide any information or comments as to what they were. In terms of social functioning, the physician reported either periodic support/supervision (4 areas) or continuous support/supervision (able to deal appropriately with unexpected demands) but did not offer any explanation or description of the degree and duration of support/supervision required. Yet, down on the same page, at the question "If the applicant requires help, as indicated above, please describe the support/supervision required which would help to maintain her in the community", he wrote "No". The physician did not offer any more detailed evidence in his letter of 27 October 2014, only giving his opinion that the appellant "has a severe mental impairment which restricts her daily activities and limits her interaction with other people". Conversely, the physician added "it is likely that her PWD status will be temporary, likely for a couple of years, until she has completed further education... I do feel the prognosis is good." This seems to suggest that the lack of education might be a factor restricting her functioning.

Given those circumstances, the panel finds there is little evidence supporting a severe mental impairment and significant impact on her DLA, in particular there is little information as to how her DLA are being impacted, and therefore finds that the ministry reasonably determined it was not satisfied the appellant had a severe mental impairment.

Daily Living Activities (DLA):

The ministry argued that there is not enough evidence by the prescribed professional (the appellant's physician) that her DLA are directly and significantly impacted for lack of information and inconsistencies. For instance, while it acknowledged that she required assistance with using public transit, the physician indicates the appellant got rides from her family and further there is no evidence why she needed continuous assistance using transit schedules and arranging transportation.

The appellant argued that many of her DLA were impacted by her mental impairment and provided some examples that are generally consistent with what the physician indicated in both PR and AR.

The panel notes that many of the restrictions the appellant faced (shopping, going to appointments, to the bank etc.) were because she needed transportation. The panel accepts that the appellant cannot use public transit but there is no evidence as to whether she needs to use public transit and why it impacts on her DLA. There is no indication as to what her transportation needs are, whether she could drive a car or use a bicycle or walk to her destination. Once there, the only restriction mentioned by the physician is in terms of "making appropriate choices" where it states that she needs "periodic assistance" but there is no explanation as to why or what is meant by "periodic"; yet, her abilities in terms of reading and hearing are good according to the physician and he indicated "no impact" on "language" that includes comprehension problems, inability to understand. Perhaps the physician included that in "executive" where he assessed a moderate impact but he did not provide any explanation and the panel cannot speculate.

As mentioned above, in terms of social functioning, there were significant inconsistencies in that one page of the AR and there is no indication as to what periodic support/supervision is required, what is the extent of the support/supervision required, what are the challenges she faces when such support/supervision is required. There is no indication as to what the physician meant when he stated that she needs continuous support/supervision in respect of her ability to deal appropriately with unexpected demands or how often she is faced with unexpected demands. In his letter of 27 October, the physician did not clarify any of those questions, rather stating that she had numerous panic attacks when outside the house – is that why she needs assistance/supervision or is it for transportation or both? Again, the panel cannot speculate.

Given a number of inconsistencies and many unanswered questions as to the impact of her medical condition on her DLA, the panel finds the ministry reasonably determined there was not enough evidence to establish that the appellant's impairment directly and significantly restricted her DLA continuously or periodically for extended periods as most DLA are managed independently and, in terms of social functioning, only periodic support of unknown duration and frequency is required for all but one area.

As a result of those restrictions, help required to perform DLA:

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons and that no assistive devices are required nor an assistance animal.

The appellant argued that she needed help to perform some of her DLA as mentioned above and that she could not perform some of them if she did not have that assistance.

From the evidence presented, it is not clear what help is required by the appellant to perform her DLA or to what extent it is required. Thus, the panel finds the ministry reasonably determined the appellant did not meet the legislative test of the need for help arising from significant restrictions to perform DLA either continuously or periodically for extended periods.

Conclusion:

The panel comes to the conclusion that the ministry reasonably determined the appellant does not have a severe physical or mental impairment and that the prescribed professional did not establish that an impairment directly and significantly restricted her ability to perform DLA either continuously or periodically for extended periods and that, as a result of those restrictions she required help to perform those activities under s. 2(2) of the EAPWDA. Consequently, the panel finds the ministry's decision was reasonably supported by the evidence and confirms the decision.