

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 31, 2014, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

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

PART E – Summary of Facts

The appellant did not attend the appeal hearing. Having confirmed that the appellant was notified, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

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 form (which the appellant opted to leave blank) dated July 10, 2014 along with a physician's report ("PR") completed by the appellant's psychiatrist (the "psychiatrist") dated June 9, 2014 and assessor's report ("AR") completed by the appellant's family doctor (the "physician"), dated June 26, 2014.
- The appellant's Request for Reconsideration form, dated October 23, 2014, with a brief handwritten reconsideration submission.

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The panel reviewed the evidence as follows:

Diagnoses

In the PR the psychiatrist (who has known the appellant since August 2012 and has seen her 2-10 times in the past 12 months) diagnosed the appellant with chronic depression (10 years history) and asthma. The psychiatrist commented that the appellant qualifies for a diagnosis of dysthymia. In the AR the physician described the appellant's impairment as "depressed mood – children having mental problems." The physician also commented that the appellant has asthma.

Physical Impairment

- In terms of physical functional skills, the psychiatrist reported in the PR that the appellant can walk for 4+ blocks unaided on a flat surface, climb 5+ stairs unaided, and that her ability to lift and to remain seated was unknown.
- In the AR the physician reported that the appellant independently manages walking indoors and outdoors, but that she requires periodic assistance with climbing stairs, standing, and lifting/carrying/holding due to "fatigue".
- In her reconsideration submission the appellant stated that she has severe problems including asthma, depression and pain.

Mental Impairment

In the PR the psychiatrist:

- Described the appellant's depression as being "moderate for 10 years."
- Commented that the appellant has been "feeling depressed for 10 years related to psychological stressors [and] relationships with men (abusive relationship) and teen age children" and that "She needs medications for years but key factors to help in future [are] modify life style and family therapy."
- Indicated that the appellant has no difficulties with communication other than a lack of fluency in English.

- Indicated that the appellant has significant deficits in two of twelve categories of cognitive and emotional functioning: emotional disturbance and motivation.
- Indicated that the appellant needs a combination of psychopharmacology and cognitive behavioural modification.

In the AR the physician (who has known the appellant for 10 years and has seen her 2 to 10 times in the last year) reported that:

- The appellant's ability to communicate is satisfactory to good in all respects.
- The appellant experiences minimal impacts in 9 of 14 categories of cognitive and emotional function, and no impact in the remaining categories.
- The appellant experiences stress related to her children.
- The appellant is unable to work currently.

DLA

In the PR the psychiatrist reported that:

- The appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA.
- The appellant is not directly restricted with the DLA of *personal self-care, meal preparation, basic housework, daily shopping*, or with the indoors aspect of *mobility indoors and outdoors*.
- The psychiatrist did not know if any of the remaining prescribed DLA are directly restricted.

In the AR the physician reported that the appellant:

- Independently manages all aspects of the DLA *manage personal finances* (pay rent and bills), and *mange personal medications*.
- Independently manages all tasks related to *daily shopping*, except that she requires periodic assistance carrying purchases home.
- Independently manages all tasks related to *personal self-care* except that she requires periodic assistance with regulating her diet (depressed) and with transfers on/off chair.
- Independently manages all tasks related to *meal preparation*, except that sometimes she is too tired to cook.
- With respect to the DLA *use of transportation*, the appellant independently uses public transit, but she periodically requires assistance getting in/out of a vehicle and using transit schedules or arranging transportation.
- The appellant requires periodic assistance with *daily housework* when she is tired.
- The appellant requires periodic or continuous assistance with all aspects of social functioning, and she exhibits marginal functioning with respect to both her immediate and extended social networks.

The appellant noted in her reconsideration submission that she lives with her son who needs her care, and that her daughter lives elsewhere. She stated that she cannot work and needs help for daily living.

Help

- In the PR the psychiatrist reported that the appellant does not require any prostheses or aids for her impairment, and that the appellant requires help with child care and housework.

- In the AR the physician noted no assistive devices that the appellant routinely uses for her impairment, and reported that the appellant does not have an assistance animal. The physician indicated that the appellant receives help with DLA from her family.

Neither party provided any additional information on appeal.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that 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.

Severe Physical Impairment

The appellant's position is that her asthma and pain constitute a severe physical impairment. She argued in her Notice of Appeal that things have changed medically and her condition has worsened. She stated that she is still unable to work due to her health and she needs to support her family.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to establish a severe physical impairment. The ministry argued that the psychiatrist did not indicate any limitations to physical functioning, and the physician did not provide any information about how often the appellant requires assistance with mobility and physical abilities.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's psychiatrist and physician.

In the appellant's case, the only physical impairment identified by the prescribed professionals is asthma. There is no evidence before the panel as to how asthma affects the appellant's physical functioning. The evidence of the psychiatrist and the physician is that the appellant independently manages her mobility, and there is no information as to how often the appellant requires assistance with other physical functions, the reason for the need for assistance, or the nature of the assistance required.

As discussed in more detail in these reasons for decision under the heading Significant Restrictions to DLA, the limitations to the appellant's physical functioning do not appear to have translated into significant restrictions to her ability to manage DLA.

For the foregoing reasons, and considering the evidence as a whole, the panel finds that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant's position is that her depression constitutes a severe mental impairment. She argued that her social functioning is significantly impacted and that the psychiatrist identified significant deficits in cognitive and emotional functioning in the areas of emotional disturbance and motivation. She argued that the physician's findings of marginal functioning with her immediate and extended social networks are indicative of a severe mental impairment.

The ministry's position is that there is not enough evidence to establish a severe mental impairment. The ministry argued that the professionals indicated that the appellant has satisfactory to good communication skills.

Panel Decision

The legislation makes it clear that the determination of severity is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In the appellant's case, the evidence in the PR and AR regarding the appellant's ability to function independently for the most part is consistent with the psychiatrist's view that the appellant's depression is moderate in severity.

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 physician'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 the DLA of *manage personal medication* (taking as directed/safe handling and storage), *manage personal finances* (banking, budgeting, pay rent and bills), *meal preparation* (meal planning), and *daily shopping* (making appropriate choices). The physician indicated that the appellant requires periodic support or supervision with making appropriate social decisions, but did not provide any information about how often the appellant requires assistance, the nature of the assistance, or who provides it.

With respect to *social functioning*, the physician reported that the appellant has marginal functioning with both her immediate and extended social networks. There is no evidence before the panel with respect to how often the appellant requires support or supervision.

Considering that:

- the evidence does not demonstrate that the appellant has significant difficulties with communication,
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*, and
- on balance the evidence of the psychiatrist and physician indicates that the appellant's cognitive and emotional functioning is not significantly impacted,

the panel concludes that the ministry reasonably determined that the information provided does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that her impairments significantly restrict her ability to perform DLA. She argued that the physician's evidence indicates that she is often too tired and depressed to perform DLA.

The ministry's position is that there is not enough evidence to confirm that the appellant's impairments significantly restrict her ability to perform DLA continuously or periodically for extended periods. The ministry argued that the appellant independently manages the majority of DLA and that no information was provided as to how often she requires assistance.

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 psychiatrist and physician. 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" that the person's impairment meets the criteria regarding restrictions to DLA.

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 indicates that the appellant manages the majority of tasks related to most DLA independently. Where the physician has indicated that the appellant requires periodic assistance with various tasks, no information has been provided to explain the frequency or duration of the restriction, or the nature of the assistance required.

Based on this analysis, and for the foregoing reasons, the panel finds that the ministry reasonably concluded that the evidence is insufficient to demonstrate that the appellant's DLA are significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires help with DLA 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. The ministry also argued that the appellant does not require assistive devices or the services of an assistance animal.

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

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.