

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 6, 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 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 dated May 20, 2014 along with a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated February 20, 2014 and assessor's report ("AR") completed by the physician, dated May 7, 2014.
- The appellant's Request for Reconsideration form, dated October 23, 2014, with attached two-page type-written submission prepared by the appellant's advocate.

* * *

The panel reviewed the evidence as follows:

Diagnoses

In the PR the physician (who has known the appellant for over 15 years and has seen her eleven or more times in the past year) provided diagnoses of rotator cuff tendonitis in the left shoulder, bursitis of the left hip, tendonitis of the extensor tendons in both forearms and congenital neuro hearing loss. He wrote that her "problems" have been very persistent and treatments have been unsuccessful, commenting "I think that they are now chronic." He noted that the appellant has had hearing problems since birth and described the condition as "severe". He wrote that her hearing "leads to communication problems" and "affects her ability to work." The physician also noted that a number of orthopaedic issues have accumulated so that the appellant is now "severely limited by them."

Physical Impairment

- In terms of physical functional skills, the physician reported in the PR that the appellant can walk for one to two blocks unaided on a flat surface, climb 2 to 5 stairs unaided, can lift under 5 pounds, and can remain seated for less than one hour.
- In the AR the physician reported that the appellant independently manages walking indoors, walking outdoors, climbing stairs, and standing, though she takes significantly longer than typical to do so and uses a cane 50% of the time. The physician indicated that the appellant requires periodic assistance with lifting, carrying and holding.
- In her self-report, as well as the medical conditions described by the physician, the appellant described her disabilities as including residual effects from burn injuries, osteoarthritis, and a knee that "pops out from time to time." She wrote that she has a hard time climbing stairs or walking, at least once a month and lasting a week to two weeks, stating "Some days, during those times, I can't even get out of bed."

Mental Impairment

- In the PR the physician indicated that the appellant has no difficulties with communication. In the AR he described the appellant's speaking as "satisfactory", her hearing as "poor", and "don't know" regarding reading and writing.
- In the PR the physician reported that the appellant has "no" significant deficits with cognitive and emotional functioning. In the AR the physician indicated that the appellant experiences major impacts in two of fourteen categories of cognitive and emotional function: *emotion* and

motivation. He also indicated that the appellant experiences moderate impacts in four of fourteen categories: *bodily functions, attention/concentration, executive, and other neuropsychological problems*. The remaining eight categories exhibit minimal or no impact. The physician commented "Always been very thin -? Anorexic related but due to medications (pain meds) poor appetite [and] tends not to eat properly...Hearing loss is severe has impact on all verbal interactions she has."

- In her self-report the appellant wrote that she suffers from social anxiety disorder and depression.

DLA

In the PR the physician reported that:

- The appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA.
- The appellant is unrestricted in her ability to perform the prescribed DLA of *personal self-care, meal preparation, management of medications, the inside aspect of mobility indoors and outdoors, use of transportation, management of finances, and social functioning*.
- The appellant is continuously restricted with the DLA of *basic housework and daily shopping*, as well as the outdoors aspect of *mobility indoors and outdoors*. The physician described the degree of restriction as "severely restricted by the combination of her orthopaedic problems."
- The physician commented that "While I would like to see [the appellant] try to integrate into the labour market she is severely impaired by the combination of musculoskeletal problems and now is unable to work [and] limited in her ability to care for herself. I think she would benefit from some physio[therapy] but she is not able to afford this. I think she needs to consider some education to stimulate her intellectually, [and] hopefully prepare her for some employment."

In the AR the physician reported that:

- The appellant independently manages all tasks related to the four DLA of *personal self-care, management of finances, management of medications, and use of transportation* (though she takes significantly longer than typical getting in/out of a vehicle due to her hip bursitis.)
- Regarding the DLA of *daily shopping*, the appellant independently manages the tasks of reading prices/labels, making appropriate choices, and paying for purchases. He indicated that the appellant needs periodic assistance with the tasks of going to/from stores (slow walking), and carrying purchases home.
- The appellant gets periodic assistance from her family "on a regular basis" with all aspects of meal preparation except for the task of safe storage of food.
- The appellant requires periodic assistance from her family "on a regular basis" with *basic housekeeping*, which takes the appellant significantly longer than typical to perform.
- With respect to the DLA of *social functioning*, the appellant is independently making appropriate social decisions, but requires periodic support/supervision with developing and maintaining relationships, interacting appropriately with others, and dealing appropriately with unexpected demands. He commented "Avoids new relationships. Withdrawn over last few years. Lots of social issues."
- The appellant has good functioning with her immediate social network and marginal functioning with her extended social network.
- "[The appellant] has a long history of working hard but these issues have made it impossible

for her to work. She needs to be considered for some retraining to get her back in the work force.”

In her self report, the appellant wrote that:

- Her mother helps her a lot with things like carrying groceries, household tasks, and driving her to shopping/appointments.
- Her young child also helps as much as possible.
- Every other month the appellant has to go for a week without showering (sponge baths only) due to the severity of the pain in her left hip, wrists and left shoulder.

In her oral testimony the appellant stated that:

- She doesn't get a lot of sleep because of constant pain, and she tires easily.
- She can't do anything too long.
- She has been on a narcotic pain medication and is trying to get off it.

In response to questions from her advocate the appellant replied that:

- Her neighbours help her with DLA, as well as her mother “when she can.”
- The physician knows there are side effects from her medication.
- The periods of severe pain “can be recurring.” Right now it's not bad. Every once in a while it “goes off.” A year and a half ago she was in bed for one and a half months.
- She is regularly completely disabled for a week or two.
- It now takes her a couple of days to clean house, whereas it used to be two hours.

In response to questions from the panel the appellant replied that:

- During the 50% of the time that the physician indicates the appellant does not use a cane, she manages her mobility by using “whatever I can grab.” She just uses the cane for disability.
- She has been on the pain medication for three years, and will have to go through a period of reduced dosage to get off it.
- She was not with the physician when he completed the PWD application forms.
- When she is laid up she asks her mother and friends to care for her child.

Help

- In the PR the physician 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 indicated that the appellant uses assistive devices in the form of a cane and hearing aids. He also indicated that the appellant does not have an assistance animal, and that her family and friends help her with DLA.

Admissibility of Additional Information

The appellant's oral testimony contains additional information which is consistent with and tends to corroborate information that was before the ministry at the time of reconsideration. The panel has accepted this as supporting evidence in accordance with section 22(4)(b) of the *Employment and Assistance Act*.

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 hearing loss, coupled with her shoulder, hip and wrist pain constitutes a severe physical impairment. She argued, through her advocate, that the physician used the word "severe" to describe the impairments, and that the appellant's physical functioning as described by the physician is indicative of a severe impairment. The appellant also argued that the use of a cane 50% of the time, and the physician's acknowledgement that he has seen the appellant more than 11 times in the past year, indicate that the appellant's impairments are severe. Finally, the appellant argued that there is no requirement for the physician to indicate quantitatively how much longer than typical the appellant takes with her physical functioning.

The ministry's position, as expressed in its reconsideration decision, is that the evidence provided by the physician is indicative of a moderate rather than a severe physical impairment. The ministry argued that because the physician did not describe how much longer than typical the appellant takes with mobility and physical functions, it is difficult to determine whether the amount of additional time she takes represents a significant restriction.

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 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.

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. Accordingly, in this case the physician’s use of the term “severe” to describe the appellant’s impairments, while being an indication of the physician’s opinion, does not determine whether the statutory criterion is met.

The physician’s use of the term “severe” is coloured by the opinion he expressed in both the PR and the AR that with some additional training, education, and possibly physiotherapy the appellant could reenter the workforce. Employability is not a statutory criterion for PWD designation – the focus of the legislation is an applicant’s ability to manage DLA. Paid employment generally requires a higher level of functioning than DLA.

The appellant’s physical functional skills as described by the physician in the PR are generally in the mid-range to low end of the scale. The physician reported in the AR that the appellant independently manages all aspects of mobility, though she walks slowly, takes significantly longer than typical and uses a cane 50% of the time. There is evidence that the effects of the appellant’s impairments are episodic in nature. The appellant wrote in her self report that she has a hard time climbing stairs or walking at least once a month and lasting a week to two weeks. Though the physician indicated in the PR that the appellant is continuously restricted in 3 DLA, in the more detailed AR he indicated that the appellant only periodically needs assistance. He didn’t provide any detail about how often those periods occur or how long they last other than to write that the appellant gets help from her family with cooking and housekeeping “regularly.”

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.

Section 2 of the EAPWDA requires that a physical or mental impairment must be diagnosed by a medical practitioner. The physician did not diagnose burn injuries, osteoarthritis or knee problems (as referred to by the appellant) as impairments, and has not provided any information as to whether or how those conditions may impact the appellant’s physical functioning. Accordingly, the panel can give little weight to the appellant’s evidence of these conditions.

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 anxiety constitutes a severe mental impairment. She argued that her social functioning is significantly impacted and that the physician identified major impacts in cognitive and emotional functioning in the areas of emotion (excessive or inappropriate anxiety, depression) and motivation. She argued that the physician's findings of marginal functioning with her extended social network and "lots of social issues" are indicative of a severe mental impairment.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry argued that the physician indicated that the appellant has no difficulties with communication and that she does not require support or supervision to maintain herself in the community.

Panel Decision

The evidence regarding mental impairment is inconsistent and conflicting. In the PR the physician noted no significant deficits to cognitive and emotional functioning, but in the AR he indicated major impacts in two areas. In the PR he provided no diagnosis of a mental impairment, but in the AR he indicated in an off-hand manner that there have been "anorexia-related" issues that are now perhaps exacerbated by her pain medications.

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) *social functioning* (making appropriate social decisions) and *daily shopping* (making appropriate choices). The physician did not provide an explanation for why the appellant would require assistance with meal planning.

With respect to *social functioning*, the physician reported that the appellant has good functioning with her immediate social network and marginal functioning with her extended social network. The panel notes that the description for marginal functioning provided to the physician in the AR form is "little more than minimal acts to fulfill basic needs." This indicates to the panel that in the physician's view the appellant is able to independently meet her basic needs in this area.

Considering that:

- evidence of a diagnosis of mental impairment from the physician is inconsistent and conflicting,
- 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
- the evidence of significant deficits in cognitive and emotional functioning is inconsistent and conflicting,
- there is no professional evidence that the appellant is under any course of treatment for a

mental disorder,

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 impairments significantly restrict her ability to perform DLA on a regular basis. She argued that the physician's evidence that she uses a cane 50% of the time, coupled with her evidence that she has difficulty with walking and climbing stairs at least once a month for up to a week or two weeks demonstrates that she is significantly restricted for extended periods of time.

The ministry's position is that the assessments provided by the physician are indicative of a moderate level of restriction. The ministry argued that the nature, frequency and duration of the periodic assistance the appellant receives with DLA, particularly basic house work and carrying purchases home, is not described.

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. 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 physician indicated in the PR that she is unrestricted with six of the ten prescribed DLA: *personal self-care, meal preparation, management of medications, management of finances, use of transportation, and social functioning*. For the reasons explained above under the heading Severe Mental Impairment, the panel has concluded that the appellant is not significantly restricted with the DLA *decision making*. The more detailed analysis of DLA in the AR – which breaks DLA down into discrete tasks – indicates that the appellant does have some restrictions with some tasks, but the physician has provided insufficient supporting narrative. For example, he's

indicated that the appellant's family "regularly" helps her with the DLA of *meal preparation and basic housework*, but he's provided no explanation as to why she requires this help, the nature of the help provided or how frequently she receives it.

On balance, 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.

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.