

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 28, 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 May 22, 2014 along with a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated April 24, 2014 and assessor's report ("AR") also completed by the physician on April 24, 2014.
- The appellant's Request for Reconsideration form, dated September 29, 2014, with attached reconsideration submission.
- An X-ray report dated July 3, 2013 regarding the appellant's knees, spine, pelvis and right hip.
- An X-ray report dated July 22, 2013 regarding the appellant's chest and leg lengths.
- A Medical Report – Employability form completed by the physician on August 4, 2013.

* * *

The panel reviewed the evidence as follows:

Diagnoses

- In the PR the physician (who has known the appellant for one to two years and has seen her 2-10 times in the past 12 months) diagnosed the appellant with scoliosis and COPD (chronic obstructive pulmonary disease). The physician commented that the appellant was involved in an accident which caused significant shortening of her left leg which compounds her scoliosis, and that she experiences back pain secondary to severe scoliosis. The physician also commented that the appellant has nicotine addiction compromising her pulmonary function.
- In the AR the physician described the appellant's impairments as "chronic back pain [and] SOBE [shortness of breath on exertion]".

Physical Impairment

- In terms of physical functional skills, the physician reported in the PR that the appellant can walk for 2-4 blocks unaided on a flat surface, climb 5+ stairs unaided, that she can lift 5 to 15 pounds, and that she can remain seated for 1 to 2 hours.
- In the AR the physician indicated that the appellant independently manages walking indoors and outdoors, climbing stairs and standing, but that she needs periodic assistance from another person with lifting and carrying/holding. The physician commented "limited physical endurance."
- In the Additional Information section of the AR the physician commented "Severe back pain, limited respiratory capacity limits social interaction (& work)."
- The July 3, 2013 X-ray report indicated that the appellant has mild patellofemoral osteoarthritis in her left knee, degenerative disc disease at multiple levels through the thoracic and lumbar spine, and that the hips and SI joints are well maintained.
- The July 22, 2013 X-ray report indicated that the appellant has severe scoliosis convex to the right in the thoracic spine, the lungs are clear and no active disease is seen, and the right leg

measures 1.7 cm longer than the left leg.

- In the Medical Report – Employability the physician stated that the appellant’s spinal condition is chronic and progressive. He commented that the appellant is unable to stand, walk or sit for any substantial period.

In her reconsideration submission the appellant stated that:

- She sustained a lifting injury many years ago which resulted in excruciating pain.
- Over the years she has suffered debilitating bouts of recurrent lumbar pain which sometimes leaves her bed ridden for up to a week.
- A car accident resulted in her left leg being shorter than her right. This led to deterioration of her left knee joint.
- Spinal surgery has been recommended to her by various physicians over the years but she remains terrified of it.
- She has a tilted pelvis which causes debilitating hip pain through the years which is helped by chiropractic care.
- About 18 months ago she started to experience pain and swelling in her right knee and now wears an elastic knee brace during the day.
- It has been several years since she has experienced distressing lumbar episodes. Instead she suffers from chronic fatigue, thoracic back, neck, shoulder, hip and knee joint pain.
- She can stand, sit and walk for very limited duration.

Mental Impairment

- In the PR and the AR the physician noted no difficulties with communication, and commented in the AR “no cognitive dysfunction.”
- In the PR the physician indicated that the appellant has significant deficits in 4 of 12 categories of cognitive and emotional function: emotional disturbance, motivation, impulse control, and attention/sustained concentration.
- Part B.4 of the AR, dealing with cognitive and emotional function, is to be completed “for an Applicant with an identified mental impairment or brain injury.” The physician marked this part of the AR as “N/A” (not applicable).
- In her reconsideration submission the appellant stated that she suffers from anxiety and depression over her physical decline; also that she feels overwhelmed and disheartened by the process of applying for assistance.

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.
- In the AR the physician indicated that the appellant independently manages all tasks related to all DLA except that she needs periodic assistance from another person with respect to:
 - Carrying purchases home.
 - Using public transit.
 - Dealing appropriately with unexpected demands.
 - Securing assistance from others.
- With respect to the DLA of *social functioning*, the physician reported that the appellant has

marginal functioning with both her immediate and extended social networks, and commented "Recluse – due to pain [and] mobility."

- The physician commented with respect to DLA that the appellant is "generally independent."

In her reconsideration submission the appellant stated that:

- She lives in a fairly secluded area and rarely leaves home.
- She no longer drives and depends on her roommate and friends for grocery shopping, appointments and assistance with the heavier housekeeping chores that she can no longer perform.
- She manages DLA by planning and executing chores in stages and resting in between.
- She spends a good portion of the day in a reclining/zero gravity chair and often spends the day in pajamas for comfort and ease.
- She is unable to work and receives CPP disability benefits.

Help

- In the PR the physician responded to a question about prostheses or aids required by the appellant by indicating that she uses a lift in her left shoe.
- In the AR the physician noted no other assistive devices that the appellant routinely uses for her impairment, and indicated that no equipment is required but is not currently being used. The physician reported that the appellant does not have an assistance animal.

Neither party submitted 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 scoliosis along with COPD, fatigue and joint pain together constitute a severe physical impairment. She argued that her mobility is severely limited and that the physician confirmed that she can only stand, sit and walk for very limited duration. She also argued that she can no longer work, and that while she qualifies for CPP disability income it simply is not enough to live on.

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 physician indicated that the appellant independently manages mobility, stair climbing and standing, and that the appellant does not require any equipment or devices to compensate for her impairment.

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. 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 physician.

In the appellant's case, the appellant's physical functional skills are described by the physician in the PR as being in the mid- to higher end to the scale. The physician indicated in the AR that the

appellant independently manages her mobility and standing, and there is no information as to how often the appellant requires assistance with other physical functions.

The panel notes that while the ability to engage in paid employment is a consideration for the CPP disability pension, the focus of the assessment for PWD designation is the degree to which one is restricted from managing DLA independently.

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 did not advance an argument with respect to severe mental impairment, though she stated that her situation is causing her depression and anxiety, and in the PR the physician described significant deficits to four areas of cognitive and emotional functioning.

The ministry's position is that there is not enough evidence to establish a severe mental impairment. The ministry argued that the physician did not indicate that deficits to the appellant's cognitive and emotional functioning have any impact on her daily functioning, and that she has no difficulties with communication.

Panel Decision

The legislation requires that a severe impairment must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. The appellant's physician has provided no diagnosis of a mental health condition. He indicated in the PR that the appellant has significant deficits in four areas of cognitive and emotional function, but when offered the opportunity to provide more detail in the AR, he simply commented "N/A" – not applicable. The physician's evidence in both the PR and the AR was consistent that the appellant's communication skills are good, and he commented in the AR "no cognitive dysfunction."

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), *daily shopping* (making appropriate choices), and *social functioning* (appropriate social decisions.)

With respect to *social functioning*, the physician reported that the appellant has marginal functioning

with both her immediate and extended social networks, though she requires periodic assistance in dealing appropriately with unexpected demands and securing assistance from others. There is no evidence before the panel with respect to how often the appellant requires support or supervision in these areas. The physician's comment in the AR ("recluse – due to pain & mobility) indicates that the source of the appellant's restrictions in this area is her physical condition rather than a mental condition.

Considering that:

- the physician did not diagnose a mental impairment,
- the evidence demonstrates that the appellant has no 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 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 she relies on friends and roommates for assistance with some DLA, and that she only manages other DLA by performing them in stages and resting in between.

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. The ministry also argued that no safety issues were identified.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – 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 professional evidence is that the appellant independently manages virtually all tasks related to all DLA. The physician described the appellant's ability with DLA as being

“generally independent.” For those few tasks where the physician indicated that the appellant requires periodic assistance from another person, there is no evidence as to the duration or frequency of those periods. The appellant has indicated that she manages DLA by planning and executing them in stages, and that she requires assistance with the heavier aspects of housekeeping. There is no evidence with respect to how much longer than typical the appellant may take with DLA.

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.