

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of December 12, 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

With the appellant's consent, her advocate had two observers attend the hearing for training purposes.

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 (date-stamped by the ministry as being received July 2, 2014) along with a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated June 24, 2014 and assessor's report ("AR") also completed by the physician on June 24, 2014.
- The appellant's Request for Reconsideration form, dated November 13, 2014, with a two-page handwritten reconsideration submission.
- An article on Cushing's syndrome.
- A DLA checklist form (the "Checklist"), provided by an advocacy agency to "assist you to identify [DLA] that you need help with" which appears to have been completed by the appellant for the purposes of reconsideration. Instructions on the Checklist state "List the activities you cannot do on your worst days without help. Include activities that you can do, but that take you much longer to do than they would most people."
- An imaging report for a whole-body bone scan dated January 24, 2014.
- An imaging report for a CT scan of kidneys, ureter and bladder dated September 4, 2013.
- Blood test reports dated June 28, 2014 and October 28, 2014.
- A Medical Report – Employability form completed by the physician dated December 12, 2013.

* * *

The panel reviewed the evidence as follows:

Diagnoses

- In the PR the physician (who has known the appellant for ten years and has seen her 2-10 times in the past 12 months) diagnosed the appellant with Cushing syndrome, adrenocortical adenoma, gastric ulcer, fibroid uterus, chronic vaginal bleeding, chronic anemia, nephrolithiasis, hypertension and dyslipidemia.
- In the PR the physician described the appellant's impairments as "long standing, chronic medical conditions", and observed that Cushing's syndrome is causing muscle wasting, weakness, chronic fatigue, and has caused the appellant's skin to be thin and atrophic with poor wound healing and easy bruising. He commented that the appellant also suffers from renal calculus, osteoporosis, reduced resistance to infections, and psychiatric deficiencies and explained that all these conditions are related to Cushing's syndrome.
- In the AR the physician commented that the appellant's condition is complicated by chronic depression/anxiety.

Physical Impairment

- In terms of physical functional skills, the physician reported in the PR that the appellant can walk for 1-2 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.

- The physician wrote that “Patient underwent major surgery – left laparoscopic adrenalectomy due to left adrenal adenoma – 2007. Post operative period was complicated by hematoma which required prolonged recovery.”
- In describing the appellant’s mobility and physical ability in the AR, the physician indicated that the appellant independently manages standing, she requires periodic assistance climbing stairs, and she needs continuous assistance with walking indoors/outdoors and lifting/carrying;/holding. He commented “Patient is having weakness of limbs.”
- The whole-body bone scan report referenced “minimal” and “mild” degenerative changes.
- The CT scan showed four stones in the left kidney, none of which are obstructing and which have not appreciably changed in location from a study in November 2012. No obstructing renal or ureteric calculi were seen.
- The two blood test reports showed ferritin levels that are diagnostic of iron deficiency.
- In the Medical Report – Employability form the physician described the appellant’s primary medical condition as “Severe abdominal pain” with an anticipated duration of two months. He did not identify any secondary medical condition.

In her reconsideration submission the appellant wrote that:

- Over the past seven years she has had her good days and bad days with her health issues.
- The hematoma puts pressure on her left side where the ulcer is and makes it hard to sit or stand for long periods.
- She cannot take any pain medication for her osteoarthritis as her ulcer does not tolerate anti-inflammatory medications.

In her oral testimony the appellant said that it is difficult to forecast the effects of Cushing’s syndrome. She said she can no longer do what she used to do and has to take one day at a time rather than being able to plan ahead. She also said that she is still bothered by the hematoma which resulted from her adrenal surgery.

In response to questions from the panel during her oral testimony the appellant responded that:

- The adrenal surgery was to remove a tumour on her adrenal gland. She has to have a breast exam every six months to see if the cancer has spread.
- She doesn’t like to take medications as they mask what is going on in the body.

Mental Impairment

- In the PR the physician reported that the appellant’s Cushing’s syndrome causes “psychiatric disturbances”.
- In the PR and the AR the physician noted no difficulties with communication, indicating in the AR that the appellant’s communication skills are good in all respects.
- In the PR the physician indicated that the appellant experiences significant deficits with four of twelve categories of cognitive and emotional function: memory, emotional disturbance, motivation, and attention/sustained concentration. He commented “Multiple medical conditions are causing emotional disturbance.”
- In the AR the physician indicated that the appellant’s mental impairment has major impacts in two of fourteen areas of cognitive and emotional function (emotion and motivation), moderate impacts in three additional areas (bodily functions, attention/concentration, and memory), and

minimal or no impact in the remaining areas. The physician commented that “[The appellant’s] condition is complicated by chronic depression/anxiety. Sleep disturbance is common. No interest in anything, poor concentration, low energy level. Appetite is affected. Having occasional suicidal thoughts.”

In her reconsideration submission the appellant wrote that:

- Due to long-term bleeding she has lost so much iron that she is always tired making it hard to be motivated and get focused.
- She must write all things down in a planner due to memory loss from fatigue.
- She gets extremely emotional and depressed.

In response to questions from the panel during her oral testimony the appellant responded that:

- Her medical conditions cause anxiety and depression.
- She attended three sessions at a free student mental health clinic in 2013 and was “signed off” with the advice to “stay focused”. She takes that advice by living “in the day”.

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 aspects of the DLA of *manage personal finances* (pay rent and bills) and *manage personal medications*. The physician did not complete the section dealing with the DLA of *social functioning*.
- Independently manages all aspects of the DLA of *personal self-care* (except that she needs periodic assistance with bathing and with transfers in/out of bed) and *daily shopping* (except that she needs periodic assistance going to and from stores, and continuous assistance carrying purchases home.) The physician commented “Unable to lift moderately heavy objects due to weakness – ongoing anemia due to chronic blood loss” and “Due to leg weakness assistance required almost all the time.”
- Requires periodic assistance with all tasks related to the DLA of *basic housekeeping, meal preparation, and use of transportation*.

In the Checklist the appellant indicated that:

- Regarding the DLA of *personal self-care*, water in the shower must not be too hot, she gets in and out of the tub slowly, and she has no difficulty in terms of eating.
- With respect to the DLA of *meal preparation*, she is restricted with chopping food, peeling fruit or vegetables, lifting food from cupboards to counters “as long as [it’s] not heavy”, using a can opener, and opening jars.
- She has no restrictions in *managing personal medications, use of transportation and managing personal finances*.
- With respect to the DLA of *basic housekeeping*, cleaning the bathtub “takes time”, she doesn’t carry laundry, and she “sometimes” is restricted in remembering or having the energy/motivation to keep the house clean. The appellant commented “I can do most things but for short periods of time as I get tired easily.”

- Regarding the DLA of daily shopping the appellant indicated that she gets tired walking around stores and can't wait in line for long periods.
- With respect to the DLA of *mobility indoors and outdoors*, the appellant moves slowly inside the home, and outside the home she must stop to sit down.
- She sometimes has a hard time making herself understood, but she usually understands most things in writing.
- Regarding mental and emotional skills, she has restrictions in coping with anxiety and agitation, coping with depression, coping with stress, coping with sensitivity to sound/light/motion (sometimes), and remembering information/appointments.
- With respect to the DLA of social functioning, she is "sometimes" afraid to ask for help when she needs it and "sometimes must think it through" when dealing with unexpected situations.

Help

- In the PR the physician indicated that the appellant does not require any prostheses or aids for her impairment.
- In the AR the physician did not identify any assistive devices that the appellant routinely uses for her impairment. The physician reported that the appellant does not have an assistance animal.
- In response to a question in the AR as to what assistance would be required for the appellant that is not currently available, the physician wrote "Needs help all the time."
- In the Checklist the appellant indicated that she requires eye glasses.
- In response to a question from the panel during her oral testimony, the appellant responded that she gets assistance from friends, her children and her neighbour.

The appellant's oral testimony provided additional detail which was consistent with and tended to corroborate information that had been before the ministry at reconsideration. The panel accepted it as oral testimony in support in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no additional information.

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 Cushing's syndrome and the multiple related medical conditions collectively constitute a severe physical impairment. She argued, through her advocate, that the physician confirmed that she is experiencing muscle wasting, chronic fatigue, and weakness of the limbs, which leaves her requiring assistance "all the time."

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish a severe physical impairment. The ministry argued that the appellant's functional skills as described by the physician are more in keeping with a moderate degree of impairment. The ministry also argued that the diagnoses identified in the PR were not considered severe enough to be mentioned in the Medical Report – Employability completed by the physician in December, 2013.

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.

The physical functional skills described by the physician in the PR are in the mid- to upper-range of the scale. This is consistent with the physician's observations in the PR and the AR that the

appellant does not use or require assistive devices. These pieces of information are inconsistent with the physician's evidence in the AR where he indicated that the appellant requires continuous assistance with walking indoors and outdoors. The physician stated in the PR that the appellant can lift 5 to 15 pounds, and in the AR that she is unable to lift moderately heavy objects due to weakness from ongoing anemia. Reading this information together, the panel concludes that when the physician indicates in the AR that the appellant requires continuous assistance with lifting/carrying/holding, this assistance would be for "moderately heavy" items in excess of the 5 to 15 pound lifting capacity identified in the PR. This conclusion is supported by the appellant's response in the Checklist where she indicated that she is able to lift food from cupboards to counter "as long as it is not heavy."

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 yet 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 the anxiety and depression related to her medical conditions constitute a severe mental impairment. She argued that the physician confirmed that she has significant deficits to cognitive and emotional functioning that result in major impacts on her daily functioning, including sleep disturbance, poor concentration, and lack of motivation.

The ministry's position is that the information provided does not establish a severe mental impairment. The ministry argued that no mental conditions were identified by the physician in the diagnosis section of the PR, and that there is no evidence of a referral to a mental health professional such as a psychiatrist.

Panel Decision:

The physician indicated that the appellant's Cushing's syndrome causes psychiatric disturbances, that she experiences depression and anxiety, and that she has significant deficits in aspects of cognitive and emotional functioning.

As noted above in the discussion of severe physical impairment, severity must be assessed in the context of the degree to which DLA are restricted. 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 *personal self-care* (regulate diet), *manage personal medication* (taking as directed/safe handling and storage), *manage personal finances* (banking, budgeting, pay rent and bills), and *daily shopping*

(making appropriate choices). The physician indicated that the appellant requires periodic assistance with *meal planning*, but provided no explanation as to why the appellant requires this assistance when she is able to deal with other aspects of *decision making* independently. The appellant also did not identify any cognitive problems related to *meal preparation* in the Checklist.

With respect to the DLA of *social functioning*, the physician provided no evidence to indicate that the appellant is restricted in any way. In the checklist the appellant noted only that she is sometimes afraid to ask for help when needed and she sometimes must “think it through” when confronted with unexpected situations. Even taking this information at face value, it is not indicative of a significant restriction to the DLA of social functioning. The panel also notes that according to the appellant’s oral testimony she has good functioning relationships with friends, family and neighbours in respect of getting assistance with various tasks.

Considering that:

- the evidence demonstrates that the appellant’s communication skills are good in all respects,
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*, and
- there is no evidence to indicate that the appellant is undergoing any treatment regime for a mental impairment,

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 directly and significantly restrict her ability to manage DLA. She argued that abdominal pain and pain from her hematoma restrict her ability to stand and sit for prolonged periods, and that she does most things slowly and needs to rest frequently. She also argued that the physician has confirmed that she requires assistance “all the time”, and that she relies on help from her friends, family and neighbours.

The ministry’s position is that the evidence does not demonstrate that the appellant has a severe impairment that directly and significantly restricts her ability to perform DLA. The ministry argued that a severe impairment has not been established, and that the physician has not indicated that the appellant would benefit from any assistive devices such as a cane or a walker with a seat to enable her to take rests when needed.

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 physician has provided conflicting information with respect to the “time” component of the legislative test. The physician commented in narrative that the appellant requires help “all the time” or “almost all the time”, but in the section of the AR providing a detailed breakdown of the tasks associated with the prescribed DLA the physician indicated only that the appellant requires “periodic” assistance. There is no indication from the physician as to the duration or frequency of those periods. He provided no explanation or description of his use of the term “periodic”. In the Checklist the appellant wrote that she “can do most things”, but for short periods of time as she gets tired easily. This tends to indicate that the appellant takes longer than typical to perform some DLA, but there is no evidence or examples as to how much longer it takes her, which would demonstrate whether DLA take an unreasonable amount of time.

While the evidence indicates that the appellant does experience direct restrictions to some tasks related to some DLA, 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. She argued that she relies on help from friends, family and neighbours.

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

The evidence demonstrates that the appellant’s medical conditions do impact her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, for the reasons provided above 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.