

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated January 16, 2015 which found that the appellant did not meet four of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that the evidence establishes that:

- in the opinion of a medical practitioner, the appellant's impairment is likely to continue for at least two years;
- 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated July 25, 2014, a physician report (PR) and an assessor report (AR) both dated August 12, 2014 and completed by a general practitioner who has known the appellant for one week and has seen her once. The appellant chose not to complete the self-report.

The evidence also included the following:

- 1) Screening mammogram report dated March 15, 2014;
- 2) Letter from the appellant dated July 15, 2014 regarding her medical conditions and “required natural therapies;” and,
- 3) The appellant’s Request for Reconsideration dated January 13, 2015.

Diagnoses/ Duration

In the PR, the general practitioner wrote in the diagnosis section that the appellant has “possible breast ca [cancer] not confirmed. Pt [patient] declining follow up investigation and treatment.” Asked whether the impairment is likely to continue for two years or more, the general practitioner wrote “not sure.” The general practitioner added that the appellant has “no clear diagnosis of breast cancer. May be fine or may have breast cancer. Patient declining to have further testing or follow up.” In the additional comments, the general practitioner wrote that the only information she has is copies of abnormal screening mammography (not diagnostic). The appellant “...says she is not interested in further investigation or treatment for breast cancer but no breast cancer diagnosis yet. No clear pathology at present.”

In the AR, the general practitioner described the appellant’s impairment as: “no clear diagnosis. Breast screening test not normal but no further tests done.”

In the screening mammogram report dated March 15, 2014, the interpretation by a radiologist is stated as: “bilateral mammogram, abnormality seen.” The recommendation to the primary care provider is that the patient has been referred to another medical imaging center for further evaluation.

Physical Impairment

In the PR, the general practitioner reported that:

- In terms of health history, the appellant “states she may have breast cancer but not want further investigations or treatment. Screening mammogram was abnormal and she was supposed to go for diagnostic mammogram but declined. Not even sure she has breast cancer or not.”
- For functional skills, the appellant can walk 4 or more blocks unaided, climb 5 or more steps, and has no limitation with lifting or with remaining seated.
- The appellant does not require an aid for her impairment.

In the AR, the general practitioner indicated that:

- The appellant is independent with all aspects of mobility and physical ability, namely: walking indoors, walking outdoors, climbing stairs, standing, lifting and carrying and holding.
- The section relating to assistance provided through the use of assistive devices did not indicate any of the listed assistive devices as applicable.

In the letter dated July 15, 2014, the appellant wrote that:

- She relied on Organization X for 13 years for information, education, alternative doctors and conventional medical doctors and advisors. She has extremely high blood pressure, heart, allergies and anaemia and alternative medicine is highly effective for breast cancer or prevention.
- Use of surgery, radiation and chemotherapy cause severe pain, disfigurement and terrible illness with only a modest cure rate, and the natural therapies are painless, highly effective and much cheaper.

In her Request for Reconsideration, the appellant wrote that:

- She has dizziness and light headedness, dangerously high blood pressure, heart problems, low energy, tiredness because of “bilateral mammogram abnormality seen area of left breast.”
- Radiation therapy and chemotherapy will not help her.
- On September 19, 2014 a doctor asked her to lie down and she left the hospital quickly.

Mental Impairment

In the PR, the general practitioner reported that:

- The appellant has no difficulties with communication and does not have any significant deficits in her cognitive and emotional functioning.

In the AR, the general practitioner indicated that:

- The appellant has a good ability to communicate in all areas, namely: speaking, reading, writing and hearing.
- For the section of the AR assessing impacts to cognitive and emotional functioning for an applicant with an identified mental impairment or brain injury, the general practitioner indicated that there is no impact in each listed area and wrote: “no clear deficits, no clear diagnosis.”
- For the section of the AR assessing impacts to areas of social functioning, the general practitioner has also marked each area as independent, with good functioning in both immediate and extended social networks.

Daily Living Activities (DLA)

In the PR, the general practitioner indicated that:

- The appellant has not been prescribed any medications and/or treatments that interfere with her DLA.

In the AR, the general practitioner reported that:

- The appellant is independent with moving about indoors and outdoors.
- The appellant is independently able to perform every task of all of the listed DLA, namely: personal care (dressing, grooming, bathing, toileting, feeding self, regulate diet, transfers in/out of bed and on/off of chair), basic housekeeping, shopping (going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, carrying purchases home), meals (meal planning, food preparation, cooking, safe storage of food), paying rent and bills (banking, budgeting, paying rent and bills), medications (filling/refilling prescriptions, taking as directed, safe handling and storage) and transportation (getting in and out of a vehicle, using public transit, using transit schedules and arranging transportation).
- The appellant is “able to do” her DLA “at present”, “no assistance needed” and there are “no

clear deficits.”

Need for Help

The general practitioner reported in the AR that the appellant lives alone and “no help is required” for DLA. Asked to describe details of any equipment or devices used by the appellant, the general practitioner wrote “none.”

Appellant's Additional Information

In her Notice of Appeal dated February 2, 2015, the appellant wrote that the September 19, 2014 incident was self-explanatory. The doctor instructed her to lie down, and she did. The doctor report dated August 11, 2014 was based on her answers, not her condition. Chemo/radiation therapy success rate is only 2.2%. She will take her chances with natural healing.

Prior to the hearing, the appellant provided two additional documents:

- 1) Handwritten page of dates, doctors' names and addresses; and,
- 2) Print out of an email dated February 20, 2015 sent by the appellant to the Tribunal regarding “alternate cancer treatment” and stating that it is cost effective, painless, and avoids poisoning the body (radiation giving women cancer). She is a vegan and currently on a Phenylalanine diet, she has heart problems and extremely high blood pressure.

At the hearing, the appellant stated that:

- The handwritten page of doctors' names and addresses submitted before the hearing was given to her by the general practitioner who completed the PR and AR as a way of referring her to a clinic that integrated the use of natural therapies in its practice.
- The doctor who completed the reports for the PWD application was at a walk-in clinic and she told the doctor that she needed help. The doctor completed the forms in about 10 minutes and did not ask questions. She told the doctor about her heart problem and her high blood pressure and the doctor recommended some medications and provided the names of other doctors who use natural therapies, as set out in the handwritten notes.
- As set out in her Notice of Appeal, in the September 19, 2014 incident the doctor instructed her to lie down and she was afraid of what he was going to do. After 2 minutes, she got up and left.
- She went through difficult times in 2013 when the court ordered that she vacate her house. She had to live in a shelter and since she was not eating much, she started to get more health problems. She is on her own now, in a better situation.
- As set out in her Request for Reconsideration, she has dizziness and light headedness, dangerously high blood pressure, heart problems, low energy, and tiredness. However, the doctors that she was referred to do not want her to get natural therapies to cure these problems.
- One doctor said that her cancer was spreading, but she does not believe that.
- Asked about whether a doctor has confirmed a diagnosis of breast cancer, she referred to the screening mammogram report dated March 15, 2014. She was asked to have these mammography tests done many times, but they are painful. She does not want to have any more tests done since she is concerned about the radiation which can make her feel sick and tired.
- She is not feeling well and she needs to lie down from time to time because she is tired. However, she does not want anyone helping her with cleaning or cooking as she has always

taken care of herself and she would rather die than depend on another person to help her take a bath, for example. She cannot be compared with other sick people who might want others to help them because she has never relied on other people.

- Lifting is a problem for her and she could “lie down and let other people do things”, but she does not want to live like that. She finds a way to do things differently so she does not need help from others. For climbing stairs, for example, she climbs 3 stairs and then takes a break before continuing.

The ministry relied on its reconsideration decision, as summarized at the hearing.

Admissibility of Additional Information

The ministry did not object to the admissibility of the handwritten notes and the appellant’s email and did not raise an objection to the appellant’s oral testimony. The appellant’s email and oral testimony contained information about her medical conditions that had been referred to at reconsideration and the panel admits the email and oral testimony as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*. The panel considers the handwritten notes to be part of the appellant’s argument, not evidence.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD) under Section 2 of the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry also found that her daily living activities (DLA) are not, 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, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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.

(4) The minister may rescind a designation under subsection (2).

Section 2(1) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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.

Section 2(2) of the EAPWDR defines prescribed profession as follows:

- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,
 if qualifications in psychology are a condition of such employment.

Duration

The appellant's position is that the doctor's report does not reflect her medical conditions, including breast cancer, heart problems and high blood pressure, which will likely continue for 2 years.

The ministry's position is that the appellant's general practitioner has not confirmed that the appellant's impairment will continue for two years or more.

Panel Decision

Section 2(2)(a) of the EAPWDA requires the opinion of a medical practitioner indicating that the appellant's impairment is likely to continue for at least two years. In response to the question in the PR on whether the appellant's impairment is likely to continue for two years or more, the general practitioner wrote "not sure." The general practitioner added that the appellant has "no clear diagnosis of breast cancer. May be fine or may have breast cancer. Patient declining to have further testing or follow up." Although the appellant also stated that she suffers from heart problems, high blood pressure, allergies and anaemia, these conditions have not been referred to in either the PR or the AR and have not been confirmed by a medical practitioner, as required by Section 2(2)(a) of the

EAPWDA. The panel finds that the ministry's determination that the medical practitioner had not confirmed that the appellant's impairment will continue for two or more years from the date of the application was reasonable.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by her dizziness and light headedness because of dangerously high blood pressure and heart problems as well as low energy and tiredness as a result of "bilateral mammogram abnormality." The appellant argued that her symptoms are further intensified by radiation from the screening tests. The appellant argued that the doctor who prepared the reports for the PWD application was negligent because there was no real patient/doctor relationship established and the doctor said that if something were to happen to her, the government would close down her office.

The ministry's position is that there is not sufficient information from the general practitioner to confirm that the appellant has a severe physical impairment. The ministry argued that the general practitioner indicated that the appellant can walk 4 or more blocks and climb 5 or more steps unaided, has no limitation with lifting or with remaining seated and is independent in all areas of 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, the ministry must consider both 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 the ability to perform DLA is restricted. In making its determination the ministry must consider all of the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's general practitioner.

The general practitioner, who has seen the appellant only once, wrote that there has not been a diagnosis of breast cancer. In the PR, the general practitioner wrote in the diagnosis section that the appellant has "possible breast cancer not confirmed" and that the appellant was declining follow up investigation and treatment. In the additional comments, the general practitioner wrote that the only information she has is copies of an abnormal screening mammography (not diagnostic). The appellant "...says she is not interested in further investigation or treatment for breast cancer but no breast cancer diagnosis yet. No clear pathology at present." In her Request for Reconsideration, the appellant wrote that she has dizziness and light headedness, dangerously high blood pressure, heart problems, low energy, tiredness because of "bilateral mammogram abnormality seen area of left breast." However, the general practitioner has not provided diagnoses of heart problems or high blood pressure and she is unable to confirm or rule out a diagnosis of breast cancer until further diagnostic testing is completed.

At the hearing, the appellant stated that lifting is a problem for her and she could "lie down and let other people do things", but she does not want to live like that. She finds a way to do things differently so she does not need help from others. For example, when climbing stairs, she will climb 3 stairs and then takes a break before continuing. However, the general practitioner reported in the PR that the appellant's functional skills are not limited. The general practitioner assessed the appellant

as able to walk 4 or more blocks unaided, climb 5 or more steps, and has no limitation with lifting or with remaining seated. The appellant does not require an aid for her impairment. In the AR, the general practitioner indicated that the appellant is independent with all aspects of mobility and physical ability.

Although the evidence demonstrates that there is a possibility that the appellant has breast cancer, there has not been a diagnosis because the appellant has not had a diagnostic mammogram. Her general practitioner has not indicated any restrictions in her physical functioning and reported that she is independent in performing all DLA requiring physical effort. Considering all of the evidence currently available, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant did not advance a position that she has a severe mental impairment.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry argued that the general practitioner reported that the appellant does not have any significant deficits in her cognitive and emotional functioning, and that there are no impacts in the listed areas of cognitive, emotional and social functioning.

Panel Decision

The general practitioner did not diagnose a mental health condition in the PR and reported that the appellant has no significant deficits with cognitive and emotional function. In terms of impacts to daily functioning, the general practitioner assessed no impacts to each of the listed areas of the appellant's cognitive and emotional functioning and wrote that there are "no clear deficits" and "no clear diagnosis."

The general practitioner indicated in the AR that the appellant has a good ability to communicate in all areas. With respect to social functioning, the appellant is assessed as being independent in all areas and she has good functioning in both her immediate and extended social networks. Given the absence of a mental health diagnosis and no assessed significant impacts to the appellant's mental or social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that her physical impairments directly and significantly restrict her ability to perform DLA on an ongoing basis to the extent that she requires the significant assistance of another person, although she is not prepared to accept that assistance.

The ministry's position is that the information from the prescribed professionals does not establish that the impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the general practitioner is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in

the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the appellant's circumstances, the general practitioner reported in the PR that the appellant has not been prescribed any medications and/or treatments that interfere with her DLA. In assessing the degree of assistance required for each DLA, the general practitioner indicated in the AR that the appellant is independent with moving about indoors and outdoors and with all tasks under all of the listed DLA. At the hearing, the appellant stated that she is not feeling well and she needs to lie down from time to time because she is tired. However, she does not want anyone helping her with cleaning or cooking. She cannot live like that. She has always taken care of herself and she would rather die than depend on another person to help her take a bath.

The panel finds that the evidence from the general practitioner demonstrates that the appellant manages all of her DLA without assistance. Therefore, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professionals to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods. The legislative criterion of Section 2(2)(b)(i) of the EAPWDA is therefore not satisfied.

Help to perform DLA

The appellant's position is that she requires the significant assistance of another person to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The general practitioner reported in the AR that the appellant lives alone and "no help is required" for DLA. Asked to describe details of any equipment or devices used by the appellant, the general practitioner wrote "none." The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA was reasonably supported by the evidence. The panel therefore confirms the decision.