

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (Ministry) reconsideration decision dated January 13, 2015 in which the Ministry determined the Appellant was not eligible for Persons with Disabilities (PWD) designation because she did not meet all five PWD criteria in section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA). The Ministry was satisfied that the Appellant meets the age criteria and that her severe impairment directly and significantly restricts her ability to perform daily living activities and she requires help with those activities. However, based on the information provided in the PWD application and Request for Reconsideration, the Ministry was not satisfied that in the opinion of a medical practitioner the Appellant’s impairment is likely to continue for at least two years as required by EAPWDA section 2(2)(a).

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act, section 2

PART E – Summary of Facts

The evidence before the Ministry at the reconsideration included the following documents and background information that are relevant to the duration of impairment criterion the Ministry determined was not met :

1. A Persons with Disabilities Designation Application (PWD application) comprised of the Applicant Information and self-report completed by the Appellant on September 10, 2014, and a Physician Report (PR) and Assessor Report (AR) dated September 25, 2014. Both the PR and AR were completed by the Appellant's family physician who has known the Appellant since 2003 and has seen her 2-10 times in the past year.

2. The Appellant's Request for Reconsideration dated January 7, 2015 with an attached one-page submission in which she stated she began a treatment in August 2014 but had to be taken off it because it caused her physical and mental health to collapse resulting in hospitalization. She indicated that she may be starting another treatment after May of 2015 and each of her treatments requires a recuperation period at the end. Further, there is nothing definite to indicate whether the treatment will improve her disability and it is unknown how many years of treatment she will need in order to live a normal life.

Diagnoses:

In the PR, the physician reported that the Appellant has Hepatitis C, onset in 1994, and a Mood disorder (depression). In the AR, the physician confirmed these conditions and wrote "fatigue and pain" under Hepatitis C.

Physical or Mental Impairment:

In the PR under Health History, the physician reported that in the past year the Appellant has had bouts of pain and elevated liver enzymes, hence the decision to start Interferon treatment. Treatment side effects included weight loss, decreased appetite, decreased energy, weakness, and exacerbation of depression. The Appellant was taken off Interferon after she became reclusive and attempted suicide. She will potentially be treated with a different agent in 2015. In her self-report, the Appellant confirmed her low energy and mood and that she was taken off Interferon but might be starting another treatment program in October 2015.

Duration of impairment

Regarding the Degree and Course of Impairment section of the PR, the physician was asked to check mark the yes or no box in response to the question, "Is the impairment likely to continue for two or more years from today?" The physician created a separate box titled "unknown" and check marked this box.

When asked to explain the estimated duration of the impairment and whether there are medical treatments that may resolve or minimize the symptoms, the physician wrote that the effects of Interferon treatment will hopefully diminish over time. He added that the Appellant is tentatively scheduled to begin another treatment in January 2015 and "unsure what the effect will be."

Appellant's additional submissions

In her Notice of Appeal dated January 16, 2015, the Appellant reported that her illness is chronic and her physician was on holidays but she would be seeing him at the end of January to obtain additional information. At the hearing, the Appellant submitted a letter from her family physician dated February 2, 2015 addressed "To Whom it May Concern" (doctor's letter). In this letter, the physician reported that the Appellant's depressive symptoms continue despite being off the Interferon treatment. He stated that "it will still be awhile" before she takes another treatment for Hepatitis C and it is therefore "more than likely that her depressive symptoms will continue chronically for at least a 2 year period."

In her oral testimony, the Appellant reported that she had to wait until her doctor returned from holidays to get an appointment to see him, and when she saw him in January he saw no change in her condition and her condition actually gets worse after treatment. Her advocate added that it has been over two years since the Appellant started dealing with her symptoms and there is no guarantee that a second treatment will go better than the first one. The Appellant has been treated by the same family physician, internist, and liver specialist all along. They treated her symptoms but now her symptoms have become more extreme.

Under section 22(4)(b) of the *Employment and Assistance Act* (EAA), the panel may admit as evidence oral or written testimony in support of the information and records that were before the minister when the decision being appealed was made. To determine whether the additional evidence is in support of the Ministry's records, the panel considers whether the additional information from the Appellant substantiates or corroborates the information and records the Ministry had at the reconsideration stage. Where an Appellant is appealing the denial of PWD designation, a doctor's note verifying the Appellant's information in the reconsideration record could properly be admitted as written testimony in support of information and records before the minister at reconsideration.

The panel finds that the Appellant's oral testimony is in support of the Ministry's information and records because it corroborates the information in the PR which indicated that the Appellant's physician has been treating her conditions long term, since 2003; that the Interferon treatment made her symptoms worse; and that a new treatment was contemplated with results to be determined. Further, in her Request for Reconsideration the Appellant indicated that the new treatment would not happen until 2015. The panel therefore admits the oral testimony under EAA section 22(4)(b).

As for the doctor's letter which states that the Appellant's depressive symptoms are chronic and will continue for at least a two year period, the panel finds that it also is in support of the information and records the Ministry had at reconsideration. The information in the PR, AR, and Appellant's self-report lays the foundation for the doctor's opinion on the duration of the impairment as follows:

First, the physician has treated the Appellant for the same conditions long term and is in a position to provide regular updates on the Appellant's impairments as treatments to address her symptoms are trialed. The panel finds that the doctor's letter provides an update on the impairments. He stated in the PR of September 25, 2014 that the effects of the Interferon treatment would hopefully diminish and that a new treatment was being considered in the new year. In the doctor's letter he confirmed that the Appellant's symptoms have continued, and are likely to continue chronically for at least a two year period. However, she would not be on a new treatment in the near future.

Second, the Appellant's testimony in her Request for Reconsideration and on appeal was that she understood which of the PWD criteria were not met and she is still recuperating from the Interferon treatment that had made her symptoms worse. Further, she explained in her Notice of Appeal and at the hearing that she could not get an appointment with her doctor until late January to obtain his updated information.

The panel notes that the Ministry had no objections to admitting the additional evidence. For the reasons stated above, under section 22(4)(b) of the EAA the panel admits the information in the doctor's letter as well as the Appellant's supporting testimony on appeal as evidence in support of the information and records that were before the minister at the time the decision being appealed was made.

At the hearing, The Ministry relied on its reconsideration decision and did not present any new evidence. The Ministry confirmed that the Appellant had forwarded the doctor's letter to the Ministry office and it had not been sent to the tribunal office.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision which found that the Appellant is not eligible for designation as a PWD because one criterion; that is, the duration of impairment as required in EAPWDA section 2(2)(a) was not met, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant.

The eligibility criteria for PWD designation are set out in section 2 of the *EAPWDA* as follows:

(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.

The Appellant's position is that she meets all five of the criteria for PWD designation because the additional evidence from her doctor (his letter of February 2, 2015) confirms that her depression is likely to continue for at least two more years, thereby meeting the requirement in EAPWDA section 2(2)(a).

The Ministry's position is that the Appellant does not meet all five criteria for PWD designation because the duration of impairment criterion was not satisfied. The Ministry noted in its reconsideration decision that it considered the Appellant's self-assessment information in conjunction with the PR and AR and it found that the duration criterion was not met because no additional information was submitted by her physician confirming that her impairment will likely continue for two years or more. At the hearing, the Ministry argued that when the doctor wrote "unknown" on the PR in respect of the duration of the impairment, it was impossible for the Ministry to make a positive decision on the Appellant's behalf. The Ministry noted that the doctor's letter of February 2, 2015 addresses the one criterion that was not satisfied.

Panel's decision

Section 2(2)(a) of the *EAPWDA* requires a medical practitioner's opinion confirming that the client has a severe mental or physical impairment that is likely to continue for at least two years. The physician's evidence in the PR was that the duration of the Appellant's impairment was unknown. The Interferon treatment had exacerbated the Appellant's depression but the effects of the treatment would hopefully diminish over time. Further, the Appellant was scheduled to begin a new treatment but this had not yet occurred so the results were also unknown. In his letter of February 2, 2015, the physician indicated that the duration of the Appellant's depression was no longer unknown. She still had symptoms despite being off the Interferon; she would not begin a new treatment in the near future; and it is more than likely that her depressive symptoms will continue chronically for at least two years.

In light of this additional information from the Appellant's physician which the panel has admitted under EAA section 22(4)(b), the panel finds that the Ministry's reconsideration decision is not reasonably supported by the evidence. The Ministry denied the Appellant PWD designation because it found that all five criteria in *EAPWDA* section 2 were not satisfied. The additional evidence from the Appellant's physician confirms that the Appellant's impairment is likely to continue for at least two more years as required by *EAPWDA* section 2(2)(a). Therefore, the panel rescinds the Ministry's reconsideration decision.