

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of January 7, 2015, 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 consent of the parties the hearing was held in writing, in accordance with section 22(3) of the *Employment and Assistance Act*.

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 July 6, 2014 ("SR"), a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on July 2, 2014; and an assessor's report ("AR") also completed by the physician on July 2, 2014.
- The appellant's Request for Reconsideration form with attached reconsideration submission dated December 24, 2014 (RFR) and attached Lung Function Requisition Spirometry completed by another doctor (the "doctor") dated May 29, 2014 (the "Spirometry Requisition").

Diagnoses

- In the PR the physician (who had known the appellant for 25 years and seen her two to ten times in the past 12 months) diagnosed the appellant with generalized anxiety disorder (onset since childhood), major depression (onset 2004), tachycardia and palpitations (onset over 20 years) and Asthma (onset over 20 years).
- In the AR, the physician did not complete Section B, question 1 to indicate the appellant's physical or mental impairments that impact her ability to manage DLA. In the Additional Information section of the AR the physician commented that the appellant has had significant denial of the severity of symptoms limiting her ability to access care. The physician notes that the appellant has been encouraged to seek counseling and finally feels in a position to do so. The physician notes that medication controls the appellant's heart rate and she takes another medication on occasion for panic, but she needs other coping mechanisms. The physician comments that the appellant's condition may improve but she expects she will never be free of her life long anxiety.

Physical Impairment

- In the Health History portion of the PR the physician commented that the appellant has intermittent tachyarrhythmia, which aggravates her anxiety. The physician notes that the appellant is 5'2" and weighs 95 pounds.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ stairs unaided, can lift 15 to 35 pounds and has no limitations with respect to remaining seated.
- In the AR the physician reported that the appellant independently manages walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. The physician comments that the appellant is frail, needs to be careful about her weight, and has lost 32 pounds over the last year.

In the Self-Report the appellant reported symptoms relating to major depression and anxiety but not a physical impairment.

In the RFR the appellant states that she is only able to walk more than 5 blocks on her better days

after she has taken both her inhalers and allowed them to work. However, she states that she only has a two-hour period of time before she finds herself requiring rest until she can repeat her inhaler. She reports that she can lift her 25-pound grandchild but is not able to carry him. She reports that her restricted lung function makes her feel very weak and tired when she tries to be physical. She reports that the doctor has told her that she now has COPD as well as asthma. She states that she has chronic bronchitis and that her lungs constantly produce phlegm, with severe coughing every day and night, which restricts her physical activities. Severe coughing also disrupts her speaking. The appellant also states that she used to be 125 pounds last year but is now only 92 pounds and her body is tired and weak.

The Spirometry Requisition states that the indication for spirometry is due to documented severity of known respiratory disease with COPD indicated. The doctor notes that the appellant has asthma with a 30-year smoking history and requires three medications.

Mental Impairment

- In the Health History portion of the PR the physician states that the appellant has suffered from life long anxiety with symptoms fluctuating in frequency and severity and becoming constant over the last five years. The physician states that the appellant has developed major depression caring for a partner with end stage COPD for the last several years to the point where they are now separated. The physician also comments that the appellant has had a challenging life with two partners and several children, many of whom have health/behavioral issues. The physician also comments that the appellant is resistant to taking medication and has been unable to access counseling due to her disrupted life but has relocated to another city and has agreed to contact a mental health service.
- In the PR the physician indicated that the appellant has no difficulties with communication. In the AR the physician described the appellant's speaking, reading, writing, and hearing as "good".
- In the PR the physician indicated that the appellant suffers significant deficits in two of twelve categories of cognitive and emotional function: emotional disturbance and motivation. The physician comments that the appellant is quite sad, has significant life stressors, and is not coping well.
- In the Additional Comments section of the PR the physician commented that the appellant has left her partner and is seeking a new life in another city for herself and her child, agreeing to seek counseling. The physician comments: "major somatic symptoms, weight loss, poor appetite, tearful and edgy".
- In the AR the physician indicated that the appellant's impairments have a major impact on emotion, moderate impact on motivation, and minimal impact on insight and judgment. She reported minimal or no impacts in the 10 remaining categories, namely bodily functions, consciousness, impulse control, attention/concentration, executive, memory, motor activity, language, psychotic symptoms or other neuropsychological problems. In the comments section the physician notes that the appellant has longstanding anxiety exacerbated by stressful life circumstances with increasing depression over the past few year and she is now quite impaired. The physician also comments that the appellant has left a chronically ill and demanding partner and is attempting to re-establish herself and her child. She also notes that the appellant will seek counseling but is currently struggling.

In the Self-Report the appellant reported that she has moved to a new city to start a new happier life with her child but it was a hard choice as her emotions are hard to deal with and she feels alone. She is seeking counseling and will find other groups that will help her with her depression and she is determined to make her life better.

In the RFR the appellant reports that she has major depression with life long major mood swings from happiness to feeling hopeless and no self worth which can last weeks in this dark mood.

DLA

- In the PR the physician indicated that the appellant has not been prescribed medication or treatment that interferes with her ability to perform DLA.
- In the PR the physician reported that the appellant is not directly restricted with any of the 9 DLA of *personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside or outside the home, use of transportation or management of finances*. The physician reports that the appellant's social functioning is periodically restricted, explaining that she is quite sensitive to environmental stressors and will become agoraphobic and self-isolate.
- In describing the degree of restriction the physician wrote "struggles with motivation and activity".
- In the AR the physician indicated that the appellant independently manages all tasks related to personal care, basic housekeeping and shopping. For carrying purchases home the physician reports "if not too heavy", noting the appellant is quite physically frail. The physician also reports that the appellant is independent with all DLA of meals, paying rent and bills, medications and transportation. With respect to the DLA of social functioning, the physician reports that the appellant is independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and securing assistance from others but requires periodic assistance to deal appropriately with unexpected demands. The physician described the appellant as having good functioning with her immediate social network and marginal functioning with her extended social network. The physician comments that the appellant has good relationships with her children but really has no adult support of any type.

In the Self-Report the appellant stated that:

- Her major depression and anxiety make her feel extremely sad and helpless and she finds herself crying for a few days non stop, having no energy or desire to even leave the house. She finds it emotionally hard to make it through the day with trying to keep herself from crawling into her bed and crying.

In the RFR the appellant states that she has days when she feels like her lungs are full of fire and cotton, making it very difficult to breathe, which limits her walking and ability to attend physical events such as swimming pools, dancing etc. Her coughing limits her ability to read to her grandchild and her severe coughing disrupts her ability to speak. She states that every day is a struggle for her.

Help

- In the PR the physician reports that the appellant requires emotional support but she does not require any prostheses or aids for her impairment.

- In the AR the physician indicated that the appellant receives assistance from family and has some social support from her daughter but her daughter is a young, single mother trying to complete high school so the appellant basically has no emotional support. The physician has not indicated that the appellant routinely uses any assistive devices to help compensate for her impairment and that the appellant does not have an assistance animal.
- In the RFR the appellant states that because she is so weak and tired she moved to another city where she can get help from her older children with grocery shopping, attending school activities for her younger child and to raise her younger child.

Additional information provided

In her Notice of Appeal the appellant states that she needs to get updated information from her physician as her health has decreased since her PWD application was submitted but her physician is four hours away and she has just found a new doctor in the new city she moved to.

The appellant also provided a submission consisting of a letter from the physician dated January 23, 2015 (“the physician’s letter”) in which the physician states that the appellant has been her patient for over 20 years and has recently moved to a new city. The physician comments that the appellant reports that she has progressed from asthma to COPD, has chronic bronchitis, chronic cough and continues to smoke, requiring ongoing treatment with inhalers and medication. The physician notes that the appellant reports that her condition significantly limits her ability to walk any distance and she has a chronic cough and a lot of reactive airways symptoms. The physician states that the appellant reports that her depressive symptoms have worsened and she is barely able to feed and dress herself for ten to twelve day periods and has become increasingly agoraphobic and unable to go out in public. She notes that the appellant reports panic attacks when she goes out so she does not go out much but continues to socialize with her children who she lives near. The physician comments that this is “...*the best information I have reported to me about the patient’s current clinical condition.*”

Admissibility of New Information

The ministry did not raise an objection to admissibility, and the panel has admitted the physician’s letter into evidence as it is in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information relates to the appellant’s physical and mental diagnosis and her ability to perform DLA and tends to corroborate the appellant’s evidence in the SR and RFR.

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 taking all of the information into account, particularly the recent physician's letter, and her difficulty with breathing, walking and lifting, that the physician has confirmed that the appellant has a severe physical impairment. The appellant also argues that her asthma has progressed to COPD as shown in the Spirometry Requisition and that the physician has confirmed that her impairment has become worse since the PWD application was submitted.

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. The ministry argued that the functional skill limitations are not significantly restricted and aside from being frail and having to watch her weight as she has lost 32 pounds in the last year, the physician's narrative does not describe a severe restriction in mobility.

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 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 appellant's physical functional skills as described by the physician in the PR indicate only mild limitations. In particular, the only noted limitation is with respect to lifting with a restriction to 15 to 35 pounds. This is consistent with the physician's evidence in the PR and AR where she indicates that the appellant is independent with all DLA relating to mobility and physical activity with the exception of having to be careful with carrying and lifting as she is frail.

The Spirometry Requisition indicates that there is a need for further testing to determine whether the appellant's asthma had in fact progressed to COPD. However, no test results were provided or any subsequent information from the doctor who completed the Spirometry Requisition. In addition, while the subsequent physician's letter provides information regarding the appellant's condition and an increased limitation in her ability to walk any distance, the physician indicates that the information provided is based entirely on the appellant's self-report of deterioration in her symptoms. In the RFR the appellant stated that she is only able to walk more than 5 blocks on her better days after she has taken both her inhalers and allowed them to work. There is no further medical information provided or anything to indicate the extent of the change in the appellant's functional limitations due to a severe physical impairment or the frequency and extent of her "bad" days.

The panel has concluded that while the appellant's functioning is impacted by her physical impairments, the ministry reasonably determined that the evidence falls short of establishing that she has a severe physical impairment as contemplated by the legislation.

Severe Mental Impairment

The appellant's position is that her major depression and anxiety together constitute a severe mental impairment. She relies on the physician's letter which states that her depressive symptoms have worsened and that she is barely able to feed and dress herself for ten to twelve day periods, has become increasingly agoraphobic and unable to go out in public.

The ministry's position is that the information provided is not sufficient evidence of a severe mental impairment. The ministry argued that the physician reported that the appellant has major impact to emotion, a moderate impact with motivation and a minimal impact with insight and judgment but is independent with the remainder of her cognitive and emotional functioning. The ministry also notes that the physician writes that the appellant's depression has increased in the last few years and is currently struggling but will seek counseling. The ministry also notes that although the appellant indicated in her RFR that her symptoms had increased and that she felt more information was required to explain her functioning, the appellant did not provide any further medical information with her RFR.

Panel Decision:

At the time the PR and AR were completed the physician had been seeing the appellant for over 20 years. The physician indicated that the appellant was resistant to taking medication and had not accessed counseling due to disrupted life but has now moved and has agreed to contact mental health services. In the PR the physician reports that the appellant's conditions are long standing and that the degree of symptom control may improve but she did not anticipate that they would ever go

away. In the PR the physician reports that the appellant has significant deficits with emotional disturbance and motivation. In the AR the physician reports that the appellant has major impact to emotion, moderate impact to motivation, minimal impact to insight and judgment and no impact to bodily functions, consciousness, impulse control, attention/concentration, executive, memory, motor activity, language, psychotic symptoms or other neurophysiological symptoms.

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 in the PR indicates that the appellant has a periodic restriction with social functioning as she struggles with motivation and activity. The evidence of the physician in the AR indicates that the appellant is not significantly restricted with respect to *decision making* in that she independently manages the decision making aspects of *personal self-care* (regulating diet), *shopping* (making appropriate choices), *meal preparation* (meal planning) *paying rent and bills*, *manage personal medication* (filling/refilling/taking as directed), and *transportation* (using transit schedules and arranging transportation). With respect to *social functioning*, the physician indicated that the appellant requires periodic assistance with dealing appropriately with unexpected demands but there was no additional information to explain the degree and duration of support or supervision required.

Although the physician's letter indicates some deterioration in the appellant's condition and that her depressive symptoms have worsened such that she has ten to twelve day periods where she is barely able to feed and dress herself, has become increasingly agoraphobic, and unable to go out in public, as previously noted this information is based entirely on the appellant's self report and there was no further information from the physician to establish why the severity of the appellant's symptoms have increased so much in the six months between the time the PWD application was competed and the date of the physician's letter, particularly taking into account the long standing duration of the appellant's anxiety and depression. In the RFR the appellant reported that she has life-long major mood swings from happiness to feeling hopeless and no self worth which can last weeks in this dark mood; however there was no information provided by the physician or the appellant to clarify how often the appellant experiences the periods of increased symptoms.

Considering that:

- the appellant's ability to communicate is good in all respects,
- the appellant is not significantly restricted in terms of *decision making*,
- the appellant requires only periodic support/supervision with some aspects of *social functioning*,
- the physician's evidence indicates moderate impacts to only a few aspects of cognitive and emotional functioning, and
- the physician comments that some improvement may result to the appellant's mental functioning through counseling,

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 condition has worsened and she is significantly restricted in the DLA of mobility, personal self-care, and lifting and carrying. The appellant states that she requires assistance with grocery shopping and raising her youngest child, that she has ten to twelve day periods where she is unable to feed or dress herself. She states that her major depression significantly restricts her DLA. She states that her breathing difficulties restrict her physical abilities and cause her to feel tired and weak which also adds to her major depression.

The ministry's position is that it relies on the medical opinion and expertise of the appellant's physician and that since the majority of DLA are performed independently or require little help from others, the information from the physician does not establish that the appellant's impairments significantly restricts DLA either continuously or periodically for extended periods. The ministry also states that the appellant did not provide any additional information from the physician with the RFR regarding the impacts to her DLA so the reconsideration decision was based on the current information in the original PWD application.

Panel Decision:

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that in the opinion of a prescribed professional, 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 circumstances, the PR indicates that the appellant has no restrictions to her DLA except a periodic restriction to social functioning. The physician comments that the appellant struggles with motivation and activity but does not provide any further information with respect to the duration and frequency of the restriction. In the AR, the physician reports that the appellant is independent with all DLA except that she requires periodic support to deal appropriately with unexpected demands and that she must be careful with heavy lifting as she is frail. However, the physician does not provide any explanation or description of the degree and duration of support or supervision required.

In the SR, the appellant states that she has days where she feels extremely sad and helpless, crying for a few days non-stop, with no energy to leave the house. She reports that she finds it hard to make it through the day with trying to keep herself from crawling into bed. However, the appellant also says that she has moved to a new city and is determined to make a happier life for herself and is going to access groups to help with her depression. With respect to mobility, the appellant stated in the RFR that she is only able to walk more than 5 blocks on her better days, after she has taken both her inhalers and allowed them to work, but there is no further medical information provided regarding the frequency and extent of her "bad" days.

Although the subsequent physician's letter indicates that the appellant reports a deterioration in her symptoms and with ten to twelve day periods where she is unable to feed and dress herself, there is no information from the physician about how many times this has occurred in the six months since the PWD application was submitted and the date of the physician's letter. In addition there is no information provided to explain why the appellant's condition has deteriorated to such a degree within such a short time, taking into account that her condition has been longstanding and even with fluctuating symptoms, there was no indication she has experienced prior periods where she was unable to feed or dress herself. Furthermore there was no information provided from the physician about how much longer than typical it takes the appellant to perform the DLA with which she is restricted.

In the panel's view, the physician's letter does not provide enough information to demonstrate that the appellant satisfies the legislative criteria to qualify for PWD designation. For example, in the RFR the appellant states that she requires assistance with grocery shopping, attending school activities with her youngest child and help with raising her younger child but the physician's letter does not provide any further information on how much longer than typical it takes the appellant to perform grocery shopping or how much help she requires. While the evidence does indicate that the appellant experiences some restrictions to her ability to manage DLA, it does not demonstrate that those restrictions are significant.

Based on the foregoing analysis, the panel concludes that the ministry reasonably determined that the evidence is insufficient to show that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires significant assistance with DLA from her family, particularly with respect to grocery shopping, attending school activities and raising her youngest child. The appellant's position is that she requires ongoing use of inhalers and medication and is planning to access groups to help with her depression.

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 argues that no assistive devices are required and the appellant does not require 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.

Although the physician reports that the appellant requires emotional support, for the reasons provided above, the necessary precondition has not been satisfied 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 panel acknowledges that the appellant's medical conditions affect her ability to function. However, 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.