

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of December 30, 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 consent of the parties, the hearing was conducted in writing in accordance with section 22(3)(b) 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 9, 2014 along with a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated July 6, 2014 and assessor's report ("AR") completed by a social worker/MH & SU counsellor (the "social worker") on July 11, 2014.
- The appellant's Request for Reconsideration form, dated December 16, 2014.
- A letter from the physician to Service Canada, dated December 16, 2014.

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The panel reviewed the evidence as follows:

Diagnoses

- In the PR the physician (who has known the appellant for more than 20 years and has seen her more than 11 times in the past 12 months) diagnosed the appellant degenerative disc disease L4-5 and L5-5, hypermobility syndrome – lumbar facet joints, hypothyroidism, and major affective disorder – depression.
- In the AR the social worker (who has known the appellant for five months and seen the appellant two to ten times) described the appellant's impairments as "client struggles with debilitating pain and depression."
- In his December 16, 2014 letter to Service Canada in response to the denial of the appellant's application for the federal CPP disability pension, the physician stated "With [the appellant's] marked mood disorder involving depression, anxiety and agoraphobia, along with intermittent but severe back problems, it is hard to imagine her being in any way employable even on a part time basis. There is no doubt over the last couple of years things have increased in severity and despite our intervention she has slowly deteriorated. Her long-term prognosis with regards to these entities is poor."

Physical Impairment

- In the Health History section of the PR the physician described the severity of the appellant's back pain in these terms "Recurrent severe back pain episodes essentially totally disable [the appellant] for several days when they occur. Trouble doing ADL's when this happens. In between these episodes has moderate back pain which limits her physical abilities."
- The physician also commented in the PR "No known cure for [the appellant's] lumbar back problem. Regular exercise program when tolerated only treatment" and "Unfortunately, [the appellant's] back problem is only going to increase in intensity as time goes on."
- 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 ("when back flares up"), climb 5+ stairs unaided, that she can lift 5 to 15 pounds, and that she can remain seated for 1 to 2 hours.
- In the AR the social worker reported that the appellant requires periodic assistance with all aspects of mobility and physical ability: walking indoors and outdoors, climbing stairs,

standing, lifting, and carrying/holding, and commented “Pain limits client’s mobility.”

Mental Impairment

- In the Health History section of the PR the physician commented “...intermittent episodes of depression, suicidal at times, affect cognitive abilities, memory, and associated with severe fatigue. Gets very frustrated with unpredictable back pain.”
- In the PR the physician also commented “At present on [medication] daily for depression with some slow improvement” and “Mood problem should improve over next 4-6 months with current therapy.”
- In the PR the physician noted no difficulties with communication. He indicated the appellant has significant deficits with two of twelve categories of cognitive and emotional function - emotional disturbance and motivation – “according to mood disorder.”
- In the AR the social worker reported that the appellant’s ability to communicate is good in all respects.
- The social worker indicated that that appellant experiences major impacts in five of fourteen categories of cognitive and emotional function: emotion, motivation, motor activity, psychomotor problems, and other emotional and mental problems. The social worker commented “Due to client’s pain and depression, her physical activities are limited and her mental health is impacted. Client will often withdraw from social activities and isolate, which decreases mood and motivation.”
- The social worker commented the “Client suffers from agoraphobia. During the worst times she won’t go out on her deck or answer her door. Answering the phone can also be overwhelming due to depression/hopelessness.”

DLA

- In the PR the physician reported that the appellant has not been prescribed any medication or treatments that interfere with her ability to perform DLA.
- The physician indicated that the appellant’s impairments directly and periodically restrict the appellant’s ability to perform the DLA of *personal self-care, meal preparation, basic housework, daily shopping, use of transportation*, and the “outdoors” portion of the DLA *mobility indoors and outdoors*. He also indicate that the appellant is not directly restricted in the DLA *manage personal medications, manage personal finances, social functioning*, and the indoors portion of the DLA *mobility indoors and outdoors*.
- In commenting on the degree of restriction the physician wrote “Severely restricted at times with moderate restriction between episodes.”
- In response to the question in the PR “If Social Functioning is impacted, please explain” the physician wrote “No”.
- The physician explained his use of the term “periodic” as meaning “When back flares up [the appellant] gets help from family with ADL’s.”
- In the AR the social worker reported the appellant as independently managing all tasks related to the DLA of *personal self-care, meal preparation, manage personal finances* (pay rent and bills), and *manage personal medications*.
- The social worker indicated the appellant requires periodic assistance with aspects of the DLA of *daily shopping* (going to and from stores, and carrying purchases home) and *use of transportation* (getting in and out of a vehicle, and using public transit), commenting “pain limits

mobility.”

- Regarding the DLA of *social functioning*, the social worker reported that the appellant has very disrupted functioning with both her immediate and extended social networks. She indicated that the appellant is able to independently secure assistance from others, but that she needs either periodic or continuous support/supervision with all other aspects of social functioning, commenting “Because of client’s pain and mental health issues, she has difficulty maintaining relationships...she has poor impulse control and intense moods...client can become overwhelmed with unexpected demands and tasks, which leads to isolation...client has been consistent with making her appointments. I believe extra time and support is needed to help her learn healthier coping skills for her depression.”
- In her self-report, the appellant wrote “On my bad days I am unable to get around. I’m stuck on my back till the pain slows, so my whole life is put on hold. I have depression that makes me unable to leave my house.”

Help

- In the PR the physician responded to a question about prostheses or aids required by the appellant by indicating that she “uses a cane at times when back flares up.”
- In response to the question “What assistance does your patient need with [DLA]” the physician wrote “...help required often 4-5 days at a time until severe back pain subsides with episode.”
- In the AR the social worker indicated that the appellant receives help from family and Health Authority Professionals with respect to her DLA. She indicated no equipment or devices routinely used by the appellant to help compensate for her impairment, and that the appellant does not have an assistance animal.

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 degenerative disc disease and hypermobility syndrome, along with associated back pain, constitute a severe impairment. She relied on evidence from her physician which indicates that when her back pain flares up she is essentially totally disabled, and that her back problems are only going to intensify over time.

The ministry's position, as set out in its reconsideration decision, is that the information provided does not supply sufficient evidence of a severe physical impairment. The ministry argued that there is no definite information to quantify the frequency or duration of episodes of severe back pain, and that no information has been provided on functional ability when in moderate pain as described. Finally, the ministry argued that analgesics (pain medication) are available to control the degree of pain to allow for better physical functionality.

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 and the social worker.

The panel notes that there are some significant inconsistencies between the evidence of the

physician and of the social worker. Where inconsistencies arise, the panel has tended to give more weight to the physician's evidence as he has known the appellant for much longer than the social worker and sees the appellant on a frequent basis.

Both the physician and the social worker confirm that the appellant's flare ups of severe back pain are episodic. The physician has indicated that these flare-ups can last for 4 to 5 days. However, as discussed in more detail below under the heading Significant Restrictions to DLA, there is no evidence before the panel to indicate how frequently these episodes arise. Frequency of impairment is a key factor in determining severity. In between flare-ups, the physician has described the appellant's back pain as "moderate", and which "limits her physical abilities." The social worker's evidence indicates that the appellant requires periodic assistance with mobility and physical abilities. This is consistent with the episodic nature of the appellant's severe back pain and with the physician's opinion that the appellant requires periodic assistance with some DLA. There is no description of the appellant's physical functional abilities when she is not experiencing an episode of severe back pain.

The panel notes that while the ability to engage in paid employment is a consideration for the CPP disability pension, the focus of the assessment for PWD designation is the degree to which one is restricted from managing DLA independently. In the panel's view, working at paid employment generally requires a higher level of functioning than performing DLA.

As discussed in more detail in these reasons for decision under the heading Significant Restrictions to DLA, the limitations to the appellant's physical functioning do not appear to have translated into significant restrictions to her ability to manage DLA.

The panel acknowledges that the appellant's functioning is restricted, and that the physician's evidence is that her physical conditions will worsen over time. However, 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 she suffers from severe depression and agoraphobia which impacts her ability to function. In particular, she argues that both the physician and the social worker have given evidence that she has significant deficits in cognitive and emotional function, and the social worker confirmed that the appellant has very disrupted social functioning.

The ministry's position is that the information provided is not sufficient to demonstrate a severe mental impairment. The ministry argued that the physician expressed the opinion that the appellant's mood problem should improve over the next four to six months under the current treatment regime.

Panel Decision:

The evidence indicates that the appellant suffers from depression and agoraphobia which has an impact on her cognitive and emotional functioning. The social worker indicated that her mental health has major impacts in five areas of cognitive and emotional functioning. The physician reported deficits in two areas of functioning, and expressed the opinion that the appellant's mood will improve

in four to six months under the current treatment regime.

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 professional evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that, according to the social worker, the appellant independently manages the decision making aspects of the DLA of personal self-care (feeding self and regulation diet), *manage personal medication* (taking as directed/safe handling and storage), *manage personal finances* (banking, budgeting, pay rent and bills), *meal preparation* (meal planning), and *daily shopping* (making appropriate choices).

With respect to the DLA of *social functioning*, the social worker indicated that the appellant has very disrupted functioning. This is in stark contrast to the physician's evidence, who emphatically answered "No" with respect to restrictions to *social functioning*. For the reasons stated above, the panel has given more weight to the physician's evidence regarding *social functioning*.

Considering that:

- the evidence demonstrates that the appellant has no significant difficulties with communication,
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*, and
- the physician's evidence is that appellant's mood has been improving under current treatment, and will continue to improve over the next four to six months,

the panel concludes that the ministry reasonably determined that the information provided does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that her impairments significantly restrict her ability to perform DLA. She argued that when her back pain flares up she is essentially limited to lying on her back for four to five days at a time, putting her life "on hold." She also argued that her depression leaves her unable to leave her home.

The ministry's position is that there is not enough evidence to confirm that the appellant's impairments significantly restrict her ability to perform DLA continuously or periodically for extended periods. The ministry argued that the appellant independently manages the majority of DLA and that no information was provided as to how often she requires assistance. The ministry also argued that no safety issues were identified.

Panel Decision

The legislation 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 entirely 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.

While the evidence demonstrates that the appellant is periodically restricted in some tasks related to some DLA, it also demonstrates that the appellant independently manages most tasks related to most DLA. As mentioned above under the heading Severe Physical Impairment there is no evidence before the panel with respect to the frequency of the appellant's flare-ups of severe back pain. In the absence of such evidence it is difficult to conclude that the restrictions to DLA are significant as contemplated by the legislation.

The social worker has indicated that the appellant requires continuous assistance with aspects of two DLA: *basic housekeeping* and *social functioning*. For reasons noted above the panel has given more weight to the physician's evidence regarding *social functioning*. With respect to *basic housekeeping*, there is no evidence with respect to the nature of the help provided, who provides it, and why the appellant is unable to do housework periodically between flare-ups of back pain as indicated by the physician.

Based on this analysis, and for the foregoing reasons, the panel finds that the ministry reasonably concluded that the evidence is insufficient to demonstrate that the appellant's DLA are significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires help with DLA due to the restrictions she experiences.

While acknowledging that the appellant periodically uses a cane during exacerbations of back pain, 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.

Panel Decision:

A finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.