

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of February 18, 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

The ministry was not in attendance at the hearing. After confirming that the ministry was properly notified, the hearing proceeded pursuant to Section 86(b) of the Employment and Assistance Regulation.

The information before the ministry at the time of reconsideration included the following:

1. The appellant's *PWD Application* consisting of:

- the appellant's self-report ("SR") completed by the appellant and dated October 28, 2014 in which she described her disability as follows:
 - acute pancreatitis – which she has suffered for over five years and which has caused hospitalization 1-5 times a year but since she stopped working she has had 1-2 hospitalizations per year;
 - arthritis – in the lower, upper, neck, and shoulders. She suffers pain from this everyday and cannot stay in one position for very long. In cold months she can hardly move;
 - arthritis – in five spots from the neck to the tailbone;
 - type 2 diabetes – she was diagnosed with this condition six years ago but believes that she had it for years before that. She finds it very hard to control, and to cover the cost of \$60 per month for the insulin – a cost she cannot afford. She is insulin dependent;
 - nerve damage – she has not been diagnosed with nerve damage but she is pretty sure that it is the cause of the ache in her feet which she experiences most of the time. She cannot walk more than 2-3 blocks without pain – sometimes it is unbearable and she is unable to get out of bed and stand on her feet.
 - ? (unknown condition) – the appellant is going for tests to determine why if she walks too much or lifts anything over 10 pounds (sometimes even lighter weights), she starts bleeding;
 - depression – the appellant doesn't take any medications for this condition because she has seen what it has done to some of her relatives.

The appellant reports that she has been suffering from all of this for years. She doesn't have the money for meds or to make it to appointments with doctors and specialists.

- a physician's report ("PR") completed by the appellant's general practitioner and dated October 31, 2014 which indicates that he has known the appellant since birth and that he has seen the appellant 2 to 10 times in the past 12 months.
 - an assessor's report ("AR") completed by the appellant's general practitioner and dated October 31, 2014.
2. The appellant's *Request for Reconsideration* signed and dated February 17, 2015 that states the following reasons for her request: "*There has been changes in the application – please (review).*" A 2-page letter was *attached* to the *Request for Reconsideration* in which the appellant states that she has been denied PWD designation but does not understand why since she feels that she has more problems than a lot of people on PWD. She notes that she had previously indicated on her form that she has Type 2 diabetes, but this was incorrect – she has Type 1 diabetes and is insulin dependent. She pays \$33.68 twice a month for insulin out of her own pocket. The appellant noted that she also has osteoarthritis in five spots on her back extending from her neck down to her lower spine. This condition is very painful and sometimes she needs help getting out of bed, dressed, showered, and with daily activities. She cannot lift anything over five pounds as it hurts, and she starts to hemorrhage and her back locks. She

also hemorrhages when she bends down, jumps, wears tight pants, or walks for a period of time. The appellant has been taking pain meds including Tylenol #3, Cyclobenzapr, and Naproxen four times a day – and sometimes a few more on a bad day. Her doctor has recommended that she go on Tramacet or Dilodid (Dilaudid) but this is not covered on her medical and she cannot afford them. She has nerve damage to the bottom of her feet and some days she cannot walk. When that happens she needs to crawl to the bathroom or wait for a friend to come and help her. She walks with a stick that she sometimes uses as a cane. She cannot be seated or stand for long since it hurts her back. The best way for her to be comfortable –where her pain is not gone but at ease – is to lay on a soft surface with pillows under her legs.

She has problems with depression because she has no easy way to get to appointments with specialists and doctors. Each month she pays \$400 on rent, \$68 on insulin and \$50 on Tylenol/Ibuprofin (and sometimes more if she gets the flu or a cold) which totals \$518 per month. This does not leave her with much for food of a proper diet, and bus fare to doctors and specialists, and bills. This is not about not wanting to work because she loves to work, but this is because she cannot work. She has tried several things and finds that she can only do light duty – if that – it takes her longer and is very painful. The appellant notes that even writing this letter she has had to stop four times because of her problem.

The appellant notes that she has been getting dramatically worse in the past few weeks. She needs to go to physiotherapy and she needs more assistance from friends and family. She is still getting many tests done when she can afford bus fare. She has lost 30% of her hair due to stress about not being able to afford her medications, food and appointments – at least that's what she thinks but the tests may say different.

She has tried to get help from an advocacy organization and has left them messages but she has not heard back from them so she has had to act on her own behalf.

The appellant's *Notice of Appeal* was dated February 24, 2015. Her reasons for appealing go to argument and are presented in Part F.

The ministry noted that changes had been made to the PR and the AR that were not initialed by the physician and therefore considered only the original Persons with Disabilities Designation application as information from the physician. At the hearing, the appellant confirmed that she made the changes to the PR and the AR, including the written comment "I have been going to see Doctor every 2 weeks – 4 weeks that appears on the last page of the PR. She explained that she had met with her physician and discussed the information he had provided in the PR and AR. She reported that she had told him that she disagreed with some of the responses he had provided and she stated that the physician invited her to enter the responses (beside his) that she felt were more appropriate.

Accordingly, the panel reviewed the medical evidence as follows:

Diagnoses

- In the PR the appellant's physician diagnosed her with pancreatitis (onset 2008), diabetes (onset 2006?), peripheral neuropathy (onset not given) and depression (onset not given).

Severity of Impairment:

Physical Impairment

- In the PR the physician noted that the treatment of pancreatitis and diabetes has been very difficult and required multiple hospitalizations. In describing the appellant's functional skills, the physician indicated that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 2 - 5 stairs unaided, can lift under 5 pounds, and can remain seated for less than one hour.
- In the AR the physician indicated that the appellant is independent in walking indoors and standing but requires periodic assistance with walking outdoors, climbing stairs, lifting and carrying & holding.

Mental impairment

- In the PR the physician indicates that the appellant has no difficulties with communication but lists the following significant deficits with cognitive and emotional function: emotional disturbances, motivation, impulse control, motor activity, and attention or sustained concentration.
- In the AR the physician assesses as "good" the appellant's ability in hearing, and "satisfactory" in speaking, reading and writing. In terms of *Cognitive and Emotional Functioning* the physician indicates "no impact" for bodily functions, consciousness, insight and judgement, executive, psychotic symptoms, and other emotional or mental problems: "minimal impact" for emotion, memory, motivation, motor activity, language, and other neuropsychological problems; and "moderate impact" for impulse control and attention/concentration. He indicates that the appellant is "independent" in all areas of *Social Functioning* except for "able to deal appropriately with unexpected demands" where the physician indicates that the appellant requires periodic support/supervision. In addition he indicates that the appellant has "marginal functioning" in his relationship with her immediate social networks and "good functioning" in her relationship with extended social networks.

Restrictions in performing DLA

- In the PR the physician indicates that the appellant has been prescribed medication and/or treatments that interfere with her ability to perform daily living activities. The physician listed the following DLA as restricted: basic housework and daily shopping and noted that they are periodic restrictions. He adds the following note to explain "Can't hold or do laundry at times – also difficult to do housework." The physician listed the following DLA as not restricted: personal self care, meal preparation, management of medications, mobility inside the home, mobility outside the home, use of transportation, management of finances, and social functioning.
- In the AR the physician has noted that the appellant is "independent" in regard to all DLA except for the following which require periodic assistance: bathing, transfers (in/out of bed), laundry, basic housekeeping, going to and from stores, carrying purchases home, getting in and out of a vehicle, and able to deal appropriately with unexpected demands.

Help required/provided

- In the PR the physician indicates that the appellant does not require any prostheses or aids for her impairment. The physician made no comment in response to the question "What assistance does your patient need with Daily Living Activities?"
- In the AR the physician notes that the appellant receives assistance from family and friends and comments "Will probably require some basic assistance." The physician does not indicate any equipment or devices that the appellant routinely uses to compensate for her impairment, and confirms that the appellant does not have an assistance animal.

At the hearing, the appellant stated that she has qualified as a "Person with persistent multiple barriers to employment" (PPMB). She indicated that she sometimes has to miss medical appointments and tests because she is not always able to afford the cost of bus fare. She has tried

working. She tried to work with a friend who has a cleaning business but she had to quit after 5 minutes because she could not do the physical work. She has tried waitressing but she can't stand on her feet for more than 15-20 minutes before her feet are so painful she can no longer stand.

The panel finds that the following information is in support of the information and records before the minister when the reconsideration decision was made because it substantiates the information in her *Request for Reconsideration* about being unable to work:

- the appellant's claim to have PPMB status; and
- the appellant's description of her recent work history and her inability to find employment within her physical limitations .

Accordingly, the panel finds that it is admissible under section 22(4) of the EAA as it is evidence in support of the information and records that were before the ministry at reconsideration.

PART F – Reasons for Panel Decision

The issue in 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.

(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.

Severe Physical Impairment

The appellant's position is that she suffers from several serious medical conditions that have been confirmed by her physician: pancreatitis, type 1 diabetes, and peripheral neuropathy. In addition she reports that she has arthritis in her "lower, upper, neck and shoulders" although her physician has not confirmed a diagnosis of arthritis. Finally, she reports bleeding in her abdomen whenever she walks too much or lifts too much weight. She does not yet have a diagnosis for this problem and expects to be having further tests. In the *Notice of Appeal* she reports that she is unable to perform many DLA

without help from others, and specifies cleaning, cooking, dressing herself and laundry as DLA she is unable to do by herself.

The ministry's position is that the PR indicates that the appellant can walk 2-4 blocks unaided, climb 2-5 stairs, lift under 5 pounds and remain seated for up to one hour. In assessing the appellant's mobility and physical ability, the ministry notes that the PR indicates that the appellant requires periodic assistance with walking outdoors, climbing stairs, lifting and carrying and holding. However, the ministry notes that no information is provided on how often the appellant requires such assistance, and the PR reports that the appellant is "independent" in walking outdoors and standing. The ministry concludes that there is not enough evidence to establish a severe physical impairment.

Panel Decision

The appellant reported that her medical challenges result in her being unable to work. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity.

The panel notes that the diagnosis of a serious medical condition or a medical professional's statement that a condition or an impairment is severe does not in itself establish a severe impairment for the purposes of satisfying the criteria for PWD designation.

The panel also notes that the appellant is not satisfied that her physician has adequately identified and described the severity of her physical condition. She seems to feel that either her condition has worsened since her physician completed the PR and the AR (over four months have passed since the physician completed the PR and the AR), or the physician didn't recognize the severity of her condition when he completed the PR and the AR. In addition, the panel notes that there is no additional supporting medical evidence such as lab reports, specialist reports, etc. There is only the appellant's evidence, the PR and the AR. The panel recognizes that section 2(2) of the EAPWDA requires that a severe physical impairment be diagnosed by a medical practitioner. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the applicant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's GP) identify the impairment and confirm that impairment will continue for at least two years. The panel also notes that the legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided at reconsideration presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning. The panel accepts the ministry's argument that in the present case, no information is provided on how often the appellant requires assistance with walking outdoors, climbing stairs, lifting and carrying and holding. Accordingly, the panel concludes that the ministry reasonably determined that there was not enough evidence to establish a severe physical impairment.

Severe Mental Impairment

The appellant advanced no argument with respect to a severe mental impairment, although she did identify "depression" as one of the diagnosed medical conditions from which she suffers. Nonetheless, she also reported that she takes no medications to treat this condition ["since (she) has seen what it has done to some of (her) relatives"].

The ministry's position, as set out in its reconsideration decision, is simply that there is no evidence to establish a severe mental impairment.

Panel Decision

The panel notes that in the PR the appellant's physician indicates that the appellant has no difficulties with communication, but has significant deficits in the following cognitive and emotional functions: emotional disturbance, motivation, impulse control, motor activity, attention or sustained concentration. No comment has been provided to explain how these deficits affect the appellant, nor how frequently they occur. In the AR, the physician reports that the appellant 's ability to communicate is "good" for hearing, and "satisfactory" for speaking, reading and writing.

Considering that:

- while the appellant reports that she suffers from depression, she has made no claim of having a mental impairment,
 - the appellant takes no medication to treat her depression;
 - the appellant's ability to communicate is good or satisfactory in all respects,
 - the appellant has marginal functioning with her immediate social network and good functioning with regard to her extended social network, and
 - the evidence indicates no major impact to cognitive and emotional functioning,
- the panel concludes that the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position, as stated in the *Notice of Appeal*, is that she needs help most days to clean, cook, get dressed and do laundry. In the PR, the physician indicates that the appellant is restricted in doing basic housework and daily shopping, periodically. In the AR the physician indicates that the appellant needs periodic assistance for bathing, transfers (in/out of bed), laundry, basic housekeeping, going to and from stores, carrying purchases home, getting in and out of a vehicle, and able to deal appropriately with unexpected demands.

The ministry's position is that the evidence is not sufficient to demonstrate that the appellant's impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

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. Additionally, 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.

There is a reference in the evidence to the impact the appellant's medical conditions have on her ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA. In the panel's view, paid employment generally requires a higher level of functionality than DLA.

The panel notes that the physician provides no indication in the PR of how frequently the appellant requires assistance to do basic housework and daily shopping. Similarly, in the AR, the physician indicates that the appellant requires periodic assistance with bathing, transfers (in/out of bed), laundry, basic housekeeping, going to and from stores, carrying purchases home, getting in and out of a vehicle, and able to deal appropriately with unexpected demands, but no information is provided regarding how frequently such assistance is required. Accordingly, the panel concludes that the ministry reasonably determined that the evidence is not sufficient to demonstrate that the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods.

Assistance with DLA

In the *Notice of Appeal*, the appellant reports that she needs help most days to clean, cook, dress herself and do laundry. In the PR, the physician indicates that the appellant is periodically restricted in basic housework and daily shopping. He writes that the appellant “. . .can't fold or do laundry at times – also difficult to do housework.” In the AR the physician reports that the appellant requires periodic assistance with bathing, transfers (in/out of bed), laundry basic housekeeping, going to and from stores, carrying purchases home, getting in and out of a vehicle and able to deal appropriately with unexpected demands. No additional comments are provided by the physician in the PR or the AR to indicate the frequency or severity of these limitations.

The ministry's position is that it has not been established that DLA are significantly restricted and therefore, it cannot be determined that the appellant requires significant help from other persons. The ministry notes that the appellant does not require the services of an assistance animal, as noted in the AR, and the original AR lists no assistive devices being required by the appellant.

Panel Decision

The panel is satisfied that the appellant does require help with her DLA based upon her own evidence, and that of her physician. Nonetheless, the panel recognizes that the information provided by the appellant and her physician does not provide sufficient information about the frequency with which such assistance is required. The panel also noted that no assistive devices are required and the appellant does not require the services of an assistance animal. Accordingly, the panel concludes that the ministry reasonably determined that there was enough information to confirm that the appellant's impairment significantly restricts her ability to perform her DLA continuously or periodically for extended periods.

Conclusion

The panel acknowledges that the appellant's medical condition affects 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.