

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 2 March 2015 determined that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant had a severe mental or physical impairment and that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted her daily living activities (DLA) either continuously or periodically for extended periods. The ministry was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – Summary of Facts

The following evidence was before the ministry at the time of reconsideration:

- A 3 page PWD Application – Applicant Information signed by the appellant, undated and not witnessed indicating she chose not to complete the self-report.
- A 8 page Physician Report (PR) dated 25 March 2014 completed and signed by the appellant's physician indicated the following:
 - Specific diagnosis: Depression and social phobia, no date of onset provided.
 - Health history: Long history of depression worsening over the past few years, socially withdrawn, seldom leaves home, past history of abuse, increase in chronic back pain over the past few years. "This has lead to difficulty performing any work with involves physical work".
 - She is taking medication, antidepressants that can interfere with her ability to perform daily living activities – anticipated duration: 2-3 years.
 - The appellant did not require prostheses or aids for her impairment.
 - The impairment was likely to continue for 2 years or more from that date because the lack of improvement in the past few years.
 - In terms of functional skills, the appellant did not have identified limitations other than not being able to lift more than 2kg and only being able to remain seated for up to 2 hours.
 - In terms of significant deficits with cognitive and emotional functions, the physician identified 4 areas: executive, memory, motivation and attention or sustained concentration without providing any more comments.
 - In terms of daily living activities, the physician answered "Unknown" to the question "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" and identified 2 activities that were restricted periodically: meal preparation and basic housework. He explained "Periodic" by stating: "Does not have the strength to cook at times" and, in terms of social functioning that he did not mention whether it was restricted, he wrote "Seldom sees other people". There was no comment to the invitation to provide more information regarding the degree of restriction and he wrote "N/A" to the question as to whether the appellant needed assistance with daily living activities.
 - The physician did not provide any additional comment.
 - The appellant had been a patient for 20 years and he had seen her 2 to 10 times during the previous 12 months.
- An 11 page Assessor Report (AR) dated 25 August 2014, completed and signed by the same physician who completed the PR indicated the following:
 - The appellant lives alone.
 - To the question "What are the applicant's mental or physical impairments that impact [her] ability to manage Daily Living Activities?" the physician answered: "Isolated. Seldom leaves the house."
 - The appellant's ability to communicate by speaking, reading, writing and hearing was satisfactory – no explanation.
 - In terms of mobility and physical ability, she was independent walking indoors, climbing stairs and standing but required periodic assistance from another person for walking outdoors, lifting and carrying & holding, without any further explanation or comment.
 - In terms of cognitive and emotional functioning, her mental impairment impacted daily functioning as follows:

- Major impact: None.
- Moderate impact: consciousness, emotion, attention/concentration, executive, motivation and motor activity.
- Minimal impact: bodily functions, impulse control and memory.
- No impact: insight & judgment, language, psychotic symptoms and other neurological problems.
- No assessment for other emotional or mental problems.
- The physician did not provide any comment on his assessment.
- The physician did not complete Part C “Daily Living Activities”, Part D “Assistance Provided for Applicant” and Part E “Additional Information”.
- The physician indicated it was not his first contact with the appellant and that he had known her for 15 years.
- A fax dated 2 January 2015 from the ministry to the physician who completed the AR indicated that because the physician had not fully completed the AR, the ministry was unable to adjudicate the appellant’s application and to please complete and return the AR. Blank pages attached.
- In a document faxed on 26 January 2015, the physician completed the parts left blank of the AR as follows:
 - In terms of daily living activities, she was independent except for the following activities where she needed periodic assistance from another person:
 - Regulate diet: family member helps to make sure she eats well.
 - Basic housekeeping – no explanation.
 - Meals (except for safe storage of food where there is no assessment): help with advice from family at times.
 - Social functioning: socially isolated – tends to not leave the house.
 - In terms of carrying purchases home, the physician indicated “unknown”.
 - There is no additional comment on the type and amount of assistance required or identification of any safety issues.
 - Her mental impairment was described as impacting her relationship with her immediate and extended social networks as marginal functioning.
 - There is no explanation as to what support/supervision was required to help maintaining her in the community and no additional comment.
 - Help required for daily living activities is provided by family and friends and the physician indicated that a family member helps with planning.
 - No assistive device was used and none was required. The appellant had no assistance animal and did not need one.
 - The physician did not provide any additional information and his information source was “office interview” with the appellant.
- With her request for reconsideration dated and signed on 23 February 2015, the appellant attached a 3-page letter describing her condition and 3 additional documents. In the letter, she stated that she suffered from back pain and she was worried about ending up homeless. She described weak legs due to osteoarthritis and falls due to her knees giving out which resulted in paralyzing pain and suicidal thoughts. She also expressed concern about not being able to afford nutritious food, problems with her thyroid and feelings of depression. The appellant recounted emotional turmoil in her life and the importance of her volunteer work. She stated that she did not need someone all day with her in her house as she could do little chores several times a day but she could not stay up for more than 1 hour because of pain in her knee, legs and back. She also

had medical problems for the last 3 years but due to panic attacks, she did not have the needed courage to go through surgery as well as not having anyone to help her after surgery for the months of pain and weakness. She finally indicated she was too depressed to complete the Self Report that was filed and apologized for it.

The additional documents attached were:

- An X-Ray report for the appellant's left knee dated 4 February 2015 indicated "Osteoarthritic change is seen mainly affecting the lateral and patellofemoral compartments with joint space narrowing... There is also some calcification at the insertion of the knee joint capsule on the medial femoral condyle."
- A 2-page document titled "Laboratory Investigation Results" dated 5 February 2015, listing the results of a number of tests performed in respect of the appellant but no comments or diagnosis.
- A letter dated 15 June 2012 from a gynecology physician to the appellant's physician indicated that the appellant suffered from stress and she was interested in having her condition repaired surgically. The physician indicated that the appellant looked well and that she would book her for surgery and that the appellant was aware of the risks. The gynecologist required the appellant's physician to see her for a preoperative assessment.

In her Notice of Appeal dated 9 March 2015, the appellant indicated that her osteoarthritis was only verified on her left knee but that the pain was in all her joints and was intensifying, restricting her activities for long periods of time and that as a result of that pain, she continuously falls, hurting herself.

Prior to the hearing, the appellant presented new documentary evidence, a letter dated 30 March 2015 by her physician titled "Work Absence Certificate" indicating that the appellant was assessed and was unable to work due to illness/injury, problems: Fibromyalgia, depression and urinary incontinence. The physician added that none of these problems were likely to improve within the next couple of years. The ministry objected to the admissibility of the document because it provided a new diagnosis, fibromyalgia that was not diagnosed at the time of reconsideration. The panel determined that the new documentary evidence with the exception of the diagnosis of "fibromyalgia" was admissible under s. 22(4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration, providing confirmation of the diagnoses already made in the physician's reports and the documentation filed by the appellant. However, the panel determined that the part of the letter indicating that the appellant suffered from fibromyalgia was not admissible under the said s. 22(4) of the EAA as it was not in support of the records before the minister at reconsideration as it provided a new, previously undisclosed diagnosis of an illness suffered by the appellant and that was not part of any of the documentation provided to the reconsideration officer.

At the hearing, the appellant stated that she is unable to work due to tiredness, tries her best with volunteer work and can't see what job she could do. She stated that her physician has known her for 20 years, knows she used to be active and has seen her health declining.

The ministry did not provide additional evidence at the hearing.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical and/or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement and that her impairment was likely to continue for at least 2 years had been met.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;

"**health professional**" repealed

"**prescribed professional**" has the prescribed meaning;

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

Section 2 of the EAPWDR provides further clarification:

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.

The ministry acknowledged that the appellant meets 2 of the conditions for PWD designation in that she is at least 18 years of age and that her impairment is likely to continue for at least 2 years. However, the ministry argued that she does not meet the other 3 criteria.

Severe physical impairment:

The ministry argued that there was not enough information to determine that the appellant suffered from a severe physical impairment. The ministry added that while the physician indicated that the appellant was limited to lifting no more than 5 lbs, his diagnosis did not include any physical impairment other than increasing back pain; thus the ministry argued it was not clear why the appellant could not lift more than 5 lbs. While the ministry acknowledged that the appellant indicated in her documentation a number of physical limitations, it argued that it was not confirmed or diagnosed by her physician and that the physician had not indicated that the appellant required any assistive devices to help her manage her physical functioning. Additionally, the ministry argued that when the AR was completed months later, the physician did not indicate a change in physical functioning.

The appellant argued that she is often in pain and cannot function normally to the extent that she is prevented from finding employment. She argued that she had pain in all her joints, not only the left knee and that the document she provided with her request for reconsideration supported her physician's diagnoses and reports as she assumed the ministry had medical officers that could understand the Laboratory Investigation Report. She also gave the example of urinary incontinence as an impediment for work as she had to use the toilet regularly.

The panel notes that much of the documentation provided by the appellant and the physician related to the appellant's ability to work and find employment; while this information might be relevant in

terms of describing the appellant's mobility and other abilities, it is not a criterion upon which the ministry may base its assessment in determining the eligibility of the appellant for PWD designation. The panel considers this evidence with all the information that was before the reconsideration officer and as part of the circumstances of the appellant.

The panel also notes that the diagnosis provided by the appellant's physician relates to mental disorders and no diagnosis was made with respect to a physical impairment. The panel is not in a position to make a medical assessment of the evidence – the ministry must rely on the information provided by the medical practitioner and has not speculated on what the results of laboratory tests mean in terms of impacting functioning as it would be for the medical practitioner to do such analysis. In terms of daily living activities, the physician, when asked if the impairment restricts the appellant's ability to perform them, indicated "unknown" but proceeded to write that meal preparation and basic housework were restricted periodically but did not indicate what he meant by "periodic". Further, when asked what assistance the appellant needed for daily living activities, he wrote "N/A". In the AR, the physician noted the need for periodic assistance from another person in terms of walking outdoors, lifting, carrying and holding without explaining how often and what type of assistance was required. With respect to meals and diet, the physician indicated that the appellant had help from a family member at times without elaborating why this help was required and how often. Many questions in the PR and the AR remained unanswered and the panel finds that the ministry reasonably determined that there was not enough information to confirm that the appellant had a severe physical impairment.

Severe mental impairment:

The ministry argued that while the appellant had significant deficits in her cognitive and emotional functioning, the physician assessed the impairment as having moderate, minimal to no impact on her cognitive and emotional functioning. Thus the ministry argued that there was not enough information to confirm the appellant had a severe mental impairment.

The appellant argued that she suffered from depression and suicidal tendencies that prevented her from going out of her house and having a normal life, in particular securing employment. She stated that she had been the victim of abuse in the past and that she suffered from panic attacks and she argued that her ailments tended to isolate her.

The panel notes that the physician diagnosed depression and social phobia and indicated in the PR that she had significant deficits with cognitive and emotional function in 4 areas (executive, memory, motivation and attention or sustained concentration) without providing any comment on what they were. However, in the AR, for 3 of those areas he had identified significant deficits in the PR (executive, motivation and attention/concentration) he assessed "moderate impact" on daily functioning, while for the other one, memory, he identified "minimal impact" and no area was assessed as having a "major impact". The panel notes an inconsistency in the physician's assessment since 2 areas that were not identified as having significant deficits in the PR, consciousness and emotional disturbance, were identified in the AR as having a "moderate impact", like 3 other areas that he had identified as "significant deficits" and that he provided no information to explain what he meant by "significant deficit" nor the threshold for "moderate impact". The physician noted periodic assistance for social functioning explaining that she seldom saw other people. In the

AR, he also noted periodic support/supervision for social functioning stating that she was socially isolated and tended not to leave the house but when asked if she needed help, he left that space blank and did not provide any further comment. The panel also notes that the physician's evidence is that the appellant independently manages most decision-making tasks and that the appellant's own evidence does not identify significant difficulties.

Given the information before the ministry at reconsideration the panel acknowledges that the appellant suffers from mental impairment that impacts her daily life but finds the ministry reasonably determined this evidence was not sufficient to confirm a severe mental impairment.

Daily Living Activities:

The ministry argued that the appellant's physician indicated that the appellant is independent in most of her daily activities and that when he indicated that periodic assistance was required, he did not indicate its frequency and duration. In terms of basic housekeeping and meals, the ministry argued that the physician did not describe the type and amount of assistance that was required and did not identify any safety issues. Thus, the ministry argued that there was not enough evidence to establish that the appellant's impairment directly and significantly restricted daily living activities continuously or periodically for extended periods.

The appellant argued that her back and muscle pain prevent her from getting any employment and being part of the community as she feels she needs to stay home. She argued that she was unable to do many things and could not function the same way she used to, is not able to do chores around her house for more than 1 hour at a time and the best she can do is to volunteer. If she was designated as a PWD, she would be able to eat better, more nutritious food and her health would improve. She stated that due to poor food her depression is increasing. She also argued that she needed help from her family members to check on her and to bring her some better food and medication. She cannot stand for any length of time and she is in constant fear of falling in stairs or on the ground and hurting herself.

The legislation states clearly that the minister must be satisfied that the applicant for a PWD designation has a severe mental or physical impairment that in the opinion of a prescribed professional directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods and, as a result of those restrictions, she requires help to perform those activities. Thus, the panel finds the ministry reasonably gave more weight to the prescribed professional's reports as is mandated by law. The panel notes that the appellant herself mentioned that she was not yet at the point of needing someone all day with her in her house as she could do little chores several times a day. In fact, in her testimony the appellant did not refer to her inability to perform daily living activities but mostly on her general condition and her inability to find employment, which is not one of the criteria determining eligibility to a PWD designation.

Reviewing the evidence provided by the prescribed professional, the panel notes that in the PR, there were only 3 areas where the appellant had periodic restrictions: meal preparation, basic housework and social functioning but there was no explanation as to what the physician meant by "periodic" restriction other than mentioning she did not have the strength to cook "at times" and she seldom saw other people. In the AR, he stated that for meals, a family member helps her making sure she eats

well and providing advice but no indication as to how often this help was required. For basic housekeeping the assessor mentioned periodic assistance from another person without any detail as to what help and how often it was required. Likewise for social functioning, he indicated she needed periodic help but only mentioned that she was socially isolated and tended to stay home; this does not explain what help is required and how often. Additionally, he did not make any comment when asked to describe the support/supervision the appellant required and replied "no" to what equipment or assistive device was needed.

The panel concludes that while the evidence establishes that the appellant would certainly benefit from assistance from other people to perform some of her daily living activities, there is no evidence provided by the prescribed professional that would indicate what help would be required, how often and for what periods while, and that for the vast majority of her daily living activities, the appellant is independent. Consequently the panel finds the ministry reasonably determined the evidence provided by the appellant and her physician was not sufficient to establish that her impairment directly and significantly restricted daily living activities continuously or periodically for extended periods.

As a result of those restrictions, help required to perform DLA:

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons and that no assistive device is required.

The appellant argued that she needed help to eat better food and in some basic housekeeping as well as to get employment.

Given the evidence as described above, the panel finds that while there is evidence the appellant could benefit from the assistance of others, particularly for meals and basic housekeeping, the evidence shows that she can at the moment do those activities in her house and such assistance is not required to perform daily activities and finds the ministry reasonably determined the appellant did not meet the legislative test for the need for help arising from significant restrictions to perform daily living activities either continuously or periodically for extended periods.

Conclusion:

The panel acknowledges that the appellant's difficulties have an impact on her daily functioning. However, based on the above analysis and evidence, the panel comes to the conclusion that the ministry reasonably determined that the appellant does not have a severe physical or mental impairment and that the prescribed professional did not establish that an impairment directly and significantly restricted her ability to perform daily living activities either continuously or periodically for extended periods and that, as a result of those restrictions she required help to perform those activities under s. 2(2) of the EAPWDA. Consequently, the panel finds the ministry's decision was reasonably supported by the evidence and was a reasonable application of the enactment in the circumstances of the appellant and confirms the decision.