

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated February 20, 2015 which held 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 was satisfied that the appellant had a severe mental impairment. However, the ministry was not satisfied that:

- a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- the evidence establishes that the appellant has a severe physical 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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

Evidence before the ministry at reconsideration

- A PWD application comprised of a Self-report (SR) signed by the appellant on November 11, 2014 as well as a Physician Report (PR) and Assessor Report (AR) both dated November 17, 2014. Both the PR and the AR appear to have been completed by two authors given the two very distinct handwriting styles. One author self-identifies as “the writer.” However, the ministry has accepted that the PR and AR are signed by the appellant’s general practitioner of more than 15 years.

Additional evidence submitted on appeal and its admissibility

- The original PR and AR with undated additional narrative and changes made by both authors which according to the appellant was sent to the ministry on February 6, 2015 (the second PR and AR). Changes were made to Part C of the PR (Degree and Course of Impairment) and to Part C of the AR (Daily Living Activities). No changes were made respecting the need for assistance. In Part C of the PR, the appellant’s impairment is now reported as being likely to continue for two or more years and the comment “She continues to have prolonged depression [illegible]” is added. In Part C of the AR, the appellant is now reported to take significantly longer with most aspects of the DLA personal care and meals, both aspects of basic housekeeping, and one aspect of shopping (going to and from stores). Additional narrative includes “most of these activities – she is not doing at all on most days” and “does not leave the house often – little to no motivation.”
- A March 13, 2015 letter from a “trauma therapist” who has been treating the appellant since October 2014. The therapist states that the appellant’s past history of abuse fits the DSM-V criteria for Acute Post Traumatic Stress Disorder and impacts her symptoms of depression and anxiety. The therapist also states that at this time the appellant appears to cry persistently and that the appellant self-reports that she has days when she does not eat and that her financial concerns are exacerbated by the inability to concentrate and make decisions.

In its March 19, 2015 written submission, the ministry does not object to the admission of the additional evidence and states that upon review of the information, it would have approved the appellant’s PWD designation.

Section 22(4) of the *Employment and Assistance Act (EAA)* limits the evidence that a panel may admit. Only information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration may be admitted for consideration by the panel. In concert, section 24 of the *EAA* establishes the panel’s decision-making authority, limiting the panel to determining whether the ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the applicable legislation and confirming or rescinding the reconsideration decision accordingly. Consequently, the panel is without the authority to make a new decision of its own or assume the role of a first-time decision maker by basing its decision on evidence that was not in support of the evidence at reconsideration.

The panel finds that although there are no changes to the information respecting one of the criterion

at issue, the need for help, the new information respecting DLA and duration of impairment does not corroborate the information available at reconsideration but rather, includes conflicting information on significant issues. Therefore, the panel finds that because the additional information in the second PR and AR does not substantiate or corroborate the information available at reconsideration it is not in support of the information and records before the ministry at reconsideration and is therefore not admissible under section 22(4) of the *EAA*.

Respecting the trauma therapist's March 19, 2015 letter, the panel finds that the comments of the trauma therapist respecting PTSD and its impact are not admissible under section 22(4) of the *EAA* because PTSD was not a condition diagnosed at the time of reconsideration. However, the panel does admit the appellant's self-reported description of her functioning outlined in the trauma therapist's letter as it corroborates and substantiates the appellant's previous self-reporting and information in the original PR and AR.

Summary of relevant evidence

Although the ministry was satisfied that a severe mental impairment was established and the legislation does not require that both a severe mental and severe physical impairment be established, the panel has set out the evidence relating to both mental and physical impairment as the panel must still consider the reasonableness of the ministry determination that a severe physical impairment was not established and because this information was considered when reviewing the DLA and help criteria.

Diagnoses and duration

The appellant is diagnosed with major depressive disorder, anxiety disorder and bereavement adjustment disorder, all with an onset date of 2013.

When asked about the degree and course of impairment, the response is that impairment is not likely to continue for two years or more, with narrative that "although it is possible she may remain impaired the greater likelihood is that she will show some improvement to a more functional level. However, relapse is possible."

Physical Impairment

- A physical medical condition is not diagnosed.
- Physical functional skills reported in the PR indicate that the appellant can walk 1 to 2 blocks unaided (very fatigued and muscles weak), climb 5 steps unaided, lift 15 to 35 lbs (muscles weak – not eating well due to MDD), and has no limitation remaining seated.
- Where asked to provide an applicant's height and weight "*if relevant to the impairment*", a height of 166 cm and weight of 63 kg are noted.
- In the AR, the appellant is reported as independent with all listed aspects of mobility and physical ability.
- The appellant does not identify any physical limitations in her SR or as recounted in the trauma therapist's letter.

Mental Impairment

- In the PR, the appellant is described as “currently quite depressed” due to a combination of factors including major depressive disorder and prolonged grief reactions. Some improvement is noted though the appellant remains significantly depressed and has trouble even getting out of bed sometimes. The appellant is reported to have good insight into her condition.
- Significant deficits are noted for 2 of 11 specified aspects of cognitive and emotional functioning – emotional disturbance (depression, anxiety) and motivation (loss of initiative or interest).
- In the AR, a major impact on daily functioning is reported in 8 of 11 listed aspects of cognitive and emotional functioning – bodily functions (eating, sleep, hygiene), consciousness, emotion, insight and judgement, attention or sustained concentration, executive, memory, motivation, and, motor activity.
- The PR indicates that the situation is further exacerbated by social isolation due to the appellant living in a remote area with few close friends.
- In the PR, the appellant is reported as having no difficulties with communication; however, in the AR, poor abilities with speaking, reading and writing due to anxiety and depression are reported.
- In the AR, the appellant is described as struggling with coping in her current state, isolated and at risk of further deterioration although with improved social [illegible] and closer to supports) she could improve.
- In the SR, the appellant states that she has been devastated by the death of her spouse, stepdad and dog, all within weeks of each other. She states that she cries constantly, has trouble being in crowded places, and her days are filled with sadness. She cannot work right now and worries about her future, finances, and that she is making wrong decisions. Family members live out of province and are unable to be with her and some friends are too busy while others have abandoned her. Her only purpose is to care for her dogs. She spends most days in bed wishing for the strength and courage to be normal and, at times, cannot leave her home for fear of a panic attack. Similar self-reported concerns about decision-making, finances and being out in public are noted in the trauma therapist’s letter.

DLA

- In the PR, it is noted that the appellant has not been prescribed medication or treatments that interfere with her ability to perform DLA.
- In the AR, the appellant is reported to independently perform all tasks of the DLA: moving about indoors and outdoors, personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation. Narrative includes that some of the individual tasks (dressing, grooming, housekeeping, shopping, meal preparation) are not done regularly, done well or done as much.
- For the DLA social functioning, periodic support/supervision is required for two aspects - appropriate social decisions and ability to secure assistance from others. Continuous support/supervision is required for two aspects – develop and maintain relationships and deal with unexpected demands. The final aspect, interact appropriately with others, is managed

independently. Narrative includes “cries a lot during meeting with writer.” Very disrupted functioning with immediate social network (major withdrawn) and extended network (major social isolation) is reported.

Need for Help

- The appellant does not use assistive devices or an assistance animal. Assistance provided by other people for DLA is noted as community based hospice grief counselling.

PART F – Reasons for Panel Decision

The issue on 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 when concluding it was not satisfied that

- a medical practitioner had confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- a severe physical impairment was established;
- 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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.

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

EAPWDR

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,

- (b) registered psychologist,

- (c) registered nurse or registered psychiatric nurse,

- (d) occupational therapist,

- (e) physical therapist,

- (f) social worker,

- (g) chiropractor, or

- (h) nurse practitioner.

Duration of Impairment

The ministry's position in the reconsideration decision is that the physician has answered "no" when asked if the impairment is likely to continue for two years or more from today, commenting that although relapse is possible, the appellant has shown improvement and the greater likelihood is for improvement to a more functional level.

The appellant does not expressly take a position about the duration of impairment but argues that she is devastated by her losses, cannot work right now and worries about her future.

Panel Decision

The panel notes that the appellant's condition was reported as not likely to continue for more than two years and that the narrative identifies the 2013 onset of the mental health conditions as directly relating to the loss of three family members rather than being a long-standing condition. Improvement and the likelihood of further improvement are also noted. In view of this evidence, the panel finds that the ministry reasonably determined that a medical practitioner had not confirmed that impairment will continue for two years or more.

Severe Physical Impairment

The appellant does not argue that she has a physical impairment.

The ministry's position is that a severe physical impairment has not been established. The ministry points to the reported physical functional skills and that the appellant independently manages all aspects of mobility and physical abilities.

Panel Decision

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

The appellant is not diagnosed with a physical medical condition. The evidence also shows that the appellant independently manages all listed aspects of physical functioning and that where a limitation is noted, such as weakness or fatigue with walking, it is attributed to the appellant's depression.

Therefore, the panel finds that the ministry reasonably determined that the evidence does not establish a severe physical impairment.

Restrictions in the ability to perform DLA

The appellant does not expressly advance a position respecting DLA but has given evidence that as a result of her depression she is unable to work, cries constantly, spends most days in bed, has trouble being in crowded places, and has a very difficult time making decisions.

The ministry's position is that the information that the appellant requires either periodic (frequency not indicated) or continuous support/supervision for four of five aspects of social functioning together with the evidence that the appellant independently manages all aspects of all other DLA does not establish that, as a result of a severe mental impairment, the appellant's DLA are directly and significantly restricted either continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. The trauma therapist is not a prescribed professional as defined in section 2(2) of the EAPWDR. In this case, the evidence in the PR and AR is that despite not eating well and not performing some listed tasks of the DLA personal care, basic housekeeping, shopping as well, as much, or regularly, the appellant independently manages these tasks. Additionally, all other tasks listed for these DLA and all tasks of the DLA mobility indoors and outdoors, paying rent and bills, medications, and transportation are independently performed. Respecting the two DLA that relate only to mental impairment – make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively – the appellant is reported to make some good “social” decisions and has no noted difficulty with the decision-making tasks of the DLA shopping (making appropriate choices), budgeting, medications, and transportation. Marked restrictions are noted for some aspects of social functioning, particularly with developing and maintaining relationships – both immediate and extended. However, as the ministry notes, the appellant is reported as independent for interacting appropriately with others and there is no indication of how often assistance is required for the two aspects of social functioning requiring periodic support/supervision.

Based on the evidence that the appellant manages almost all aspects of all DLA independently, albeit lacking motivation to do so, the panel finds that the ministry reasonably determined that direct and significant restrictions in the ability to perform DLA either periodically or for extended periods in the opinion of a prescribed professional were not established.

Help to perform DLA

The appellant does not expressly address her need for assistance with DLA but does indicate that

she is unable to work at this time and spends many days in bed.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The evidence in the PR and AR is that the appellant does not need any assistive devices or an assistance animal to perform DLA. Assistance from another person required for DLA is reported as grief counselling, though it is unclear how this can be viewed as another person assisting directly with the performance of any specific tasks of DLA. In particular, the panel notes that although the AR asks the assessor to describe the type and amount of assistance and support/supervision required and identify safety issues, no indication as to what assistance is required is provided. In light of this evidence, and as direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.