

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 July 7, 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 that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 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
- 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 the appellant's Self-report (SR) dated March 31, 2015 and a Physician Report (PR) and an Assessor Report (AR) both completed by the appellant's general practitioner ("the GP") of 9 years and dated March 30, 2015.
- An advocate prepared questionnaire ("the questionnaire") completed by the GP dated June 25, 2015 which was submitted at reconsideration.

Additional information submitted on appeal and admissibility

Section 22(4) limits the evidence that a panel may admit to information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration.

The appellant's Notice of Appeal and oral testimony at the hearing for the most part reiterated previous information with the addition of some corroborative information. The appellant's daughter and son also gave testimony at the hearing providing additional detail consistent with the information before the ministry. The panel admitted the above written and oral testimony pursuant to section 22(4) of the *Employment and Assistance Act (EAA)* as being in support of the information and records before the ministry at reconsideration.

Summary of relevant evidence

Diagnoses

In the PR, the GP diagnoses DM II [diabetes mellitus type 2], COPD, degenerative spine, sleep apnea, and renal failure; generalized arthritis and asthma are also mentioned. The questionnaire confirms a diagnosis of longstanding arthritis (knees, shoulders, and spine), adding a diagnosis of hypertension.

Physical Impairment

In the PR, the GP provides the following information.

- COPD is severe – uses puffers and nebulizer.
- Chronic and progressive disease – stable now.
- The appellant can:
 - walk 1 to 2 blocks unaided;
 - climb 1-2 floors of steps unaided;
 - lift 5 to 15 lbs; and
 - remain seated 1 to 2 hours.

In the AR, the GP confirms that the appellant is restricted but independently manages walking, stairs,

standing, lifting and carrying/holding.

In the questionnaire, the GP disagrees with the appellant's assertion that she is unable to walk at all without a cane; the GP writes that the appellant cannot walk far without a cane. The GP agrees that the appellant is limited to standing 10 minutes at a time – "walks few blocks then to rest."

In the SR, the appellant reports:

- the use of a nebulizer machine 2 or 3 times a day and 4 inhalers 3-4 times daily for asthma;
- being only able to walk 1 block due to COPD; and
- problems related to allergies and ulcers, neither of which is diagnosed by the GP.

Information provided at hearing by the appellant's daughter and son included:

- the appellant takes 10-15 minutes to walk 2 blocks to the store, resting 2 or 3 times;
- the appellant has 2-3 good days a week;
- the appellant's lungs can easily become infected and retain water, requiring hospitalization in the past when the appellant was staying in locations with poor quality air; and
- the appellant is always sore due to her arthritis and has disrupted sleep (2-3 hours) due to pain.

At the hearing, the appellant explained that walking early morning or in the evening is better due to less exposure to cigarette smoke and other breathing irritants.

Mental Impairment

The GP provides the following information.

- Mild depression due to family stress and health is a significant deficit with cognitive and emotional function. There is no impact on any of the other 10-13 aspects of cognitive and emotional function listed in the PR and AR.
- In the questionnaire, the GP disagrees with the appellant's assertion that she has depression and anxiety resulting in significant impacts on daily functioning, though he also notes "anxiety often".
- The appellant's ability to communicate is good.

In the SR, the appellant does not identify any impairment to mental functioning.

At the hearing, the appellant stated that her depression is higher than usual because she is going through a healing process but that she has not discussed this or her past history of abuse with her GP.

The appellant's daughter stated that she helps the appellant calm down when she gets anxious and excited.

DLA

In the AR, the GP writes that:

- the appellant can't do much due to SOB (shortness of breath) and pain;
- the appellant independently manages walking indoors/outdoors (though restricted), personal care, meals, paying rent and bills, medications and transportation as well as one aspect of basic housekeeping (laundry) and four tasks of shopping;
- the appellant is unable to do basic housekeeping due to dust and increased asthma and pain and requires continuous assistance with carrying purchases home; and
- all aspects of social functioning are managed independently with no noted restriction.

In the questionnaire, the appellant reports requiring continuous assistance or being unable to manage basic housekeeping, physical tasks of shopping, meals, and social functioning. The GP struck out this information and affirmed the assessment he provided in the AR.

At the hearing, the appellant stated that it is hard to do chores but that she manages her personal care with a little help, noting that she independently transfers from a chair but for bathing uses a bath chair and a rail and has someone nearby in case she falls. She does dishes; can wash laundry but cannot carry the laundry; makes meals, but needs help with heavy pots if making a family dinner; manages her own bills and medications; makes right choices, though she does forget (missed a couple of GP appointments); and is okay with a car and public transit (uses her cane and buses that lower) but vans and higher trucks are difficult.

Need for Help

In the AR, the GP reports that assistance is provided by family and the use of a cane and walker and nebulizer.

In the questionnaire, the GP agrees that the appellant uses a cane, bath chair, pole to get out of bed, CPAP machine, nebulizer machine and wedge (to sleep sitting up) but disagrees with the reported use of a walker.

At the hearing, the appellant and her children confirmed the use of grab bars for bathing, a bathing chair, a cane and clarified that the appellant will receive a walker in approximately 2 weeks.

PART F – Reasons for Panel Decision

Issue on Appeal

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 in determining that:

- a severe physical or mental impairment was not established;
- the appellant's daily living activities (DLA) are not, 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 does not requires help, as it is defined in the legislation, to perform DLA?

Relevant Legislation

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.

Severe Physical Impairment

The appellant argues that her medical conditions, particularly her trouble breathing, severely limit her physical functioning and that while she has some good days, she also has really bad days and day to day is a struggle.

The ministry argues that the GP reports the appellant as independently managing all mobility and physical functions and that, in the absence of new medical reports explaining greater limitations to functioning and the use of assistive devices indicated in the questionnaire, there is not enough information from the GP to confirm a severe physical impairment.

Panel Decision

The legislation 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.

In this case, the appellant is diagnosed with a number of physical medical conditions, with longstanding arthritis and severe COPD reported as having the greatest impact on her functioning. Both the appellant and her GP report restrictions to functioning; however, the level of impairment reported by the appellant is not supported by the GP's assessment. The GP notes the appellant's condition as stable and has consistently assessed the appellant as being able to walk at least 2 blocks unaided and a few blocks before requiring rest. As the ministry notes, in the questionnaire the GP confirms the use of assistive devices he did not previously identify and the panel notes that the GP has provided inconsistent information respecting the use of a walker. At hearing, the appellant and her children clarified that a walker is not currently used but that the appellant will receive one in a couple of weeks. However, in this case the use of assistive devices in and of itself does not establish the level of impairment. The physical functional skills and abilities identified by the GP for walking, stairs, lifting (5-10 lb limit is confirmed by the appellant), remaining seated, and standing are mostly in the mid-range of the options provided and do not appear to have translated into significant restrictions in the ability to independently manage DLA – with virtually all physical tasks managed independently. Therefore, based on the physical abilities reported by the appellant's GP of 9 years and the level of independence with most daily tasks, the panel finds that the ministry reasonably determined that a severe physical impairment was not established.

Severe Mental Impairment

The appellant does not expressly argue that she has a severe mental impairment but that her depression has been worse lately as she has been going through a healing process to address past abuse.

The ministry's position is that a severe mental impairment is not established based on the information from the GP that the appellant has good communication and that her impairments have a minimal impact on emotion with no other impacts on cognitive and emotional functioning.

Panel Decision

The appellant's GP does not include a mental disorder in the diagnoses related to the appellant's impairment though the GP notes mild depression and "anxiety often" and queries problems with sleep disturbance. While anxiety and mild depression are noted, the GP reports minimal to no impact on daily functioning. In particular, the appellant is reported as having good communication, independently managing all aspects of social functioning as well as all listed cognitive aspects of all other DLA. At the hearing, the appellant confirmed that she is capable of making decisions and that she manages all cognitive tasks of DLA independently, though she has some memory lapses. The appellant also stated that she had not fully shared issues which impact her cognitive and emotional functioning with her GP which therefore could not be assessed by her GP or the ministry. Based on the level of cognitive and emotional functioning reported by the GP, in large part confirmed by the appellant, the panel finds that the ministry reasonably determined that a severe mental impairment was not established.

Restrictions in the ability to perform DLA

At the hearing the appellant argued that it is hard to do chores and manage some DLA tasks of personal care and that there are some tasks of basic housekeeping she is unable to perform because of her physical impairment. The appellant also takes the position that the GP initially agreed with some of the statements respecting DLA in the questionnaire but that he subsequently crossed out that section because he was upset by the advocate's statements therein.

The ministry's position is that it relies on the expert opinion of the GP who reports that the appellant independently manages almost all of her DLA and that the reported limitations with carrying purchases home and basic housekeeping are not clear given the lack of physical and mental deficits assessed by the GP. Further, these limitations do not in and of themselves provide enough evidence to confirm significant restrictions continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA 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. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

The appellant's GP, a prescribed professional, originally assessed the appellant's ability to perform specific DLA in the AR and reaffirmed that assessment in the questionnaire. While the GP notes in the PR that the appellant cannot do much in terms of DLA due to SOB and pain, when asked to identify restrictions for individual DLA, the GP reports that despite being restricted and using a cane,

the appellant independently manages almost all tasks of all DLA. The exceptions are that the appellant is unable to manage some aspects of the DLA basic housekeeping due to aggravation of her breathing problems from dust, and due to pain from her arthritis, and needs continuous assistance carrying purchases home. The panel notes that at the hearing, the appellant's testimony confirmed the ability to independently manage many tasks of DLA including those of meal preparation, transportation, medications, bill payment, and some tasks of basic housekeeping. Based on the overall level of independence with DLA reported by the GP, the prescribed professional, the panel finds that the ministry reasonably determined that the information respecting the restrictions with basic housekeeping and carrying purchases did not establish that the appellant's impairment directly and significantly restricts her DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant argues that she requires the use of a number of assistive devices to perform DLA as well as the assistance of another person.

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 establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion because the need for help must be as a result of those restrictions. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

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.