

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 2, 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

Information before the ministry at reconsideration

- A PWD application comprised of the appellant's Self-report (SR) dated November 24, 2014, a Physician Report (PR) dated December 18, 2014 completed by the appellant's general practitioner (GP), and an Assessor Report (AR) dated December 18, 2014 completed by the appellant's nurse practitioner (NP).
- A 2-page reconsideration submission from an advocate comprised of argument with no additional evidence.

Additional evidence submitted on appeal and admissibility

Section 22(4) of the Employment and Assistance Act limits the evidence that the 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.

At the hearing, the appellant provided a 2-page letter dated July 31, 2015 ("the July letter"), which the appellant explained was written by the NP and co-signed by the GP. The ministry had no objection to admitting the letter. The panel admitted the letter as evidence pursuant to section 22(4) of the EAR as it tended to corroborate and substantiate the information at reconsideration and was therefore in support.

The ministry did not provide additional evidence at the hearing and relied on its reconsideration decision.

Summary of relevant evidence

Diagnoses

The GP diagnoses arthritis – osteoarthritis (OA), depression and anxiety.

Physical Impairment

- The GP reports that OA causes chronic pain, impaired hand grips, reduced ability to lift or carry even small items, and makes writing very difficult. Further, mobility is impaired due to slow gait, poor balance, stiffness, and reduced joint flexibility.
- The appellant uses prescribed orthotics. The July letter explains that orthotics are required due to OA and bunions and that foot problems create knee, hip and lower back pain for which the appellant has received chiropractic treatment.
- The GP reports that the appellant is able to:
 - walk 2 to 4 blocks unaided (the July letter reports that 24 hours of rest is required after walking this distance);

- climb 2 to 5 steps unaided;
- lift 5 to 15 lbs; and
- remain seated for less than 1 hour.
- The NP assesses the appellant's mobility and physical ability as follows:
 - walking outdoors/indoors and climbing stairs take 4 times longer than typical and require orthotics and periodic assistance from another person;
 - independently stands for a maximum of 15-20 minutes; and
 - lifting and carrying/holding are limited to a maximum of 10 lbs and require periodic assistance from another person (a maximum limit of 5 lbs is reported in the July letter).
- In the SR, the appellant reports being able to stand for about 15-20 minutes and that she is unable to walk outside without orthotics, though it can be difficult to figure out how much walking she can do. She gets help from another person if there is something heavy to lift.
- At the hearing, the appellant provided the following information.
 - Her feet are "ground zero" – if her feet are bad, she will have a bad day. Some days are fine – her feet and knees don't hurt – and she can walk fairly well; other days she can't walk.
 - In the last 3 months, she has had bad days a couple of times a week. On those days, she calls her mom or sister to assist her in getting to appointments/shopping or just getting out of the house.
 - She can usually keep the arthritis in her hands under control by taking vitamin D and another supplement. It is a delicate balance of keeping her hands moving but not too much.
 - She sees the NP every 6 weeks and the GP, whom she has not seen since last November, has a figure-head position in her care.

Mental Impairment

- The GP reports significant deficits with cognitive and emotional function have a major impact on daily functioning in 8 of 12 listed areas – executive, memory, emotional disturbance, motivation, impulse control, motor activity, attention or sustained concentration, and other (sleep disturbances) resulting from the combination of the appellant's conditions.
- The GP notes reoccurring episodes of severe depression and anxiety that result in panic attacks with shortness of breath and paralyzing fear; social isolation and feeling overwhelmed to the extent of not being able to leave her home (agoraphobia); agitation; impaired decision making; and thoughts of death to end her suffering. Anxiety and severe episodes of depression can interfere with her ability to connect with others, make decisions or communicate her needs. The appellant has contact with a small immediate social network but isolates during episodes of depression or increased anxiety.
- The NP reports a minimal impact on daily cognitive and emotional functioning for memory, a moderate impact for bodily functions and attention/concentration and a major impact for emotion, motivation, and motor activity. No impact is reported for the remaining 8 areas of function. No additional narrative is provided.

- No cognitive limitations with communication are identified in the PWD application by the GP or NP. The NP reports good functioning with immediate social networks and marginal functioning with extended networks.
- In the SR, the appellant reports pain and anxiety prevent a solid 8 hours of sleep. She is scared and worried about her future and has problems with concentration, focus, and problem-solving; she has been agitated and lacking interest and initiative.
- In the July letter:
 - the appellant's depressive disorder and anxiety are reported to have worsened since the PWD application was completed;
 - many of the previously noted cognitive/emotional deficits are confirmed, noting problems with short-term memory (forgets to take medication) and the use of sleeping medication nightly (the appellant clarified that the medication is not new but that she has required it nightly for the past 6 months);
 - the appellant is also noted to have been receiving psychological counselling and is currently wait-listed for more intensive programs (the appellant clarified that she saw a counsellor from February through June when the counsellor got a new job);
 - the appellant is reported as only able to leave her home when absolutely necessary, often having to reschedule vital health related appointments, due to debilitating anxiety.
- At the hearing, the appellant provided the following additional information.
 - Her depression is cyclical – when the basics of her life are settled it's easier.
 - She is in a down cycle now and has found the PWD application process destabilizing. In the last 3 months she has had 3 panic attacks, but prior to that had been free of them for a year. Also, in addition to requiring nightly sleep medication, she was prescribed medication for her panic attacks about 1 ½ weeks ago. The appellant stated that the panic attack medication is generally effective, calming her down within an hour after taking it, and that just having the medication with her helps to ward off an attack by reducing her anxiety about the prospect of having an attack.
 - When “not inside her head” she goes out and interacts with the world. She still goes out other times and knows it's bad depending upon her level of patience and kindness for others and may stay home for at least a couple of days.
 - Her depression doesn't just cause her to isolate, it affects the way she sees the world. She knows she is a capable person and is worried it will get worse and won't allow her to be the person she is.

DLA

- The GP writes that the combination of chronic pain and depression significantly restricts the appellant's activities of daily living. When help is not available they take significantly longer to complete or are neglected.
 - Continuous restrictions are noted for personal self-care, meal preparation, basic housework, daily shopping, and mobility inside and outside the home.
 - A periodic restriction is noted for social functioning - has a small immediate social network but isolates during episodes of depression or increased anxiety which interfere with her ability to connect with others, make decisions, and communicate.
 - Management of medications, use of transportation, and management of finances are

not restricted.

- The NP reports that the following DLA tasks take at least 4 times longer to complete, and most require periodic assistance from another person, due to pain, fatigue, reduced range of motion and loss of motivation and/or initiative:
 - Walking indoors/outdoors, climbing stairs (moving about indoors/outdoors); Dressing, grooming, bathing (personal care), laundry, basic housekeeping (basic housekeeping); going to and from stores, carrying purchases home (shopping); food preparation, cooking (meals); and getting in and out of vehicle (transportation).
 - Paying rent and bills and medications are managed independently as are the cognitive aspects of all above DLA including regulating diet, making appropriate shopping choices and safe storage of food.
 - Social functioning: develop and maintain relationships and deal appropriately with unexpected demands all require periodic support/supervision; secure assistance from others requires continuous support/supervision; and appropriate social decisions and interact appropriately with others are managed independently.
- In the SR, the appellant describes difficulties with getting dressed, bathing, housework, shopping, meals, and transportation due to pain and lack of motivation, noting that when she can clean it is done in small bursts and she does small shops daily.
- The July letter reports significant ongoing restrictions to activities of daily living due to OA – identifying specific tasks of personal care, meals, written communication, housework, shopping and use of public transportation (requires a seat even for short trips).

Need for Help

- The GP reports that help is needed or DLA take significantly longer or are neglected.
- The NP reports that help with DLA is provided by family and friends and that a bathing aid provides assistance.
- The July letter confirms the need for assistance, described as significant ongoing, with shopping, meal preparation, housework, and transportation adding that the appellant needs reminders to take medication and attend appointments. Other assistance required is orthotics, supportive shoes, bathroom safety supports such as grab bars as well as extra pillows for neck and back support.

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 require 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 Impairment

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.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant argues that she does have a severe physical impairment as evidenced by the impact of her pain on her ability to walk. The appellant also took issue with the ministry observation that the information provided was 7 months old given that it was current when she provided it and the delay was caused by the ministry.

The ministry argues that the information respecting the appellant’s ability to walk and manage other physical functional skills indicates a significant physical impairment but not a severe physical impairment. The ministry also notes that the information in the PWD application completed in December 2014 is not current.

Panel Decision

The appellant is diagnosed with OA which has impaired the functioning of her hands and feet, the latter of which is also impacted by bunions and causes pain in her knees, hips and spine and necessitates the use of orthotics. Physical functional abilities reported in the PWD application include the ability to walk for 2-4 blocks unaided, to climb 2-5 steps, remain standing for 15-20 minutes, and lift a maximum of 10 lbs., and the fact that most of these activities take 4 times longer than typical. The appellant is also reported as having significant difficulty using her hands for tasks involving grasping – including cutting, chopping, and writing. The appellant’s evidence at the hearing reflects a somewhat different picture of her physical functioning. Rather than the steady functional limits/abilities reported by the GP and the NP, the appellant states that she has some days when she can walk fairly well and others when she cannot walk at all, with bad days occurring a couple times a week over the last 3 months. Additionally, the appellant reports that she can usually keep the arthritis in her hands under control with the use of supplements and by maintaining a healthy amount of movement. The statement in the July letter that 24 hours of rest is required after walking 2-4 blocks is not in keeping with the information in the PWD application or the appellant’s oral or written testimony support. While the panel accepts that there is greater variability in her ability to walk and mobilize than is reflected in the AR and PR, the evidence is that most of the time the appellant is able to function at the levels reported in the AR and PR. The panel finds that the ministry has reasonably determined that the physical functional skills do not establish a severe physical impairment.

Mental Impairment

The appellant's reconsideration submission argues that a severe mental impairment is established by the evidence of the GP who repeatedly describes severe episodes of depression and by the evidence of both the GP and NP of significant deficits with cognitive and emotional functioning. At the hearing, the appellant explained the cyclical nature of her depression and her increasing anxiety, noting that the PWD application process has been destabilizing, requiring increased medication.

The ministry's position is that although the GP reports a number of significant deficits with cognitive and emotional functioning, the appellant is also reported as only periodically restricted with the management of social functioning. The NP indicates a major impact in 4 areas of cognitive and emotional functioning but provides no explanation of this level of impact in these areas and indicates that there is moderate, minimal to no impact in the remaining 11 assessed areas. Further, no recent medical reports or psychiatric consultations accompany the PWD application and both the PR and AR were completed seven months ago so it is unclear if the appellant's current mental health is represented.

Panel Decision

The appellant is diagnosed with depression combined with anxiety. As the ministry notes, both the GP and the NP indicate that the impact on functioning worsened during severe episodes, but they do not describe the frequency or duration of the severe episodes. The appellant's evidence is that her depression is cyclical and that overall functioning can depend on her pain, that she has good and bad days, with bad days occurring a couple times a week over the past 3 months, and that for the last year she was free of panic attacks, but has suffered 3 over the last 3 months. The information respecting the 2 DLA specific to mental impairment – social functioning and decision making – reflects mostly minimal or no impact, except during severe episodes. Additionally, neither the GP nor the NP identifies any impact on the cognitive aspects of any of the other 8 DLA due to mental impairment in the PR and AR, though an impact on the ability to remember to take medication is noted in the July letter. The statement in the July letter that anxiety prevents the appellant from leaving her home except when absolutely necessary is not supported by the other evidence provided by the GP and NP or the information provided by the appellant. Based on the above analysis, the panel finds that the ministry reasonably determined that there was not enough information from the GP or NP to confirm that the appellant has a severe mental impairment.

Restrictions in the ability to perform DLA

In her reconsideration submission, the appellant argues that the GP states that she is significantly restricted in her ability to complete 6 DLA which take significantly longer or are neglected and that the NP confirms they take 4 times longer if assistance is not available. At the hearing, the appellant stated that on bad days she calls upon her mom or sister to get her out to shop or attend appointments and that her depression causes her to isolate.

The ministry's position is that it is unclear why the GP reports the appellant is continuously restricted in her ability to perform a number of DLA given the physical and mental health assessments made by

the GP and as there is no information to confirm the frequency and duration of the episodic depression. Additionally, the NP has not provided information respecting the frequency and duration of the periodic assistance required for tasks of personal care, housekeeping and shopping and that continuous assistance is not indicated for any DLA. Also, most aspects of social functioning are managed with periodic assistance.

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.

While the GP notes continuous restrictions for many DLA, describing them as significant, the ministry argues that it is unclear why the appellant is continuously restricted given the physical functional abilities reported by the GP. The evidence suggests that the appellant likely has continuous restrictions due to her physical limitations but that the functional skills do not reflect "significant" continuous restrictions and the appellant has clarified that she has good days when she walks fairly well and has kept the arthritis in her hands under control. While noting some ongoing restrictions in the ability to manage physical tasks of DLA, the NP reports that the appellant requires periodic assistance from another person but, as the ministry notes, does not provide any information respecting the frequency and duration of that assistance. As noted in the previous discussion respecting mental impairment, there is a greater level of impaired functioning during episodes of severe depression and anxiety, with decision making and social functioning otherwise being managed mostly independently or with periodic assistance, but neither the GP nor the NP provide information to establish the frequency or duration of those episodes. Based on the above analysis, the panel finds that the ministry reasonably determined that the information 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 does need the significant help of others and that she requires the use of a number of assistive devices. At the hearing, the appellant noted the inclusion of information in the reconsideration decision respecting help that is clearly not about her.

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. At the hearing, the ministry stated that as the information included which appears to be about someone else does not appear elsewhere in the decision, it was an error and was not considered when assessing the appellant's PWD eligibility.

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.