

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of September 11, 2015, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

PART E – Summary of Facts

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

- Letter from a psychiatrist dated October 9, 2013
- The appellant's PWD application form consisting of the appellant's self-report form dated April 14, 2015 ("SR"), a physician's report ("PR") and assessor's report ("AR"), both completed by the appellant's general practitioner (the "physician") on April 21, 2015
- Note from the appellant's physician dated April 22, 2015 (the "April Note")
- The appellant's Request for Reconsideration dated August 31, 2015 with handwritten statement (the "RFR")
- Note from the appellant's physician dated August 31, 2015 (the "August Note")

Diagnoses

- In the PR the physician reports that the specific diagnoses related to the appellant's impairment are asthma (date of onset 1995), anxiety and depression (date of onset 2000), eczema (lifelong) and carpal tunnel syndrome (date of onset 2012). The physician indicates that the appellant has been his patient since 1997 and he has seen her two to ten times in the past 12 months
- In the AR, the physician indicates that the appellant's physical or mental impairments that impact her ability to manage DLA are: hand pain, back pain, hip pain, anxiety and depression. The physician reports that he has known the appellant for 18 years.
- The psychiatrist indicates that the appellant's current diagnosis is major depressive disorder recurrent, current episode mild to moderate with comorbid post traumatic stress disorder.

Physical Impairment

- In the Health History portion of the PR the physician indicates that the appellant has little objective evidence of recurrent carpal tunnel syndrome. He indicates that she has symptoms of hand pain, which she states prohibit her from typing and she has difficulty turning knobs, opening containers and blow drying her hair. He states that the appellant is 156 cm and weighs 67.5 kg.
- In terms of physical functioning, the physician reported in the PR that the appellant can walk 2 to 4 blocks unaided, can climb 5+ steps unaided, is limited to lifting 5 to 15 pounds and can remain seated for less than 1 hour.
- In the AR the physician reported that the appellant is independent with mobility and physical mobility tasks but that hip, back and hand pain limit her ability to lift and to walk.
- In the April Note the physician states that the appellant had previous carpal tunnel surgery and recent EMG testing confirmed a good benefit from the surgery but she has right hand and wrist pain that is severely limiting her from employment. The physician indicates that the appellant has difficulty opening and closing jars, taking the top off toothpaste containers, combing her hair, blow-drying her hair, and using nail clippers. The physician also indicates that the appellant has bilateral hip and leg pain and that her exercise tolerance is walking approximately 2 blocks with maximum walking distance of 5 blocks before having to sit down.

Mental Impairment

- In the Health History portion of the PR the physician indicates that the appellant has anxiety which is exacerbated even by housework and that she is afraid to leave her home. He indicates that she cannot sit without being fidgety and restless and has constant fears. He also indicates that due to depression she is shutting herself off from interactions with other people and has recently been experiencing some minimal suicidal ideation.
- In the PR the physician reports that the appellant has not had adequate psychiatric assessment and has been self-reducing her medications which may be to her detriment.
- In the PR the physician indicates that the appellant does not have difficulties with communication.
- In the PR the physician indicated that the appellant has significant deficits in one of 12 categories of cognitive and emotional function being emotional disturbance, noting depression and anxiety.
- In the AR the physician indicates that the appellant's ability to communicate with speaking, reading, writing and hearing is good.
- For question 4 of section B, Mental or Physical Impairment, the physician indicates that the appellant's mental impairment has major impact to emotion and motivation, moderate impact to executive and motor activity and no impact to the remaining listed areas of bodily functions, consciousness, impulse control, insight and judgment, attention/concentration, memory, language, psychotic symptoms, other neuropsychological symptoms and other emotional or mental problems.

In the April Note the physician indicates that the appellant has anxiety with episodes of feelings of panic, that her depression dates back at least 15 years, and that her anxiety and depression are affecting her to a substantial degree. The physician indicates that she is afraid to leave her home, is limiting her social interactions, has experienced some minimal suicidal ideation recently although states that she will not follow through with it.

The psychiatrist indicates that the appellant presents with a history of depressive symptomatology mainly pervasive low mood, anhedonia, insomnia, anergia, lack of appetite, low self-esteem, excessive guilt, difficulty with concentration and mild psychomotor retardation, ideas of futility and hopelessness. The psychiatrist reports that the appellant stated that she had been keeping reasonably well until the motor vehicle accident, which worsened and exacerbated her depressive symptoms with associated flashbacks of accident and anxiety, insomnia, and tendency to be easily startled and avoidance reaction which would be in keeping with hyper-vigilance in context of post-traumatic stress disorder.

In the August Note the physician indicates that the appellant is under significant psychological stress, has a long history of depression, and is stable on her present psychiatric medications.

DLA

- The physician did not complete Section E – DLA in the PR. Under Additional Comments he states “see attached” referring to the April Note.
- In the AR, for aspects of personal care, the physician reports that the appellant takes significantly longer than typical with dressing, grooming and bathing noting “see attached” referring to the April Note. He indicates that the appellant is independent with toileting, feeding

self, regulating diet, transfers (in/out of bed) and transfers (on/off of chair). For basic housekeeping the physician indicates that the appellant is independent with laundry but takes significantly longer than typical to perform basic housekeeping. For shopping, the physician indicates that the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases but takes significantly longer than typical with going to and from stores and carrying purchases home.

- For meals the physician indicates that the appellant is independent with meal planning and safe storage of food but takes significantly longer with food preparation and cooking. The physician indicates that the appellant is independent with all tasks of paying rent and bills, medications and transportation.
- In the AR the physician indicates that the appellant is independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others but adds that she is independent but significantly impaired. The physician indicates that the appellant has marginal functioning with respect to her immediate and extended social networks.

In the April Note the physician indicates that the appellant is limiting her social interactions, that housework increases her anxiety, that she has difficulty opening and closing jars, taking the top off toothpaste containers, combing her hair, blow drying her hair and using nail clippers. He indicates that her anxiety and depression prevent her from going to the store on a regular basis although she has been managing to shop on a once per week basis. She has difficulty with food preparation and cooking due to hand and wrist issues as well as anxiety and lack of motivation. The physician indicates that social decisions, developing and maintaining relationship, interacting with others, and dealing with unexpected demands are all adversely affected by her anxiety and depression.

Help

- In the PR the physician reports that the appellant does not require any prosthesis or aids for her impairment.
- In the AR, the physician comments "N/A" regarding assistance provided by other people and assistance provided through use of assistive devices. The appellant does not have an assistance animal.
- In the April Note the physician indicates that she was recommended to attend physiotherapy but was unable to afford it. In the August Note the physician indicates that the appellant is on a waiting list for hand therapy.

Additional information provided

In her Notice of Appeal the appellant states that her handicap is severe and she disagrees with the reconsideration decision because she does not believe the information from the physician and psychiatrist is perceived accurately.

At the hearing the appellant provided oral evidence regarding her difficult and abusive background, long history of depression, difficult marital separation, her efforts to educate herself, her prior employment, struggles as a single mother and her long history of depression. The appellant provided information regarding her motor vehicle accident of 2012 in which her right hand was crushed requiring surgery, explaining that her hands won't close and she is on the wait list for hand therapy.

The appellant stated that she is taking her anti-depressant medication as prescribed and that she hopes to take a real estate course in the future but that she has significant stressors right now with her house for sale and at risk of foreclosure by the bank and numerous bills that are past due.

Admissibility of New Information

The ministry did not object to the admissibility of the oral testimony.

The panel has admitted the appellant's oral testimony and information in her Notice of Appeal as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information substantiates the information at reconsideration respecting the appellant's impairments, ability to perform DLA, and help needed.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

EAPWDR section 2(1):

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

Severe Physical Impairment

In the SR, the appellant states that she does not have the proper use of her right hand and has ongoing severe right hand pain. She states that she has pain in her right hip, knee and ankle and that her physical impairments impact her ability to type, sit, stand, and write. She states that her knee swells up and pops out of the joint and she needs to elevate her right leg on a regular basis. The appellant's position is that her severe physical impairments impact her ability to perform DLA and prevent her from working.

In the AR the physician indicates that the appellant's ability with speaking, reading, writing and hearing are all good but the appellant states that is not accurate because her right hand impairment, which prevents her from being able to close her hand, means that she has to hold a pen or paint brush in the palm of her hand, not as normal people would do. The appellant's position is that she has a severe physical handicap and that the information provided by the physician and her confirm that she has a severe physical impairment.

The ministry's position is that the information provided by the physician in the PR and AR does not indicate that the appellant has a severe physical impairment. The ministry notes that in the PR, the physician indicates that despite the appellant's symptoms of hand pain there is no evidence of carpal tunnel syndrome at this time. The ministry states that although the physician indicates that the appellant has difficulty turning knobs, opening containers and using a hair dryer, the severity, frequency and duration of the appellant's difficult is not described making it difficult to establish that these difficulties are indicative of a severe impairment. The ministry also states that although the physician indicates that the appellant takes significantly longer than typical in all areas of mobility and physical ability the physician does not describe how much longer than typical is required. The

minister acknowledges that although the appellant's mobility and physical ability is limited due to hand, wrist, leg, hip and back pain, a severe impairment of her physical functioning has not been established.

Panel Decision:

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

In the PR the physician has diagnosed the appellant with asthma, eczema and carpal tunnel syndrome. In the Health History portion of the PR the physician indicates that there is little objective evidence of recurrent carpal tunnel syndrome but the physician comments that she has ongoing right hand pain and in the April Note he provides information regarding her difficulties with tasks relating to using her right hand, and in the August Note he confirms that she is on the wait list for hand therapy.

In the PR the physician indicates that the appellant is able to walk 2 to 4 blocks unaided, climb 5+ steps unaided, lift 5 to 15 pounds and remain seated less than one hour. In the AR, the physician indicates that the appellant takes significantly longer than typical in all areas of mobility and physical ability due to hip, back and hand pain, but the physician does not describe how much longer than typical is required or the frequency and duration of the appellant's pain. Given the moderate impact to functional abilities noted in the PR and the lack of information describing the frequency or duration of the appellant's pain or how much longer than typical it takes the appellant to perform physical and mobility tasks, the panel finds that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment as contemplated by the legislation.

Severe Mental Impairment

The appellant's position is that she has a long history depression and anxiety that was exacerbated by the accident in 2012. The appellant states that she worked very hard to overcome the struggles of abuse in her background and that she wants to work but that she is not able to mentally function as a normal person would. The appellant's evidence is that her severe mental impairment impacts her ability to do the basics of DLA and significantly impact her sleep and social interactions. The appellant states that she has resumed taking her anti-depressant medication as prescribed but continues to suffer with ongoing severe depression and anxiety that significantly impacts her ability to sleep, interact with others and perform DLA.

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The ministry notes that in the April Note the physician reports that the appellant has uncontrolled depression and an increase in anxiety at the same time as she elected to

decrease her use of prescribed medication. The ministry's position is that the impacts such as being afraid to leave home, limited social interactions, and tremulousness may be temporary and contingent on resuming the prescribed treatment. The reconsideration indicates that although the physician states that the appellant stays at home "a good portion of the time", he does not confirm that the appellant is restricted from leaving her home or that her anxiety is indicative of a severe mental impairment. The ministry also notes that while the physician reports significant deficits with cognitive and emotional function in the area of emotional disturbance there is no impact to the other remaining 11 areas of cognitive and emotional function. The ministry's position is that the physician's assessment of the impacts to the appellant's cognitive and emotional functioning is indicative of a moderate as opposed to a severe mental impairment. The reconsideration decision also states that although the physician indicates that the appellant is independent but significantly impaired with all areas of social functioning he did not describe the type or frequency of impairment with social functioning which further suggests a moderate as opposed to a severe impairment.

The ministry also considered the psychiatrist's information noting that it is in keeping with the physician's information and does not establish a greater degree of impairment than that described by the physician. The ministry's position is that the information provided establishes that the appellant has a moderate as opposed to severe impairment of her mental functioning.

Panel Decision:

In the PR, the physician makes a diagnosis of anxiety and depression and in the April Note the physician indicates that her impairments are impacting her to a substantial degree. In the April Note the physician also indicates that the appellant has episodes of feelings of panic, increased tremulousness and minimal suicidal ideation. The physician reports that the appellant's mental impairment impacts her social functioning and ability to work and that she is afraid to leave her home.

In Section 4 of the AR the physician indicates that the appellant has major impact to emotion and memory, moderate impact to executive and motor activity and no impact to the remaining listed areas. The appellant disagrees with the physician's report, stating that the information provided is not entirely accurate as the areas of bodily functions, consciousness, impulse control, attention/concentration and psychotic symptoms are impacted. In particular the appellant notes that her bodily functions are impacted because her sleep disturbance is very poor, consciousness is impacted because she is drowsy, her fingers lock which impacts her impulse control and that her attention, concentration and memory are all impacted from her suicidal thoughts, depression and some paranoia.

The physician has not provided any further information to indicate that the reported areas are not accurate and he has not provided any further information describing the frequency or duration of the impacts to the appellant's social functioning. In addition, although the psychiatrist indicates that the appellant has major depressive disorder recurrent, he indicates that it was mild to moderate, not severe.

As the fundamental basis for the analysis is the evidence from a prescribed professional, the panel finds that the ministry was reasonable in determining that the information provided by the physician and the psychiatrist is not sufficient to demonstrate that the appellant has a severe mental impairment.

The panel also notes that although the information provided by the physician, psychiatrist and the appellant indicate that the appellant's impairments interfere with her ability to obtain employment or take further education; employability is not a criterion for designation as PWD.

Significant Restrictions to DLA

The appellant's position is that her impairments cause her to struggle with DLA and she struggles to push herself to do everyday activities. She states that she is only able to walk short distances, cannot sit for long periods due to constant pain on the right side of her body. The appellant's position is that some of the information provided by her physician is not accurate as although he indicates that she is independent with paying rent and bills she states that she struggles with those areas because of financial difficulties. The appellant states that her handicap is severe and that she has significant restriction to DLA.

The ministry's position is that the information provided by the physician indicates that the appellant is independent with many DLA such as all areas of paying rent/bills, all areas of medications, and all areas of transportation. The ministry notes that while the physician indicates that the appellant takes significantly longer than typical in the areas of dressing, grooming, bathing, laundry, going to/from store and carrying purchases home the physician also indicates that the appellant is able to go shopping once a week and there is no other information provided to establish how much longer than typical it takes to perform the other aspects of DLA. The ministry's position is that without any further description of how much longer than typical it takes the appellant for those DLA, it is difficult to establish that the appellant is significantly restricted with these activities.

The ministry finds that the information provided does not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods as required by the legislative criteria.

Panel Decision:

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one, which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

In the AR, for aspects of personal care, the physician reports that the appellant takes significantly longer than typical with dressing, grooming and bathing noting "see attached" referring to the April Note. He indicates that the appellant is independent with toileting, feeding self, regulating diet,

transfers (in/out of bed) and transfers (on/off of chair). For basic housekeeping the physician indicates that the appellant is independent with laundry but takes significantly longer than typical to perform basic housekeeping. For shopping, the physician indicates that the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases but takes significantly longer than typical with going to and from stores and carrying purchases home. At the same time however in the April Note the physician confirms that while the appellant struggles with shopping as her anxiety causes her to stay home rather than go out, he indicates that she is able to go shopping once per week.

For meals the physician indicates that the appellant is independent with meal planning and safe storage of food but takes significantly longer with food preparation and cooking.

The physician indicates that the appellant is independent with all tasks of paying rent and bills, medications and transportation. While the appellant indicates this is not accurate as she struggles with paying rent and bills because of her financial difficulties the physician has not provided any further information confirming the appellant's difficulties with these tasks.

In the AR the physician indicates that the appellant is independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others but adds that she is independent but significantly impaired. The physician indicates that the appellant has marginal functioning with respect to her immediate and extended social networks. The panel finds that this information is unclear as it is difficult to understand how the appellant's social functioning can be independent but significantly impaired at the same time.

While the physician has provided additional information in the April Note regarding the areas of impact to the appellant's DLA he has not provided any further information describing the frequency or duration of the appellant's limitations or how much longer than typical it takes the appellant to perform DLA.

In the panel's view, the ministry reasonably determined that the information provided by the physician does not provide enough information to demonstrate that the appellant satisfies the legislative criteria, namely that she has a severe impairment which directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires help with household activities, hand therapy, psychiatric treatment and motivation because of her physical and mental impairments.

The ministry's position is that there is not enough information to establish that DLA are significantly restricted so it cannot be determined that significant help is required from other people. The ministry also states that the appellant does not require the services of an assistance animal.

Panel Decision

A finding that a severe impairment directly and significantly restricts a person's ability to manage DLA

either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, the necessary precondition has not been satisfied in this case.

In addition, in the AR the physician does not include any information confirming that the appellant requires help. In the August Note the appellant confirms that the appellant is on a wait list for hand therapy but there is no indication that other assistance is needed.

Accordingly, the panel finds that the ministry reasonably concluded that it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's reconsideration decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.