

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 6 October 2015 determined that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant’s mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLA) either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

PART D – Relevant Legislation

EAPWDA, section 2

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

PART E – Summary of Facts

The hearing was conducted with the assistance of an interpreter.

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

- A PWD Application – 3 page Applicant Information (Self Report – SR) completed and signed by the appellant before a witness on 24 May 2015. She wrote that she suffers from rheumatoid arthritis, depression, migraines, thyroid and cholesterol. She indicated that in the morning it takes her 45 minutes to an hour to get out of bed and be able to go to the toilet because her hands, wrists, elbow and feet do not move. She was abused by her husband and as a result suffers from depression. She cannot lift any heavy or light objects, cannot cut hard vegetables and a family member helps her with groceries and carrying. She can do everything herself but it takes her much longer for instance to comb her hair and take a bath. She cannot attend to any social events because of her migraines and depression.
- An 8 page Physician Report (PR) undated, received at the ministry's office on 20 June 2015, completed and signed by the appellant's physician, a general practitioner (GP), who reported the following:
 - Specific diagnoses: Wrist/hand & knee pain – rheumatoid arthritis (RA), onset 2002-2005 and depression, onset January 2015 with a comment that the appellant was followed closely for rheumatology.
 - Health history: Severe joint pain for many years. The appellant had been treated for joint pain by physicians and specialists, including a rheumatologist. Her RA limits her DLA, in particular those that involve the use of hands. She has been treated with therapy and medications but the latter had to be stopped due to side effects.
 - The appellant was prescribed no medication that interfered with her ability to perform DLA but are used to help with pain and stop further decline. There is no indication with respect to the anticipated duration of medication and/or treatments.
 - The appellant does not require any prostheses or aids for her impairment.
 - The impairment was likely to continue for 2 years or more from that date and the GP explained that the appellant had been on and off medications but there were some difficulties due to side effects.
 - In terms of functional skills, the GP indicated that the appellant could walk less than 1 block unaided in the morning and 2 to 4 blocks later in the day, she could climb 5 + steps unaided, she can lift up to 7 kg, she can remain seated for 1 to 2 hours and has no difficulties with communication.
 - In terms of cognitive and emotional functions, the GP indicated significant deficits in the areas of emotional disturbance and motivation, commenting that there was a recent diagnosis of depression that might have been present for months before and she has started therapy accordingly.
 - While the GP did complete the Assessor Report (AR) he nonetheless completed the DLA part of the PR as follows:
 - The impairment does directly restrict the appellant's ability to perform DLA.
 - She has periodic restrictions for personal self care, basic housework, daily shopping and mobility outside the home. There are no restrictions for meal preparation, management of medications, mobility inside the home, use of transportation, management of finances and social functioning.

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- In terms of periodic restrictions the GP explained that the appellant had joint pain that was worse some days than others and that when pain was present, it limits her DLA. The GP reiterated that restrictions were the result of joint pain. In terms of assistance needed for DLA, he wrote: “May need help periodically when e.g. shopping & needing to lift items. Overall however, this has been tolerable & managed well.”
 - The GP had known the appellant since November 2014 but she had been seen at that medical office before, in July 2014 and in the 12 months before the PR, the GP had seen the appellant 11 times or more.
 - An undated 11 page Assessor Report (AR) received at the ministry’s office on 20 June 2015, completed and signed by the same GP reported the following:
 - The appellant lives with her young son.
 - In terms of physical or mental impairments that impact DLA, the GP indicated that it was related to RA, severe pain and limited mobility in her joints (particularly in hands, wrist and finger).
 - The appellant’s speaking, reading, writing and hearing abilities are good.
 - In terms of mobility and physical ability, the GP indicated that she was taking significantly longer than typical for walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding, with no indication as to how much longer it took. The GP commented that she did not need any particular assisting device and that the impairment was due to joint pain.
 - In terms of “Cognitive and Emotional Functioning” the GP reported no impact for all categories but for a moderate impact for “Other emotional or mental problems” with the comment that the appellant has history of separation from an alcoholic / abusive partner; from this stems depression; and that she had a young son who she was responsible for.
 - In terms of DLA, the GP provided the following assessments (the GP’s comments in parenthesis):
 - Personal care: independent in all aspects;
 - Basic housekeeping: takes significantly longer than typical for laundry and basic housekeeping (joint pain);
 - Shopping: independent for going to/from stores, reading prices and labels, making appropriate choices and paying for purchases; takes significantly longer than typical for carrying purchase home (joint pain);
 - Meals: independent in all aspects;
 - Pay rent and bills: independent in all aspects;
 - Medications: independent in all aspects;
 - Transportation: independent for using public transit and using transit schedules and arranging transportation; takes significantly longer than typical for getting in and out of a vehicle;
 - Social functioning: independent in all aspects; marginal functioning with immediate social network (abusive relationship and spouse in rehab) and extended social networks.
 - The GP included a general comment that it does take her longer to perform DLA such as cleaning, cooking etc. “No assistance used, [appellant] needs to limit her lifting, carrying, pushing and pulling.”
 - In terms of support/supervision required which would help maintain her in the community, the GP wrote: “No support/supervision needed @ this time. We are controlling her pain &

have her on [treatment] for depression.”

- No safety issue was reported.
 - In terms of assistance provided by others, the GP indicated “Family” with the comment: “As much as possible” and in general her young son helps.
 - To the question “If help is required but there is none available, please describe what assistance would be necessary”, the GP wrote N/A.
 - The appellant did not need assistive devices or assistance animals.
 - The assessor’s sources of information were:
 - Office interview with the appellant,
 - File/chart information with the note: “Notes from specialists”.
 - Other professionals – Rheumatology.
 - The GP had known the appellant since November 2014 and had seen her 11 or more times during the previous year.
 - Services provided by the GP’s office: pain control, medications, visits, counselling for depression, follow up.
- In her Request for Reconsideration dated 22 September 2015, the appellant indicated that she was still taking medication but that made her unable to move around on her own and at some point she needed a family member’s help. She also indicated she had to wait hours before taking a shower and brushing her teeth and still needed help from a family member or friends for the shower and to comb her hair. She cannot do any kind of work for her living and cannot do her own housekeeping. She stated she needed help with her DLA. Along with the Request for Reconsideration, the appellant provided the following document:
 - A letter from her GP dated 21 September 2015 confirming the diagnosis of RA, recurrent migraines for which she was taking medications, in particular injections for her symptoms; those injections had to be increased recently because of continued pain and discomfort. The GP wrote about DLA: “[The appellant] has mentioned to me that her pain is not improving and is hindering her in her daily activities. Although she is able to ambulate, this is causing her great discomfort. She has mentioned to me that she has had to rely on [a family member] and friends to do basic house work, take her child to and from school. She also mentions to me that general housework around the house takes her a long time, showering, brushing her teeth and preparing food produces a lot of pain and a lot of the time, she needs to rely of family and friends to complete these chores for her.”

In her Notice of Appeal dated 16 October 2015, the appellant wrote that she did not agree with the reconsideration decision because she did not believe the ministry understood what she was going through with her illness and that she could explain it better over the phone.

At the hearing the appellant provided additional information. She testified that what used to take 15 minutes was now taking her 2 hours and that she was getting help from her young son. She indicated that her GP who completed the PWD application form was not fully informed of her condition while her specialist, a rheumatologist, would have had much better information about her actual condition as he knows exactly what her limitations are but she did not have any report from him. She reiterated that her depression had been caused by her ex-husband’s violence and alcoholism that happened day and night, anytime he showed up. She indicated that because of her condition she could not make a living, that she could not be expected to go out and work since she was ill and was often crying. She mentioned that she had blood pressure problems and had been prescribed medications

to address this issue, but that the side effects made her sleepy and made it more difficult to being on time for her son to go to school. She hoped to get better and be able to work again as she was a hard worker most of her life. She also testified that she did not make her son's lunches but she spent most of the day cooking the evening meal so that they have fresh food. She also mentioned she had an old car that she could use to pick up her son from school and that it was only a few minutes driving from their residence.

The panel determined that the additional oral evidence about the appellant suffering from blood pressure issues was not admissible under s. 22 (4) of the Employment and Assistance Act (EAA) as it was not in support of the information before the minister at reconsideration as it disclosed a diagnosis that was not in evidence at the time. The remaining additional oral evidence is admissible as it was in support of the information before the minister at reconsideration as it provided corroborating information about the appellant's condition.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria of section 2 of the EAPWDA for designation as a PWD because it was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLA either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA

was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement and that her impairment was likely to continue for at least 2 years had been met.

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

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

"**health professional**" repealed

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

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

Section 2 of the EAPWDR provides further clarification:

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

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

(i) prepare own meals;

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- (ii) manage personal finances;
 - (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*, if qualifications in psychology are a condition of such employment.

Severity of the impairment:

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the ministry's PR and AR forms 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 panel notes that 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. The panel also notes that the evidence refers to the appellant's inability to work because of joint pain and as a result, she finds it difficult to make a living. However, for a PWD designation, employability or the ability to work are not included criteria that determine eligibility under the legislation.

Severe physical impairment:

The appellant argued that her condition is deteriorating and that she takes an inordinate amount of time to perform her DLA. She indicated that she was in great pain in her joints, particularly elbows, wrists and hands and that prevented her from doing DLA most of the time. She argued that she could not pick up anything and that the GP that completed the PR misinterpreted her condition when he wrote that she could lift up to 7 kg.

The ministry argued that the GP did not indicate how much longer than typical the appellant needed to perform her tasks and that it could not determine whether her medical condition represented a significant restriction to her ability to perform those activities. Given the medical reports, the ministry argued that the appellant's physical impairment speaks to a moderate rather than a severe degree of impairment.

Panel decision:

The panel notes that the appellant in her SR stated that it took her 45 minutes to an hour when she wakes up in the morning to be functional while in her Request for Reconsideration she mentioned that she had to wait "hours" to take a shower and brush her teeth and in her testimony at the hearing she testified it took her 2 hours. The GP described the difficulties that the appellant was facing every day because of her RA and joint pain but nonetheless assessed her ability to lift items weighing up to 7 kg and qualified her ability to walk unaided on a flat surface as less than 1 block in the morning but 2 to 4 blocks in the afternoon. In terms of walking however, the GP indicated in the AR that the appellant was taking significantly longer than typical but did not indicate how much longer it was; he nonetheless mentioned "no particular assisted device needed" and in terms of DLA, he wrote that the appellant needed to limit her lifting, carrying, pushing and pulling but no assistance was needed. The GP also wrote "We are controlling her pain" and that no support/supervision was needed. The panel also notes that the GP, when making his assessment, did refer to the notes from specialists.

The GP provided more information on the appellant's medical condition in his letter of 21 September 2015 but qualified his comments by stating "she has mentioned" and the panel finds that the ministry reasonably determined this additional information was akin to a self report by the appellant rather than reflecting the GP's medical opinion. The panel also notes that this letter does not provide a medical confirmation that the appellant's condition is deteriorating. Given her physical abilities as reported by the GP, the panel finds that the ministry, while acknowledging that she experiences limitations to her physical functioning, was reasonable in determining that the assessments of the GP speak to a moderate impairment and that the evidence provided did not establish a severe physical impairment.

Severe mental impairment:

The appellant argued that she suffers from depression and migraines as a result of spousal abuse she endured from her ex-husband from whom she is now separated. She argued that it impacted her social life because she could not attend any social and family event as a result.

The ministry acknowledged the appellant had limitations to her mental functioning due to depression but argued that there was not enough evidence to demonstrate a severe mental impairment.

Panel decision:

While there is a diagnosis of depression, the evidence does not show any significant impact on the appellant's mental functioning. The PR mentions significant deficits for emotional disturbance and motivation and the GP comments that they started therapy for this. However, in the AR, the same GP indicated there was no impact on any of the categories of mental functioning except for "other emotional or mental problems" where he indicated a "moderate" impact. The GP also commented that no support/supervision was required, that her pain was controlled and that she was treated for depression.

As well, the panel notes that the appellant is independent for DLA that are specific to mental impairment under s. 2 (1)(b) of the EAPWDR: making decisions about personal activities, care or finances (decision-making) and also notes the GP indicated "independent" for the other DLA of relating to, communicating or interacting with others effectively (social functioning) but had marginal functioning in terms of immediate (with the comment about abusive relationship with her ex-husband) and extended social networks. Given the evidence presented, the panel finds that the ministry was reasonable in determining that the assessments of the GP did not establish a *severe* mental impairment.

Daily living activities:

The appellant argued that her condition was such that she was significantly restricted in her ability to perform DLA and that she needed the help of her young son and of a family member to do them. She insisted on the fact that she could not take a shower, comb her hair by herself, do any lifting and carrying but needed help to perform those activities. She also argued that she could not look for employment because of her condition.

The ministry argued that while the GP mentioned periodic restrictions to some areas of DLA, he did not indicate the frequency and duration of episodes when the appellant's symptoms were exacerbated and it could not be determined whether they were for extended periods of time to the extent that these activities were significantly restricted. As well, when it took longer to perform some activities, the GP did not indicate how much longer it took, making it difficult to determine whether the length of time taken represented a significant restriction to her ability to perform those activities.

Panel decision:

The panel acknowledges that the description provided by the appellant about her difficulties performing her DLA is significantly different from that of the GP who completed the PR and the AR. The panel must refer to s. 2 (2) of the EAPWDR that specifically requires that the impairment "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"

Consequently, the panel must consider whether the ministry's decision is a reasonable application of the legislation that requires that the minister be satisfied that the DLA criterion is met based on the

evidence from a prescribed professional.

The appellant suggests that if her specialist had completed the forms, the information would have been more accurate and would have substantiated her description of the significant impact her medical condition has on her DLA. The panel cannot speculate as to what the specialist would report and there is no evidence that was presented from that specialist. Thus, the panel must look at the evidence as is and consider the opinion of the GP presented by the appellant.

There is no doubt for the panel that the GP was of the opinion that the appellant's medical condition limited her DLA because of joint pain caused by RA. However the issue is whether it establishes a *direct and significant* impact. In the PR, the GP indicated periodic restrictions for personal self care, basic housework, daily shopping and mobility outside the home and when asked to explain "periodic" the GP indicated "Some days pain worse than others. When pain is present, limits daily activities". There is no explanation as to how frequently this takes place and later on the same page, the GP wrote: "Overall however, this has been tolerable [and] managed well".

In the AR, the GP indicated that the appellant was independent for the vast majority of DLA and none of the activities required periodic or continuous assistance from another person. Where there is an impact on an activity, it was because it takes much longer than typical to perform the activity and the GP did not indicate how much longer. The appellant's testimony was not consistent as she referred to between 45 minutes and 1 hour in her first statement to 2 hours or even "hours" in subsequent statements. The GP commented that the appellant needed to limit her lifting, carrying, pushing and pulling. The GP also noted that the appellant was getting some help from her young son "as much as possible" but when asked whether support/supervision was required, the GP responded in the negative and that they were controlling her pain and treating her depression.

Given the evidence presented and the opinion of the appellant's GP, the panel finds that the ministry reasonably determined there was not enough information from a prescribed professional to establish that the appellant's *impairments directly and significantly restricted* DLA continuously or periodically for extended periods.

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

The appellant argued that she needed help from her young son and family member to perform most of her DLA because of joint pain.

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons.

Panel decision:

While the appellant stated she was using as much help as possible from a family member and her young son, the panel notes the prescribed professional suggested otherwise. The GP indicated in the PR that in terms of DLA, the appellant "may need help periodically when e.g. shopping and lifting items" he added "Overall, however, this has been tolerable [and] managed well". In the AR the GP commented: "No assistance used, [the appellant] needs to limit her lifting, carrying, pushing &

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pulling”. When asked to describe support/supervision required, the GP wrote: “No support/supervision needed [at] this time. We are controlling her pain & have her on [treatment] for depression.”

Based on the above information and since 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 finds that the ministry’s conclusion that it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions was reasonable.

Conclusion:

Having reviewed and considered all of the evidence and the relevant legislation, and for the reasons provided above, the panel finds that the ministry’s decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence. The panel therefore confirms the ministry’s decision.