

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of September 23, 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

Neither the appellant nor the ministry attended the hearing. Having confirmed that both parties were notified, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

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

- The appellant's PWD application form consisting of the appellant's self-report dated April 1, 2015 along with a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated June 23, 2015 and assessor's report ("AR") completed by a social worker, dated June 22, 2015.
- The ministry's file note (dated September 21, 2015) confirming that the appellant had been a patient at her current health facility since 2005.
- An Outpatient Progress Note dictated by the appellant's orthopedic surgeon on March 18, 2015.

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The panel reviewed the evidence as follows:

Diagnoses

- In the PR the physician (who has seen the appellant 11 or more times in the past year) provided a diagnosis of arthrofibrosis of the left knee following a total knee replacement in March 2014, Hepatitis C (onset 1998), and cirrhosis (stage 4 fibrosis – onset March 2015).
- In the AR the social worker indicated that she had known the appellant for six months and had seen her two to ten times. In describing the mental and physical impairments restricting the appellant's mental or physical functioning, the social worker identified osteoarthritis of knees, diabetes, Hepatitis C, high blood pressure, a possible head injury from a motor vehicle accident in the 1990's, childhood trauma, a broken arm from a fall on ice resulting in a plate in the affected arm, shortness of breath, asthma, and a history of trauma. She commented that the appellant is waiting for right knee replacement surgery.

Physical Impairment

In the PR the physician reported that:

- The arthrofibrosis of the left knee causes a limited range of motion in the knee, as well as pain and instability. She has limited walking ability due to stiffness and pain, preventing her from doing any physical work.
- In terms of physical functional skills, the physician reported in the PR that the appellant can walk 2-4 blocks unaided on a flat surface, climb 2-5 stairs unaided, can lift 5 to 15 pounds, and can remain seated for 1-2 hours.
- The knee pain and stiffness is now a chronic condition that will always restrict the appellant's ability to walk, climb stairs, and stand.
- The Hepatitis C is chronic, and results in chronic fatigue.
- On occasion the appellant has right upper quadrant abdominal pain.

In the AR the social worker reported that:

- Regarding mobility and physical ability, the appellant requires periodic assistance from another

person walking indoors and outdoors, and continuous assistance climbing stairs, standing, and lifting/carrying holding.

- She had completed the AR based on office interview(s) with the appellant and file/chart information in the health facility's medical records system.

In the Outpatient Progress Note the orthopedic surgeon stated that:

- The range of motion of the appellant's left knee is slowly improving.
- The appellant receives physiotherapy twice a week and has to work aggressively to break down the scar tissue and increase her flexion. Currently the knee still has limited function and a limited walking ability.
- Long term recovery will be slow, and the current function of the knee will not allow her to do any physical work. It is unlikely she will be able to do any strenuous physical work for the next year, and she will always be restricted in walking, standing, and stair-climbing. The appellant was to be reassessed in three months' time "to see how her knee function comes along."

In her self-report the appellant stated that:

- She has short term memory loss.
- Her mobility is very restricted and stairs are out of the question.
- She can stand for a maximum of 20 minutes.
- Walking on the local area's dusty roads aggravates her asthma.
- She has pain in her left arm, knees and back.
- She has issues with constant fatigue, sometimes sleeping for two straight days.

Mental Impairment

In the PR the physician indicated that the appellant has no difficulties with communication, and no significant deficits with cognitive and emotional function.

In the AR the social worker reported that:

- With respect to the appellant's ability to communicate, her speaking is good, but all other functions are poor: reading ("poor vision in both eyes – needs glasses"), writing, and hearing "hole in eardrum – as a result of ear infection in right ear").
- The appellant's mental impairment or brain injury moderately impacts 8 of 14 categories of cognitive and emotional functioning, and causes minimal or no impacts to the remaining 6 categories. The social worker commented "PTSD – trauma survivor" and "difficulties w/ sleep + fatigue."

DLA

In the PR the physician reported that:

- The appellant's impairments directly and continuously restrict her ability to perform three of the ten prescribed DLA: basic housework, daily shopping, and mobility outside the home. The physician reported no direct restrictions to the remaining DLA including personal self-care, meal preparation, management of medications, use of transportation, management of finances, and social functioning/daily decision making.
- Regarding the degree of restriction to DLA, the physician commented "Needs assistance with house work and shopping. Has difficulty ambulating when shopping." Regarding the type of

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assistance needed, the physician commented “Requires help with heavy lifting, labour intensive house chores, carrying groceries.”

In the AR the social worker reported that:

- The appellant requires periodic or continuous assistance with tasks related to every DLA
- The appellant requires continuous support/supervision making appropriate social decisions, and has very disrupted functioning in her immediate and extended social networks.
- Regarding the DLA of personal-self care, the appellant independently manages the tasks of feeding herself and regulating her diet.
- Regarding the DLA of daily shopping, the appellant independently manages the tasks of reading prices and labels, making appropriate choices, and paying for purchases.
- Regarding the DLA of meal preparation, the appellant independently manages the tasks of meal planning and safe storage of food.
- Regarding the DLA of managing personal medication, the appellant requires periodic assistance with all tasks.
- Regarding the DLA of managing personal finances, the appellant requires continuous assistance (“rent paid direct so doesn’t need to pay that bill”).

In her self report the appellant stated that:

- She needs help with cooking, cleaning her floors, laundry, cleaning her bathroom, getting in and out of the bath. Her friend helps her with these things.
- Her friend helps her with shopping and carries “everything.”
- Getting around is hard. She has to walk because she has no money for transportation, and has to rest/sit down after half a block of walking.
- A bus pass and eligibility for HandyDART would be helpful.

Help with DLA

- In the PR the physician reported that the appellant requires a cane for walking.
- In the AR the social worker reported that the appellant uses a cane as an assistive device, commenting “on some days a cane helps [the appellant] to get around. She relies on it on her bad days due to her knee OA.” The social worker reported that the appellant does not have an assistance animal and commented “friend assist her often with household/chores + bathing.”

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

The appellant's position is that the pain and loss of mobility associated with her knee condition, in conjunction with fatigue and abdominal pain associated with Hepatitis C and cirrhosis constitutes a severe physical impairment. She argued that the professional evidence indicates that her mobility and physical functioning are significantly impaired.

The ministry's position, as set out in its reconsideration decision, is that while it acknowledges the appellant's mobility is restricted, a severe impairment to physical functioning has not been established. The ministry argued that more weight should be given to the PR than the AR given the appellant's long history as a patient of the physician and the health facility.

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 reasonable discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must consider all the relevant evidence, but the legislation places significant emphasis on the evidence of prescribed professionals.

The evidence of the physician and the social worker, read together, indicates that the appellant's physical functioning is in the mid-range of the scale. The physician indicates the appellant can walk two to four blocks unaided (that is, without the assistance of another person, assistive device or assistance animal), which is consistent with the social worker's evidence that the appellant takes significantly longer walking indoors and outdoors, but that she only periodically requires assistance from another person or from her cane (presumably on the "bad days" referred to by the social worker). The social worker indicated that the appellant can walk for up to two blocks before sitting down for a rest. The appellant also stated that she gets around by walking (though having to take a break every half block) because she can't afford to pay for transportation.

These observations are consistent with the physician's evidence that the appellant requires assistance with "heavy lifting" and "labour intensive" chores

As discussed in more detail in these reasons for decision under the heading **Significant Restrictions to DLA**, the limitations to the appellant's physical functioning do not appear to have translated into significant restrictions to her ability to manage DLA.

Based on the above-noted level of physical functioning, and the degree of restrictions to DLA, the panel finds that the ministry was reasonable in determining that a severe impairment to physical functioning has not been established.

Severe Mental Impairment

The appellant's position is that she suffers from post-traumatic stress disorder which constitutes a severe mental impairment. She argued that she has a history of trauma including a lengthy history of physical and emotional violence and abuse which causes major impacts to her cognitive and emotional functioning.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry argued that the physician did not diagnose or describe a mental disorder or brain injury, and that limitations in the ability to communicate as identified by the social worker are caused by physical, rather than mental, limitations. The ministry also argued that the social worker identified only moderate, minimal, or no impacts to cognitive and emotional functioning.

Panel Decision:

The legislation (EAPWDA section 2(2)) requires that a severe impairment must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. The physician has provided no diagnosis of a mental health condition.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*). For the reasons detailed below under the heading **Significant Restrictions to DLA**, the evidence does not demonstrate on the balance of probabilities that the appellant is significantly restricted in these DLA.

Based on the foregoing analysis, the panel finds the ministry reasonably determined that a severe mental impairment has not been established.

Significant Restrictions to DLA

The appellant's position is that severe physical and mental impairments directly and significantly restricted her ability to perform DLA. She argued that she is restricted in most tasks related to virtually every DLA.

The ministry's position is that there is not enough evidence to confirm that the appellant is significantly restricted in her ability to perform DLA continuously or periodically for extended periods. The ministry argued that more weight should be given to the physician's evidence than the social worker's evidence. The ministry also argued that the social worker did not describe the nature, frequency and duration of periodic assistance/supervision the appellant required with various DLA.

Panel Decision:

The appellant bears the onus of demonstrating on the balance of probabilities that she satisfies the statutory criteria for PWD designation. However, there is a significant degree of contradiction between the evidence of the physician and the social worker with respect to restrictions the appellant experiences in her ability to manage DLA. The evidence indicates that the appellant had been receiving medical care from the health facility for several years, whereas the social worker had only known the appellant for a few months. The panel notes as well that the social worker's assessment of restrictions to DLA was based on several medical conditions (diabetes, high blood pressure, possible head injury, childhood trauma, post traumatic stress disorder, broken arm, poor vision, hole in eardrum) that the physician did not confirm and did not diagnose as impairments as required by EAPWDA section 2(2). Finally, the panel notes that while the social worker appears to have indicated that she had access to the appellant's medical records, the physician had completed the PR after the social worker completed the AR, and so the social worker did not have the benefit of the physician's diagnoses and opinions. For the foregoing reasons, where there are inconsistencies between the evidence of the physician and the social worker with respect to restrictions to DLA, the panel concludes it was reasonable for the ministry to give more weight to the physician's evidence.

The physician indicated that the appellant is directly and continuously restricted in three DLA: basic housework, daily shopping, and the outdoors aspect of mobility indoors and outdoors. Regarding mobility outdoors, the physician reported that the appellant can walk for two to four blocks unaided. Regarding the degree of restriction to housework and shopping, the physician's evidence indicates that the appellant requires help with "heavy lifting" and "carrying groceries" (presumably in excess of the appellant's 5 to 15 pound lifting capacity), and "labour intensive house chores." This does not indicate a significant degree of restriction.

There is also inconsistency in the evidence regarding the two DLA that are specific to mental impairment – decision making and social functioning. Regarding social functioning, the physician noted no direct restrictions. The social worker noted very disrupted functioning; however both she and the appellant noted that the appellant receives help from a friend with various activities such as

shopping and housework.

Regarding decision-making, the physician noted no direct restrictions. The social worker noted no restrictions in the decision-making aspects of the DLA of personal self-care (feeding self and regulating diet), daily shopping (making appropriate choices, paying for purchases), and meal preparation (meal planning). However, she indicated that the appellant requires continuous assistance with managing personal finances, continuous support/supervision making appropriate social decisions, and periodic assistance with managing personal medications. The social worker provided no information as to the nature of the help the appellant receives in these areas except that the appellant's rent is paid directly on her behalf, and that she is able to independently pay for her purchases when shopping. Given these gaps and inconsistencies, the panel finds the ministry reasonably determined it is difficult to develop a clear and coherent picture of the impacts on the appellant's ability to perform DLA. The evidence regarding social functioning and decision-making does not indicate significant restrictions to those DLA on the balance of probabilities.

Based on the foregoing evidence and analysis, the panel finds that the ministry was reasonable to conclude that there is not enough evidence to confirm that the appellant is significantly restricted in her ability to perform DLA continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires help with DLA due to the restrictions she experiences.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

A finding that a severe impairment directly and significantly restricts a person's ability to manage her 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, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded 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, for the foregoing reasons, the panel finds that the ministry's 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.