

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 24 September 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

With the consent of parties, the hearing was conducted in writing pursuant to section 22(3) (b) of the *Employment and Assistance Act (EAA)*.

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

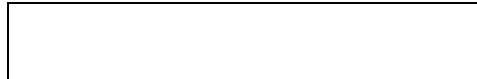
- A PWD Application, divided in 3 sections: 1 Self Report (SR), 2 Physician Report (PR) and 3 Assessor Report (AR) as follows:
- Section 1 – a 3 page Applicant Information (SR) completed and signed by the appellant before a witness on 15 December 2014. In an attachment to the form, the appellant described her medical condition and how it impacted on her daily activities. In particular she stated she was suffering from rheumatoid arthritis in her back, shoulders, neck, legs and hands. She also has difficulties with her bladder that despite 3 surgeries she still has difficulties to control. Because of her health conditions she relies on others for assistance for DLA. She also mentioned the following:
 - Ability to communicate: difficulties with writing and gripping pen because of arthritis that makes her to shake her hand;
 - Mobility and physical ability: able to climb 10 stairs before having to use handrail, able to stand up for an hour at a time, can sit for up to 30 minutes at a time, able to lift 50 pounds but uses wheel cart to carry purchases when grocery shopping;
 - Personal care: takes longer than typical to get dressed, groom, bath, toilet and get out of bed. Difficulties in controlling her bladder;
 - Shopping: use shopping cart and goes with friend due to flare ups with arthritis. Need to use eyeglasses to read prices and labels;
 - Meals: difficulties with peeling potatoes and need to take breaks because of cramping and numbness in hands;
 - Transportation: use the seat and door for support when getting in and out of a vehicle.
- Section 2 – the PR dated 19 May 2015 completed and signed by the appellant's general practitioner (GP) who had known her since 2014 and who had seen her 2-10 times in the past year. He reported the following:
 - Specific diagnoses: urinary bladder prolapse, onset at 18 years, and degenerative disc disease (DDD), onset 2005.
 - In the health history, the GP indicated that the appellant had surgery for prolapse bladder. DDD back low spine.
 - The appellant was prescribed medication and/or treatment that interfered with her ability to perform DLA but did not provide any explanation and only indicated that the medication / treatments would be likely lifelong.
 - 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.
 - In terms of functional skills, the GP indicated that the appellant could walk 4+ blocks unaided, she could climb 5+ steps unaided, she has no limitation lifting, she can remain seated for less than 1 hour (30 minutes) and has no difficulties with communication.
 - In terms of cognitive and emotional functions, the GP indicated no significant deficits.
 - The GP did not provide any other comment.
- Section 3 – The AR completed by the same GP and also dated 19 May 2015. The GP reported

the following:

- The appellant lives alone.
- In terms of physical or mental impairments that impact DLA, the GP indicated RA/DDD lower back – prolapse bladder.
- The appellant's speaking, reading and hearing abilities are good while her writing ability is poor due to shaking.
- In terms of mobility and physical ability, the GP indicated that the appellant was independent for walking indoors and outdoors but took significantly longer than typical, climbing stairs also taking significantly longer than typical and he indicated 10 stairs maximum, standing and carrying & holding but for the latter she uses an unspecified device.
- The GP crossed out completely the page about an individual with an identified mental impairment or brain injury and no impact is reported.
- For DLA, the GP provided the following assessments (the GP's comments in brackets):
 - *Personal care*: independent for feeding self, regulate diet and transfers on/off chair; for dressing and transfers in/out of bed, takes significantly longer than typical (twice as long); for grooming, bathing and toileting, took significantly longer than typical but did not explain or describe.
 - *Basic housekeeping*: independent in all aspects.
 - *Shopping*: the appellant needs continuous assistance from another person or is unable, uses an assistive device and takes significantly longer than typical for going to and from stores but the GP did not explain or describe the situation; uses an assistive device for reading prices and labels with no explanation or description but for carrying purchases home, the GP indicated that she used a wheel cart for groceries; independent for making appropriate choices and paying for purchases.
 - *Meals*: independent for meal planning, cooking and safe storage of food but takes significantly longer than typical for food preparation (cramping hands);
 - *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 but for getting in and out of a vehicle, uses an assistive device and takes significantly longer than typical (hold on to door – in and out).
 - *Social functioning*: the entire section is crossed out.
- For assistance provided by others, the GP indicated "friends".
- The appellant uses an assistive device, a wheeled cart and no assistance animal is used.
- No additional information was provided.
- The assessor's source of information was "office interview" with the appellant.

With her Request for Reconsideration dated 25 August 2015, the appellant attached a letter prepared by her advocate dated 26 August 2015 signed by the appellant's GP in September 2015 ("the letter"). The letter described the appellant's condition and asked the physician to indicate his agreement or disagreement and add any comment he thought would be helpful. The GP agreed to 2 additional diagnoses: lower abdominal wall hernia (awaiting surgery & hernia repair) and fibroid uterus – Rx conservative. The GP also agreed with the following statements:

- The appellant is only able to lift less than 30 lbs;
- The following DLA take the appellant 3-4 times longer than typical due to her limitations: getting in



and out of a vehicle, food preparation, cooking, going to and from stores, transfers (in/out of bed), toileting, bathing, grooming, dressing and housekeeping but provided no further comment.

- The appellant needs continuous assistance or is unable to do the following DLA: going to and from stores (takes someone with her), basic housekeeping (unable to move heavy things, furniture), medications – taking as directed (overtakes medications, upped dosage on own) but provided no further comment.

In her Notice of Appeal dated 6 October 2015, the appellant stated that due to her rheumatoid arthritis, it was increasingly difficult for her to get around because of her joints aching constantly and that she was in lots of pain.

Since this is a written hearing, the appellant and the ministry were offered the opportunity to make further submissions but both declined to do so.

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 was either a reasonable application of the legislation or reasonably supported by the evidence. 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 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

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;

(ii) manage personal finances;

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- (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.

Severe physical impairment:

The appellant argued that she suffers from rheumatoid arthritis in her back, shoulders, neck, legs and hands for approximately 15 years and that a vehicle accident 12 years ago triggered a deterioration of her condition. She also argued bladder difficulties that she still has difficulties controlling and the

combination of those ailments cause her to rely on others for assistance for DLA. In her Notice of Appeal, she also argued that she suffered from rheumatoid arthritis, making it hard for her to get around because of the pain.

The ministry argued that the information provided by the appellant and her physician was incomplete and did not provide evidence of a severe physical impairment.

Panel decision:

As of September 2015, the GP provided the following diagnoses in respect of the appellant: urinary bladder prolapse, degenerative disc disease, lower abdominal hernia and fibroid uterus; the appellant mentioned rheumatoid arthritis in her SR and her Notice of Appeal but this diagnosis has not been confirmed by the GP.

The appellant's reported physical abilities other than lifting have been consistent: she can walk unaided 4+ blocks, can climb up to 10 stairs unaided and can remain seated for 30 minutes. In terms of lifting, the PR indicated no limitation, the AR stated she was independent and in her SR, the appellant stated she could lift up to 50 lbs but the letter suggests she is now limited to lifting 30 lbs due to her hernia which appears to be a condition that was not known in May 2015 but which the physician suggested surgery would repair. The AR indicated she was independent for all areas of mobility and physical abilities, albeit taking significantly longer for some – without mentioning how much longer - and being somewhat limited for climbing. The PR and the AR mentioned the appellant used a wheeled cart for her groceries but the panel notes that under s. 2 (1) of the EAPWDA, such a device is not “*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” and finds the ministry reasonably determined it was not an assistive device.

Given the appellant's mobility and physical abilities as reported by the GP and that the GP has assessed her as independent for virtually all aspects of DLA requiring physical effort (see also below under Restrictions in the ability to perform DLA), the panel finds that the ministry was reasonable in determining that the information provided did not establish a severe physical impairment.

Severe mental impairment:

The appellant did not provide any argument in support of a severe mental impairment.

The ministry argued that given the PR and AR, there were no deficits to cognitive and emotional functioning, no difficulty with communication and no impact on DLA, thus there was not enough information to confirm a severe mental impairment.

Panel decision:

The panel notes there is no diagnosis of a mental disorder or any evidence of a brain injury. The GP in the PR clearly stated there was no significant deficit with cognitive and emotional functions and in the AR he crossed out the whole page about the potential impact of an identified mental impairment or brain injury and the page about social functioning. In terms of DLA that are specific to a mental

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impairment under s. 2 (1)(b) of the EAPWDR, *making decision* about personal activities, care or finances and relating to, communicating or interacting with others, the GP has provided no evidence that would suggest that the appellant is restricted in performing these DLA.

Given the evidence presented the panel finds the ministry reasonably determined that there was not enough evidence to demonstrate that the appellant has a severe mental impairment.

Daily living activities:

The appellant argued that she had to rely on others for her DLA, in particular having difficulties to write because of arthritis, with personal care, shopping, meals and transportation.

The ministry argued that because the majority of the DLA were performed independently or required little help from others, the information from the prescribed professional did not establish that the appellant's impairment significantly restricted DLA either continuously or periodically for extended periods.

Panel decision:

In assessing the reasonableness of the ministry's decision the panel notes that the ministry accepted the further evidence provided by the appellant in the letter signed by the GP in September 2015. Consequently, the panel reviewed the DLA as assessed by the appellant's GP in the reports and the letter and notes the following:

The appellant is independent in all aspects of mobility and physical ability (the DLA of moving about indoors and outdoors) and the vast majority of the other DLA, albeit for some aspects of these DLA taking 3-4 times longer than typical (walking indoors and outdoors, dressing, grooming, bathing, toileting, transfers in/out of bed and food preparation) but there is no explanation as to why and there is no indication that the appellant needs any assistance from another person. For getting in/out of a vehicle, the appellant is reported using an assistive device (holds on to door, which is not an assistive device under the legislation) and takes 3-4 times longer than typical but no assistance from another person is required. In terms of cooking, she is independent (AR) but takes 3-4 times longer than typical without any explanation as to why and no help is required.

Shopping: in terms of going to/from stores, the AR mentions that the appellant needs continuous assistance from another person or unable, uses an assistive device and takes 3-4 times longer than typical and in the letter it is stated that she takes someone with her without any explanation as to the type and level of assistance required. There is no explanation as to how she gets to the stores, why it takes her significantly longer. She needs a wheeled cart to carry purchases home but, as mentioned above, the panel found this is not an assistive device according to the legislation (s. 2 (1) EAPWDA). Finally, the AR mentions an assistive device to read prices and labels and, coupled with the SR, the panel finds that the GP meant eyeglasses, which is fairly common and not necessarily consistent with a significant restriction.

For basic housekeeping, the appellant is independent in all aspects but, according to the letter, she needs continuous assistance to "move heavy things, furniture". The panel notes that *basic*

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housekeeping involves what is usually considered normal for maintaining a person's residence in acceptable sanitary condition and moving heavy things and furniture appears to go beyond what is normal or basic housekeeping. Further, there is no information as to the type and level of assistance required.

The other area, medications, where the AR indicated that the appellant is independent but according to the letter she needs continuous assistance from another person or is unable. The letter indicated that the appellant "overtakes medications, upped dosage on own" but, again, there is no indication as to how frequent this happens and of the type and level of assistance that would be required. Nonetheless, this is an area that is relevant to a deficit in executive or insight and judgment that would be attributable to an undiagnosed mental impairment, the severity of which has not been established, and not to her diagnosed physical conditions.

Considering that a severe impairment has not been established and given the evidence presented and taking into account the opinion of the appellant's GP that the appellant is independent for the majority of DLA and requires little help from others, the panel finds that the ministry reasonably determined that the information from a prescribed professional does not establish that the appellant's *impairments directly and significantly restrict* DLA continuously or periodically for extended periods.

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

The appellant argued that because of her condition, she requires help with most DLA.

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

Panel decision:

There is very little evidence that the appellant would require help to perform her DLA. Where the AR asks the GP to describe the support/supervision required to keep her in the community if the appellant required help and "if help is required but there is none available, please describe what assistance would be necessary", he did not provide any comment. Further, 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 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:

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.