

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated October 30, 2015 made by the Ministry of Social Development and Social Innovation (the ministry) which 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,
- 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

The relevant legislation is section 2 of the EAPWDA and section 2 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

PART E – Summary of Facts

The appellant is currently in receipt of income assistance. On May 14, 2015 she attended a walk-in clinic in order to complete the physician's report in her application for PWD status. As her regular physician had recently retired, the appellant's report was completed by another physician whom she had not met before. On May 29, 2015 the appellant attended a meeting with a social worker in order to complete her assessment report in her application for PWD status. The appellant had not met the social worker before either. The appellant also partially completed, likely with assistance, a self report dated April 24, 2015.

The physician's report indicates that the appellant has anxiety disorders with some features of PTSD as well as flexion problems with a finger of the right hand and head trauma. She is afraid to take medications and to see doctors. The appellant reported to the physician that she self-medicates with illicit substances. When she was a teenager she witnessed a violent crime which has led to constant fear, panic attacks and nightmares. The damage to her right hand prevents her from gross and fine motor movements. Despite these issues, the physician's report indicates that the appellant's physical functional skills are not impacted. The physician notes that there are significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation. DLAs are not restricted except for meal preparation and basic housework, which are continuously restricted, although the physician notes "maybe help with meal prep and housework" when describing what assistance is required, and social functioning, concerning which the physician notes: "She doesn't have friends due to lack of trust and lack of ability to leave the house (panic attacks)".

The assessor's report indicates that the appellant: has significant issues with her ability to communicate in that her speaking, reading and writing are considered poor; is independent in terms of her mobility and physical ability; has cognitive and emotional functioning issues that have a major impact on her daily functioning in a number of areas as a result of PTSD caused by witnessing a violent incident as a teenager. The assessor's report goes on to indicate that the vast majority of the appellant's DLAs require continuous assistance from another person or unable and takes significantly longer than typical. The assessor states: "the combination of conditions means her ability to perform [DLAs] is severely restricted and she requires significant, daily support and assistance in all areas of daily functioning as a direct result of her impairments". Finally, the assessor's report states that the appellant's mental impairment means that she suffers from very disrupted functioning as she is "Very fearful and mistrusting of others" and "Avoids all social interactions due to fears".

In her self report under "Please describe your disability" the appellant lists: "severe anxiety with panic attacks, depression, right breast cancer, thyroid cancer, very fearful and mistrustful: her mother was suicidal and [when the appellant was a teenager she witnessed a violent incident], she is extremely fragile and easily moved to tears, a very traumatic life, needs and receives a lot of support and help at [her housing]." Under "How does your disability affect your life and your ability to take care of yourself?" the appellant did not write anything.

At reconsideration the appellant's advocate submitted a report dated October 29, 2015 containing a number of questions regarding the appellant's health which was completed by another physician. This report indicates that the physician considers that the appellant: has a severe mental impairment as "she suffers from depression, anxiety and PTSD" resulting in "panic attacks, nightmares, fear, depressed mood"; takes significantly longer to perform DLAs which are continuously restricted; has a

reduced level of activity; is continuously and significantly restricted from performing DLAs; and would benefit from counselling as she rejects help from others which she needs.

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

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;
 - (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.

The appellant's position is that her physical and mental impairments mean that she does qualify for PWD status. At appeal the appellant stated that, given her fear of medications and doctors the only reason she went through the process of applying for PWD status was that a ministry worker encouraged her to do so. She stated that, although she has significant difficulties with DLAs due to her PTSD, she is reluctant to seek help but has lived in assisted living housing for 4 years and neighbours in her housing complex assist her.

The ministry's position is that there is such a discrepancy between the physician's report (which likely does not support the appellant's application for PWD status) and the assessor's report (which likely does), both of whom were meeting the appellant for the first time, that it cannot conclude that the appellant qualifies for PWD status. In particular, it is concerned that, while the physician would have access to the appellant's medical records, the assessor's report was based on what the appellant told the social worker at their single meeting. In addition, the incomplete self-assessment means that the ministry does not have complete information from the appellant with which to make this decision. And finally, the third report submitted by the appellant's advocate at reconsideration and completed by another physician adds little to the information available to the ministry and, again, raises the issue of the physician having no history with the appellant.

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. However, the panel notes that there are significant differences between the physician’s report and both the assessor’s report and the second physician’s report submitted at reconsideration.

Severe Physical Impairment

The physician’s report found that an injury to the appellant’s right hand “prevents certain gross and fine motor movements” of that hand. This report indicates that the appellant’s functional skills, used to assess the severity of the impairment, are not impacted. The assessor report notes “Dom right hand injury” but indicates that the appellant is independent in all instances of mobility and physical ability. The self report does not mention the physical impairment. The report submitted at reconsideration states: “she has a flexion constriction of a finger on her right hand.”

Based on these statements the panel considers that the ministry’s decision that it could not determine whether the appellant’s physical impairment is *severe* was reasonable.

Severe Mental Impairment

All four reports are relatively consistent in their assessment of the appellant’s mental impairment. PTSD, anxiety, depression, social dysfunction and a number of fears are all mentioned in common. The physicians report indicates that the appellant suffers from significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation. The assessors report indicates that the appellant’s cognitive and emotional functioning has a major or moderate impact on 10 of the 14 listed items.

The appellant witnessed a violent incident as a child which appears to have impacted her ability to function in permanent and profound ways. However, the ministry argues that it could not determine the severity of the impairment because: first, the assessments provided are by professionals who were all meeting the appellant for the first time and perhaps working from the notes of others or from what the appellant was telling them at the time; and second, a more comprehensive assessment by an expert in mental health would be required in order to determine the severity of the impairment.

The ministry states that, although a physician’s familiarity with the appellant is not a legislated criteria, the legislation does require that the minister be satisfied that an applicant for PWD has a severe

mental impairment that meets the legislated criteria. This allows the minister to take into consideration the familiarity of the assessing professional with the applicant. In this case, however, the reasons why the professionals completing the reports were not familiar with the appellant was, first, because her physician had recently retired and, second, perhaps because one of the aspects of her mental condition is a fear of doctors.

While the panel agrees with the ministry's interpretation of the legislation, it also notes that the ministry's determination that it is not satisfied must be reasonable given the facts. In this case the ministry had before it three reports from three "prescribed professionals" and a self report which are all relatively consistent in their description of the appellant's mental impairment. The ministry has stated its grounds for objecting to each of them: that it considers that none of the authors was in a position to be able to properly assess the appellant because they had no history with her and that the authors were simply repeating other reports or what they were told by the appellant.

The panel finds that the ministry's objections to the reports is likely accurate for the assessor's report, but not so for the physician's report as the physician worked at the same clinic as the appellant's previous physician and would have had access to her medical records. On the other hand, the assessor's report was based on a single interview and did not include a home assessment or consultation with professionals at the appellant's residence or family members. It is not clear whether the physician who authored the second physician's report practised at the same clinic as the appellant's former physician or whether he had access to the appellant's medical records.

Accordingly, it was appropriate for the ministry to place little weight on the assessor's report and the second physician's report, but not so on the physician's report. The panel concludes that the physician's report is, as far as it goes, reliable and should be given more weight than the other two reports. As the physician's report does not establish a severe mental impairment, this conclusion essentially supports the ministry's decision.

The ministry's second main position in finding that the criteria of a severe mental impairment was not met was that, due to the professional's lack of familiarity with the appellant and the specific nature of the mental impairment (PTSD), it could not determine the severity of the appellant's mental impairment without a more comprehensive assessment by an expert in mental health. In this regard, given the nature of the impairment and the assessors' lack of familiarity with the appellant, the panel considers that it was reasonable for the ministry to decide that it could not ascertain the severity of the appellant's mental impairment without a detailed assessment by a qualified professional.

On this basis, the panel finds that the ministry's determination that it does not have enough information to establish that the appellant suffers from a *severe* mental impairment was reasonable.

Daily Living Activities

There is significant disparity between the physician's report and the assessor's report in regards to DLAs. The physician reports that the only DLAs restricted by the appellant's impairments are meal preparation and basic housework, both of which are continuous. She also indicates that social functioning is restricted but does not indicate whether it is continuous or periodic. In her response to the question "What assistance does your patient need with [DLAs]" the physician responds: "Maybe

help with meal prep and housework,” which appears to be a more conditional statement concerning the impact on those two DLAs.

By contrast, the assessor’s report indicates that the appellant requires continuous assistance with and takes significantly longer to complete almost all of the over thirty DLAs listed, stating that she is independent in only four of them: Transfers in/out of bed, transfers in/out chairs, safe handling of medications and getting in/out of a vehicle. This is in direct contradiction to the physician’s report as to the impact of the appellant’s condition on her DLAs.

Unfortunately, the appellant did not complete the section in her self report dealing with DLAs.

The report submitted at reconsideration would seem to support the assessor’s report. That report indicates that the appellant takes longer to complete DLAs, has a reduced level of activity, is continuously restricted in her DLAs, lists a number of DLAs which are impacted and rejects help and needs counselling due to her medical impairments.

It is the ministry’s position, similar to that regarding the severity of the impairment, that the lack of familiarity with the appellant of the assessor and, perhaps, the second physician, combined with the lack of proper investigation of the appellant’s abilities means that these reports more likely represent what the appellant told these professionals at their first and only meeting rather than their considered opinion based on their history with and knowledge of the appellant such that the ministry is not satisfied that these reports accurately represent the condition of the appellant.

Again, and for the reasons described above, the panel finds that the ministry was reasonable in placing less weight on the reports of the assessor and second physician than on that of the physician. There remains, however, a significant disparity between the reports which gave the ministry pause, as it does this panel. In which case, the ministry’s decision that it could not determine the impact of the appellant’s mental impairment on the DLAs to be reasonable.

Help is Required to Perform DLAs

Again, there is significant disparity between the physician’s report and those of the assessor and the second physician. As the physician’s report indicates that the appellant’s mental impairment does not impact most of her DLAs, and notes she needs “Maybe help with meal prep and housework”, the appellant requires little or no help. But both the assessor’s report and that of the second physician indicate that a significant and continuous amount of help is required.

Looking at certain items specifically the disparity is even more stark. For instance, the physician’s report states that management of medications, daily shopping, and management of finances are not restricted, while the assessor’s report states that mobility is independent and transportation mixed in whether they require continuous assistance and take significantly longer. Unfortunately, in the explanation column the assessor has simply typed “Needs help or unable” repeatedly, which is not helpful in understanding the appellant’s particular impediments or needs.

The ministry’s position is that since it cannot determine that the appellant’s DLAs are significantly restricted, it cannot determine whether she requires significant assistance for any DLAs. This is

logical and based on this reasoning the panel finds that the ministry's determination in this matter is reasonable.

Conclusion

The panel finds that the ministry's decisions that it could not determine that:

1. the appellant has a severe physical or mental impairment;
 2. the appellant's impairment directly and significantly restricts DLAs, and
 3. the appellant requires assistance with DLAs
- were reasonable;

Accordingly, the panel concludes that the ministry's decision that the appellant does not qualify for PWD was reasonable based on the facts before it.