

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated January 20, 2016 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 (DLAs) 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 information before ministry at the time of the reconsideration decision consisted of the following:

A physician's report (PR) dated August 6, 2015, and completed by the appellant's physician indicating that the appellant suffers from depression, global anxiety disorder, alcoholism, polyarthritis and COPD.

Under Health History the physician writes:

[The appellant's] polyarthritis and shortness of breath severely restrict her ability to work and the ability to do daily activities. They result in she which adds to the impairment. Her anxiety and passion motivation ability to stick to form tasks.

The physician goes on to state that the appellant's conditions will last for two years and are chronic.

Under functional skills the physician indicates the following:

- walk unaided 1 to 2 blocks;
- climb 2 to 5 steps unaided;
- lift 5 to 15 lbs ;
- remain seated less than one hour ("max 30 minutes);
- no difficulties with communication;
- significant deficits in consciousness, emotional disturbance, motivation ("confusion at times related to global anxiety/depression").

Under additional comments the physician writes: "frequent past hospitalizations for severe alcohol abuse."

The physician indicates that the applicant has been his patient for 5 years and he has seen her more than 11 times in the past 12 months.

An assessor's report (AR) dated August 6, 2015, also completed by the appellant's physician which repeats the diagnosis.

Under Mental or Physical Impairment, the AR indicates the following:

- Ability to communicate: speaking and reading are good and writing and hearing are satisfactory, writing being impacted by "hand arthritis";
- Mobility and Physical Ability: walking indoors requires 2x longer, walking outdoors, climbing stairs, standing, lifting and carrying and holding require continuous assistance or the appellant is unable to do them. Under "Explain and specify assistive devices the physician has repeated the restrictions indicated in the PR.
- Cognitive and Emotional Functioning: major impact is indicated under Emotion, moderate impact under bodily functions, memory and motivation, minimal impact under consciousness and attention/concentration and no impact under the remaining 8 items.

Under Mental or Daily Living Activities, the AR indicates the following:

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- Independent in regulating diet, reading prices and labels, making appropriate shopping choices, meal planning, safe food storage, budgeting, paying bills, taking and safe handling of medications, using transit schedules and all aspects of social functioning;
 - Requires continuous assistance or is unable in bathing, toileting, feeding self, going to and from stores, paying for purchases, carrying home purchases, banking, filling prescriptions and using public transit;
 - Uses an assistive device with grooming (leans on counter), bathing (holds shower pole) and getting in and out of a vehicle (needs to hold car door for support);
 - Takes significantly longer with dressing (sits to dress 2x longer), grooming, transfers in/out bed (takes 5 minutes), transfers on/off chair (2x longer), laundry (3-4 times longer), basic housekeeping (3-4 times longer), food preparation (2x longer), cooking (takes sitting breaks) and getting in and out of a vehicle.
 - Good functioning in both immediate social networks (“generally – conflict with family and others at times”) and extended social networks.

Under Assistance Provided for Applicant the AR indicates Family, Friends and Volunteers and states “Assistance with daily activities some days when physical symptoms are increased.”

A Self Report (SR) dated August 18, 2015, completed by the appellant which repeats the physicians diagnosis and states:

*Are important here at the Centre's kitchen two days, two hours each day. After completing this I suffer from pain in joints, hands, arms, back, legs and neck.
I have trouble bathing and have panic attacks. I have to go in the freezer to get my breath and cool down. After my shifts I go to my room and lay down. Often go to sleep and don't eat. Getting up the middle of the night it is hard to walk. I am recovering alcoholic and live in a transitional housing. I have a drug and alcohol councilor if you need a letter.
I suffer from depression and often cry myself to sleep. Headaches are often very severe. Depression, joint pain, anxiety, recovering alcoholic. When I was married my ex-husband used to beat me up. Broken jaw, ribs, finger, back.*

At reconsideration the appellant’s advocate made a submission (RS) which states:

SUBMISSION

We ask the minister to consider the intended meaning of word severe and significant restrictions. The legislation does not require and appellant to have a restriction identify all of the daily living activities. Hence, the legislation asks for significant restrictions to be identified. We submit [the appellant] does meet this requirement.

We submit based on the medical information, severe disability has been met. Clearly the minister is interpreting the term “severe” so narrowly that [the appellant], who has significant number of medical conditions, is not eligible for persons with disability designation.

Additional medical information (Exhibit A) from [the appellant’s] doctor has been provided, which confirms her medical conditions, the direct and significant restrictions, and the need for

assistance.

CONCLUSION

The legislation requires the ministry to be satisfied based on medical opinion. We submit the medical opinion supports direct and significant and help, therefore the minister should be satisfied.

We respectfully request the adjudicator to broadly interpret the legislation and respectfully grant [the appellant] Persons with Disability status.

Exhibit A referred to in the RS was prepared by the appellant's advocate and completed by her physician. This document contains:

- A list of the appellant's medical conditions;
- A checklist of "restrictions and assistance needed":
 - Basic mobility/climbing stairs:
 - Lifting/carrying/holding:
 - Sitting:
 - Dressing/grooming/bathing:
 - Toileting: significant restrictions due to chronic diarrhea with blood approximately 8x per day. {The appellant must be near a washroom at all times.
 - Regulate diet/feeding self: lack of appetite 3x per week due to depressed moods and experiences acid reflux on a daily basis.
 - Transfers on/off bed or chair:
 - Laundry/housekeeping:
 - Going to and from the store:
 - Paying for purchases and carrying them home:
 - Food prep/cooking:
 - Banking/filling prescriptions:
 - Getting in/out of a vehicle:
- a list of symptoms as a result of her mental health conditions which restrict her ability to complete DLAs:
 - sleep disturbances – major impact
 - consciousness/drowsiness – not indicated
 - depression and anxiety – major impact
 - poor concentration – moderate impact
 - memory issues – moderate impact
 - lack of motivation – major impact;
- identifies her need for a shower grab bar as an assistive device.

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.

New Evidence

At the appeal the appellant's advocate submitted two pieces of new evidence: (1) a pamphlet concerning the impact of COPD on depression, and (2) a previous decision of the Employment and Assistance Tribunal.

The panel considered the admissibility of the new evidence in accordance with section 22(4) of the EAA. The ministry representative objected to the admission of (2) on the grounds that the tribunal decision "has nothing to do with the particular situation of the appellant".

The panel found that (1) was evidence in support of the information before the ministry at the time of the reconsideration decision in that it provided more detail in regards to one of the appellant's medical conditions.

In regards to (2), the panel found that the decision was evidence that was not before the ministry at the time of the reconsideration decision and was not in support of such evidence. As such, the appeal decision itself is not admissible. However, the panel did decide and inform the parties that the appellant was free to make the same arguments in this appeal as were submitted in the previous appeal.

The Appellant's Position

The appellant's advocate argued that there is enough evidence before the ministry to establish that the appellant suffers from a severe medical condition that significantly impacts her ability to carry out her DLAs and that the ministry decision denying this is not reasonable given this evidence.

In the alternative, the appellant's advocate argued that the ministry by not taking into consideration the totality of the appellant's medical conditions but rather considering each condition and its impacts on the appellant's ability to carry out DLAs in isolation is applying a "reductivist" approach to the appellant's medical conditions and their impact on her ability to carry out DLAs which is not what is intended in the legislation and so is an incorrect application of the legislative requirements.

Rather than assessing the severity of each medical condition in isolation, the ministry should assess the severity of the appellant's medical conditions as a whole as they impact her health. This is because one medical condition might not be "severe" but the accumulation of multiple medical conditions means that the overall impact on the appellant's health is severe.

Similarly, by taking into consideration only those DLAs identified as significantly impacted and requiring continuous assistance and not looking at the impact on her ability to carry out DLAs altogether -- the cumulative impact of her medical conditions on her ability to carry out and require assistance with DLAs – the ministry is not making a satisfactory assessment of the impact of her medical conditions on her ability to carry out DLAs and the assistance she requires as required by the legislation.

Finally, the appellant's advocate argued that the ministry based its decision to some extent on a lack of information provided in the PR and AR but that those forms do not provide space for such information and that the appellant has provided ample information subsequently such that the ministry should have enough information to make its determinations. The ministry's primary concern with a lack of information is that related to the frequency and duration of the appellant's medical conditions in relation to the severity of her mental conditions. However, the legislation does not require that this information be provided so that in basing its decision on this criteria, the ministry is stepping outside the requirements of the legislation.

The Ministry's Position

The ministry's position is that in assessing PWD applications it does not take a reductivist approach but does indeed take into consideration the overall medical condition of an applicant and consider the cumulative impact of the applicant's medical conditions on their ability to carry out DLAs and the assistance required.

The ministry also argued that, although the legislation does not specifically require that an applicant provide information regarding the frequency and duration of their medical conditions, this information is necessary for the ministry to be satisfied that the legislative requirements are met.

In this case, the ministry considers that based on all the evidence before it that:

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1. The appellant has a moderate physical impairment because the PR indicates that the appellant can walk 1-2 blocks, climb 2-5 steps, lift up to 5lbs and sit for 30 minutes and because taking 2-3 longer to complete a DLA is not indicative of a severe physical impairment;
 2. A severe impairment of mental functioning has not been established because the majority of the impacts on cognitive and emotional functioning are identified as no impact or minimal impact with only one identified as major impact and because the PR and AR do not adequately describe the frequency and duration of the conditions;
 3. The appellant does not have significant restrictions completing her DLAs because for the majority of her DLAs she only requires extra time (generally 2-3x longer) than typical, which the ministry does not consider to amount to a significant restriction and because she is indicated as independent in about half of her DLAs.
 4. The appellant does not require significant assistance completing her DLAs because she is indicated as independent in about half of her DLAs and kitchen counters and car doors are not considered assistive devices.

The Appellant's Argument

The position that there is enough evidence before the ministry to determine that the appellant qualifies for PWD status is the issue rather than an argument.

The legislation requires that the minister be satisfied that an applicant has met the legislative requirements to receive PWD status. The ministry must be reasonable in making this determination, including not contravening the legislation, not being arbitrary, considering all the information before it and so on. In this instance, the panel cannot agree with the appellant's advocate's argument that the ministry did not consider the overall impact of the appellant's medical conditions or their impact on her ability to carry out DLAs. The minister has established an application process which relies on information provided a medical professional and assesses all applications based on this information. Although the forms break down the medical information so provided, there is no indication that the ministry in this case did not look at the medical conditions and DLAs as a whole in making its determination.

Similarly, requiring information in regards to the frequency and duration of an applicant's medical condition and impact on DLAs while not expressly required by legislation is clearly necessary in order for the ministry to make a determination regarding an applicant's medical conditions and ability to perform DLAs. The application forms ask for this information and space is provided, or supplemental material can be included. This is not an instance of the ministry "stepping outside the legislation", but rather fulfilling its mandate under the legislation.

Severe Physical Impairment

In terms of physical impairment, the appellant suffers from polyarthritis and COPD (chronic cough, shortness of breath). The PR indicates that these conditions do limit the functional skills of the appellant to a certain extent. The AR indicates that in mobility and physical ability she requires continuous assistance or is unable in all but one category. However, the comments echo the restrictions identified in the PR that she can walk 1-2 blocks, climb 2-5 stairs, etc. This appears contradictory. At the hearing the appellant's advocate submitted that what the physician meant by this

is that she is sometimes unable to do these things and when she is requires continuous assistance. While the panel takes note of the advocate's interpretation in this matter, the evidence before the ministry was what the physician wrote in the PR and AR.

The ministry's position is somewhat confusing in that in its analysis of the information before it, it states that there is not sufficient information to determine whether the appellant suffers from a severe physical impairment or not, but concludes that this information indicates a moderate physical impairment rather than a severe physical impairment. Clearly, it is not reasonable to argue that there is not enough information to make a determination and then to make a determination based on that evidence. Despite the ministry's contradictory decision, based on the information in the AR, PR and RL which together indicate that the appellant is generally mobile and able to carry out basic physical tasks, the panel finds that it was a reasonable interpretation of the evidence to find that the appellant suffers from a moderate rather than a severe physical impairment.

Severe Mental Impairment

The appellant suffers from depression, global anxiety disorder and is a recovering alcoholic. The PR and AR combined with the RL indicate that the appellant suffers major impacts in the areas of emotion, sleep disturbance, depression and anxiety and lack of motivation; moderate impacts in bodily functions, memory, motivation, consciousness, poor concentration and memory issues; minimal or no impact in the remaining 9 indicators. As well, the appellant is independent and has good functioning in all areas of social functioning.

The information in the PR, AR and RL indicates that the appellant is experiencing certain issues with her mental health. However, the legislative requirement is that in the opinion of the minister there is evidence of a *severe* mental condition. Given the lack of information indicating a severe mental condition it was reasonable for the ministry to find that it could not conclude that such a condition exists.

Daily Living Activities

The information before the ministry regarding the impact of the appellant's medical conditions on her ability to perform DLAs clearly indicates that in most cases she requires longer to perform them or requires periodic help to do so. The legislative requirement is that the appellant's medical condition "directly and significantly restricts daily living activities (DLAs) either continuously or periodically for extended periods." It is the ministry's position that an applicant requiring 2-3x as long to complete a DLA is not indicative of a *significant restriction*, which is a standard applied to all applications and falls within the purview of the legislative requirement that the minister be satisfied that the requirement is met.

In this case the AR and LR is difficult to understand. For instance, they indicate that the appellant requires continuous assistance with toileting while in explanation stating that the appellant needs to use the toilet in the night and often and has chronic diarrhea. Needing to use the toilet often and requiring continuous assistance to use the toilet are two different things. Similarly, having to lean on the counter is not establishing that the appellant uses an assistive device while grooming.

Aside from this and other somewhat confusing information, overall the information before the ministry indicates that the appellant can carry out most of her DLAs but that they take somewhat longer to complete. There is no indication that an assistive device is required, or that help is needed either continuously or periodically for extended periods. Accordingly, the panel finds that the ministry's determination that the appellant does not meet the legislative requirements in this regard was reasonable.

Help is Required to Perform DLAs

As noted in the above section, there is not a clear indication in the information before the ministry that the appellant requires assistance continuously or periodically for extended periods.

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.