

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated January 11, 2016 which held 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* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2

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

PART E – Summary of Facts

Information before the ministry at reconsideration

- A PWD application comprised of the appellant's Self-report (SR) dated July 30, 2015, as well as a Physician Report (PR) and an Assessor Report both dated July 29, 2015 and completed by the appellant's general practitioner of 2 ½ years (GP).
- Multiple medical reports comprised of x-ray, CT, MRI, and bone scan results in 2013 and 2014.
- Four consult letters written by the same neurologist from September through December 2014. Details of the most recent letter, dated December 17, 2014, are set out below.

Additional evidence submitted on appeal and admissibility

Section 22(4) of the Employment and Assistance Act limits the evidence that the panel may admit to information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration.

At the hearing, the appellant provided additional oral testimony. Her advocate submitted a 2-page letter dated February 18, 2016, comprised of argument, as well as 1-page note dated February 12, 2016 from the appellant's GP. The ministry did not object to the admissibility of the new information. The panel accepted the advocate's letter as argument, and it is reflected in Part F of the panel's decision. The appellant's oral testimony respecting her physical impairment was consistent with information before the ministry at reconsideration as was the GP's note confirming that the appellant continues to experience chronic pain. The panel admitted this corroborating information under section 22(4) of the Employment and Assistance Act as being in support of the information available at reconsideration. However, the panel has not admitted the information provided respecting symptoms of depression and anxiety, as this information is entirely new and therefore not in support of the information available at reconsideration.

The ministry did not provide additional evidence at the hearing and relied on its reconsideration decision.

Summary of relevant evidence

Diagnoses

The GP diagnoses soft tissue strain of the neck and mid back, compression fractures of T7 and T8, rotator cuff injury to the left shoulder, all of which have an onset date of February 2013, and underlying severe cervical spondylosis.

Physical Impairment

In the PR and AR, the GP provides the following information.

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- The appellant sustained very severe injury in terms of the soft tissue strain, left shoulder and fractures which are exacerbated by severe underlying degenerative changes in the cervical spine, causing nerve root impingement with pain, weakness, and other sensory symptoms into the arms.
 - Back and neck pain limits prolonged standing, driving, lifting, carrying, pushing and pulling, and reaching forward.
 - Numbness in arms and hands occurs frequently.
 - Neck pain prevents looking upward.
 - Severe underlying cervical spondylosis limits recovery which has plateaued, despite extensive rehab, with further functional improvement unlikely. She is severely functionally limited as described.
 - The appellant is able to:
 - Walk no further than 3 blocks (takes significantly longer); walking indoors is managed independently.
 - Climb 2 to 5 steps (takes significantly longer and must hold onto railing);
 - Stand independently for a maximum of 15 minutes.
 - Lift up to 10 lbs. Carrying and holding is limited by a maximum tolerance of 10 lbs and by limited standing/walking. Requires periodic assistance from another person for lifting and carrying/holding.
 - Remain seated less than 1 hour.

In his December 17, 2014 consult letter,

- The neurologist summarizes the appellant's X-rays, CT scans, MRI, and bone scan as showing degenerative changes at the cervical spine with mild stenosis and osteoarthritic changes, wedging compression of T7 and T8, and normal left shoulder.
- Findings upon examination: full shoulder movements but discomfort with abduction and external rotation of the left shoulder which he diagnoses as soft tissue sprain. Continued pain from the wedge compression fracture of T7 and T8.
- The appellant is noted as having great difficulty with her left shoulder, lesser the right. She has difficulty with the thoracic spine and doing her previous job. "Hopefully in time this will improve although there is some vulnerability to future injury. Physiotherapy measures are appropriate and she should specifically try to maintain a good personalized exercise program. Her prognosis is probably favourable, although this type of injury can be prolonged. She should try and resume her life activities as much as possible."

In the SR, the appellant describes severe ongoing back pain, mostly in her mid-back and, at times, in her lower back and neck. She cannot look up without excruciating pain and turning her neck left to right hurts. She has numbness and tingles in her arms, hands and toes and has headaches. Walking up hills is painful. She does not sleep well and is up and down through the night with lots of muscle spasms. It hurts to pull, push, lift, and bend. Driving long periods has put her in the hospital. At the hearing, the appellant explained that she had driven from her home to quite a distant location in the province that resulted in a medical issue requiring hospitalization for three days. She is able to manage driving the much shorter distances required to do her shopping etc. It was also noted that the appellant has been approved for CPP disability benefits due to being no longer able to work.

Mental Impairment

The GP reports that there are no significant deficits with cognitive and emotional function or difficulties with communication. The sections in the AR that address mental impairment and brain injury were not completed by the GP.

DLA

The GP provides the following information.

Personal care

- The appellant independently manages grooming, bathing (shower only as it is unsafe to bath as the appellant can't get out of the tub), toileting, feeding self, regulating diet, transfers on/off chairs. Dressing takes significantly longer due to great difficulty bending and twisting and transfers in/out of bed take 2-3 times longer than usual.

Basic Housekeeping

- Both laundry and basic housekeeping require periodic assistance. The appellant gets ongoing assistance to load laundry and her roommate and family help with basic housekeeping most of the time, doing housekeeping such as scrubbing tubs, walls, etc.

Shopping

- Going to and from stores, reading prices and labels, making appropriate choices, paying for purchases are managed independently.
- Continuous assistance is required for carrying purchases home.

Meals

- Meal planning and safe storage of food are managed independently.
- Food preparation and cooking take 4x longer than usual and require frequent breaks (can't prepare food for a single meal in one go, has to sit for breaks).

Paying Rent and Bills

- All tasks are managed independently

Medications

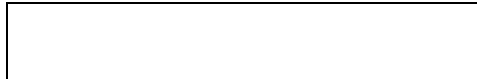
- All tasks are managed independently.

Transportation

- The appellant can independent use public transit and transit schedules but she does not use public transit as she has a car.
- Getting in and out of a vehicle is very difficult and takes 4-5 times longer than typical.

In the SR and at the hearing, the appellant provided the following information.

- She cannot do heavy housework at all or is pretty much bed ridden, including washing walls,



sweeping, mopping, and vacuuming.

- Getting dressed takes a while, mostly pants and bra, and she has difficulty with some aspects of personal hygiene due to difficulties with reaching.
- She cannot pull herself out of a bath, so she only showers.
- She cannot carry a basket for grocery shopping so she only uses a grocery cart. Friends lift heavy things from the car and carry them inside for her.
- She cannot fill a laundry basket to full and folding is a challenge.
- Cooking is a challenge. She must take breaks so that making a pot of chili or soup takes about 3 hours to cut up everything, taking breaks every 15 minutes, and then she can't really do anything for a day or two. She has difficulty lifting pots and pans, getting stuff out of the freezer, or lifting anything over 10 lbs. Lifting a frozen turkey from the freezer causes pain for 3 days. As she can't lift heavy pots, she divides the soup into portions she can manage.

Need for Help

The GP reports that assistance is provided by friends and family. At the hearing, the appellant stated that her cousin and a friend help her with hard things such as washing walls and yard work but that they do not provide assistance every day. The GP does not identify the need for assistive devices and indicates that the appellant does not require an assistance animal.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on 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:

- a severe physical or mental impairment was not established;
- the appellant's daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not requires help, as it is defined in the legislation, to perform DLA?

Relevant Legislation

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.

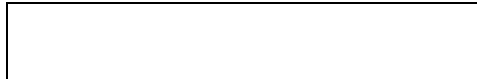
(3) For the purposes of subsection (2),

(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.

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

EAPWDR

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Severe Impairment

The legislation 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. While the legislation does not define “impairment”, the PR and AR 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.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant’s advocate argues that the ministry has applied an unreasonably stringent legal test for “severity” by requiring a person to be virtually incapacitated to be considered disabled, noting that the majority of the population can walk more than 3 blocks, climb more than 5 steps and lift more than 10 lbs. Further, the ministry’s conclusion that the ability to lift up to 10 lbs. indicates the ability to lift a range of items to meet daily functioning requirements does not reflect that by lifting such weight the appellant will suffer pain for several days after. The information provided in the initial PWD application and in the Request for Reconsideration shows that the appellant meets the criteria for designation as a PWD.

The ministry argues that the information demonstrates that the appellant experiences limitations to her physical functioning due to back and neck pain, but that the assessments provided by her medical practitioner speak to a moderate rather than severe physical impairment.

Panel Decision

The appellant is diagnosed with soft tissue strain of the neck and mid back, compression fractures of T7 and T8, rotator cuff injury to the left shoulder, and underlying severe cervical spondylosis. These conditions cause sensory symptoms, chronic pain, weakness, and limit the appellant’s ability to bend, twist, lift, and move her neck. The GP and the appellant have provided information respecting the limitations these symptoms have on her physical functioning, and it is clear that the appellant is not functioning at the level required for her former physically demanding field of employment. However, although the appellant experiences limitations to her physical functioning, she remains able to walk 3 blocks independently though taking significantly longer than typical, climb 2-5 steps using a railing, and lift up to 10 lbs. While, as the appellant argues, lifting weights of 10 lbs leaves the appellant further impaired, the information, including the appellant’s own description, suggests that she has adapted many tasks by lifting and carrying lighter loads. Also, as the ministry notes, the appellant does not require the use of any assistive devices. Stair rails do not fall within the definition set out in subsection 2(1) of the EAPWDA as they are not a device designed to enable a person to perform a DLA that the person is unable to perform due to a severe physical or mental impairment. Further, the GP writes that back and neck pain limits “prolonged” standing, driving, lifting, carrying, pushing and pulling, and reaching forward which indicates independence with mobility and physical ability within certain limitations, which is consistent with the reported physical functional skills.

Based on this analysis, the panel finds that the ministry reasonably determined that the assessments speak to a moderate impairment and that a severe physical impairment has not been established.

Mental Impairment

At the time of the initial PWD application and at reconsideration, the appellant did not argue that she has a severe mental impairment.

The ministry's position is that as no significant deficits with cognitive and emotional function, difficulties with communication, or restrictions with social functioning are identified by the appellant's medical practitioner, the information does not establish a severe mental impairment.

Panel Decision

The appellant is not diagnosed with a mental impairment or brain injury and has no reported limitations in her cognitive, emotional or social functioning, or the ability to communicate. Therefore, the panel finds that the ministry reasonably determined that the information does not establish that the appellant has a severe mental impairment.

Restrictions in the ability to perform DLA

The appellant's advocate questions why the AR asks if an activity takes significantly longer if the ministry is going to conclude that taking up to three times longer does not demonstrate a significant restriction. The advocate also argues that the ministry has failed to consider the physician's narrative. Further, the ministry has not provided an explanation and reached an unreasonable conclusion when it views the physician's statement that the appellant's roommate and family help most of the time as not establishing the need of assistance for extended periods of time. The physician has provided the necessary information to determine the level of impairment and amount of assistance required to complete DLA but it appears not to have been accepted at face value.

The ministry acknowledges that the appellant has certain limitations resulting from neck and back pain that impact her ability to manage DLA periodically, particularly basic housework. However, the frequency and duration of these periods are not described in order to determine if they represent a significant restriction to the appellant's overall level of functioning. The ministry concludes that the assessments provided by the medical practitioner are indicative of a moderate level of restriction and do not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be

considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

While the neurologist and the GP are both prescribed professionals as defined in the legislation, only the GP has provided information respecting the appellant's ability to perform DLA. The GP reports that the appellant independently manages most tasks of the prescribed DLA independently. The exceptions are both tasks of the DLA basic housekeeping (laundry, basic housekeeping), the lifting/carrying/holding aspects of the DLA moving about, and the carrying purchases home task of the DLA shopping. Additionally, for some tasks which are managed independently, the appellant takes significantly longer – with meals taking 4x longer and getting in and out of vehicles taking 4-5x longer. The panel finds that these restrictions are consistent with the reported physical functional skills which are in the mid-range of the options given. That is, the physical functional skills of being able to walk 3 blocks and lift up to 10 lbs. correspond with the appellant's reported ability to manage most DLA tasks independently, with some taking significantly longer, and the need for mostly periodic, rather than continuous, assistance for the heavier tasks of some DLA. For example, both the physician and the appellant describe the need for periodic assistance with the heavier tasks of housekeeping, such as scrubbing bathtubs and walls, which is in keeping with the reported walking and lifting abilities. Continuous assistance is reported for one DLA task, carrying purchases home. However, the remaining four shopping tasks are managed independently, including being able to go to and from stores independently. The appellant also reports that despite being unable to use a hand-held basket, she is able to shop using a grocery cart.

Based on the above analysis, the panel finds that the ministry has reasonably viewed that the prescribed professional's assessment of the appellant's ability to perform DLA establishes a moderate level of restriction and does not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant argues that she does need the significant help of others and that she requires the use of stair rails.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)((b)(ii) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and therefore confirms the decision.