

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 February 3, 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 August 22, 2015, as well as a Physician Report (PR) and an Assessor Report both dated August 31, 2015 and completed by a general practitioner (GP #1).
- A report of the findings of an ultrasound conducted August 27, 2014.
- A 4-page consultation report respecting an in-hospital examination conducted on August 27, 2014 by a colorectal surgeon ("the surgeon's report").
- An undated 2-page typewritten letter from the appellant.
- Statements from the family members and friends of the appellant ("the letters of support").
- A 5-page Request for Reconsideration submission from the appellant's advocate.

Additional evidence submitted on appeal and admissibility

On appeal, prior to the hearing, the appellant provided:

- A 1-page letter from a new general practitioner (GP #2) dated March 3, 2016.
- A 3-page advocate prepared summary of information, upon which GP #2 was asked to check all of the information that applies. GP #2 signed and dated the summary March 3, 2016.
- A 3-page self-report from the appellant dated February 13, 2016.

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. The ministry did not object to the admission of the additional documentary evidence. The panel determined that the additional information which confirmed or corroborated previous information was admissible as being in support of the information at reconsideration.

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

Summary of relevant evidence

Diagnoses

GP #1 diagnoses fecal incontinence, described as a severe condition, with an onset date of 1987.

Physical Impairment

In the PR and AR, GP #1 provides the following information.

- Following the delivery of one of her children, the appellant developed fecal incontinence. Despite having had surgery, her symptoms are getting worse, and she has less and less bowel control.
- The appellant passes flatus when standing in line-ups, and mostly stays at home.

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- She will see a surgeon again but it is unlikely to be getting any better.
 - The appellant is able to independently walk indoors and outdoors, climb stairs, stand with no reported limitations, and is not limited in the amount of time she can remain seated.
 - Though not limited in terms of the weight she can lift, and independent with carrying and holding, any lifting can lead to incontinence.
 - The appellant is not able to do any work outside her home. She has tried many different jobs but has not been able to keep any due to complications from fecal incontinence.

The surgeon's report notes the following.

- At the time of the examination, the appellant's incontinence was described as "incontinent of stool into the pants, large fecal accidents perhaps 3x per week."
- The appellant reported that she thought that certain foods stimulate her bowel. The physician notes that there is nothing specific, but the appellant is aware that she can avoid bowel movements while she is out by not eating.
- The surgeon recommends identifying foods that stimulate bowel movements while the appellant is out, which may avoid incontinence when out, and comments that the appellant can assure that the rectum is completely empty each morning prior to going out by using Metamucil and considering the use of warm tap water enemas.
- Instructions on pelvic floor anal sphincter muscle training was started and the appellant agreed to see a physiotherapist to help with an exercise program.
- Though there is a gap in the anterior sphincter that may be improved with surgery, the specialist is uncertain of the outcome.

Information provided by GP #2 includes the following.

- The appellant's incontinence is a severe chronic problem which leads to an average of 3-4 weekly episodes of stool incontinence at home or in public, and up to 3 episodes daily at its worse.
- She has limited ability to feel the urge to defecate, with numerous episodes of inadvertent flatus or bowel movements.
- The appellant should be considered for permanent disability on the basis that her condition is permanent and has not improved with maximal therapy or interventions and she is unable to perform gainful employment.
- He does not agree that the appellant has daily and severe bouts of diarrhea, constipation, gas and bloating, or nerve damage.
- The appellant has muscle damage to the rectum, the inability to hold stool back properly, and diarrhea.
- Complications include skin irritation.

In her written and oral submissions, the appellant reported the following.

- Despite surgery and biofeedback therapy, as she has grown older, her incontinence has worsened.
- If she experiences certain feelings higher up in her tummy and if she hears any rumblings, she needs to get to the nearest washroom and is unable to hold it or wait if faced with a line-up. There are times when she has no warning at all. She messes herself in public, and was forced to leave work due to this problem.

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- The appellant describes a number of circumstances in which she has been incontinent which have left her fearful of leaving her home. She has become reclusive and does not want to go anywhere or see people because she doesn't know when she will be incontinent and only leaves home when there is no choice.
 - At the beginning of the day, she performs 8 enemas. When she used to work, she would have to perform an additional 4 enemas at lunch time. She lost all of her previous employment due to her incontinence.
 - She is unable to currently afford therapy and was advised by the surgeon last week that there were no new treatments, and to continue with muscle exercises.
 - She is supposed to walk for 30 minutes daily but this too is impacted by bouts of incontinence.
 - Incontinence affects her life hugely.

The letters of support from family and friends attest to past incidents of incontinence experienced by the appellant and the resulting embarrassment felt by the appellant.

Mental Impairment

GP #1 reports:

- There are no difficulties with communication.
- A significant deficit with cognitive and emotional function in the area of "emotional disturbance" described as very self-conscious about her condition which causes lots of embarrassment. No deficits are reported for any of the other 11 listed areas of cognitive and emotional function.
- A major impact on daily functioning is reported for 2 of 14 listed areas – bodily functions and consciousness – and a moderate impact for motivation. She is very depressed and anxious to leave the house, cannot stand in line-ups at grocery stores as she never knows when she will pass flatus or have incontinence and her motivation to do anything is severely affected.

GP #2 reports:

- She is mostly home-bound, has lost her career, relationships, and has suffered extreme humiliation and experiences bouts of depression and emotional distress.

The appellant reports that a physician advised she get counselling and that she has ongoing memory problems her doctor feels are related to the high level of stress. The support letters describe the resulting embarrassment the appellant has experienced.

DLA

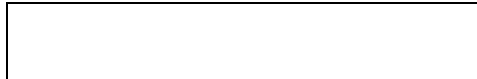
GP #1 comments that appellant has a severe restriction as she cannot go anywhere without fear of incontinence and prefers not to do anything outside of the house due to this concern. She needs help with activities outside the house. He provides the following information specific to each DLA.

- Personal care and basic housekeeping are periodically restricted, when the appellant has incontinence, though she independently manages all tasks.

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- Meal preparation is reported in the PR as not being restricted but in the AR, both food preparation and cooking are reported to require the periodic assistance of another person.
 - Management of medications and finances are reported as not restricted in the PR, whereas in the AR, the tasks of filling/refilling prescriptions, banking and paying rent and bills are reported as requiring periodic assistance from another person.
 - Daily shopping is continuously restricted and requires periodic assistance from another person for going to and from stores, paying for purchases and carrying purchases home.
 - Mobility outside the home is continuously restricted, though walking indoors/outdoors/standing are all managed independently, while mobility inside the home is not restricted.
 - Use of transportation is continuously restricted. Getting in and out of a vehicle requires periodic assistance from another person. Using public transit and transit schedules require continuous assistance from another person. The appellant prefers not to use public transit due to incontinence.
 - Social functioning is continuously restricted. The appellant cannot go anywhere with concerns regarding smell if she has incontinence and has lost friends and partners. The appellant has very disrupted functioning with immediate and extended social networks. She has major withdrawal and social isolation. Making appropriate social decisions, interacting appropriately with others, and securing assistance from others are managed independently. Periodic support/supervision is required for the ability to develop and maintain relationships and the ability to deal appropriately with unexpected demands. No further description is provided.

At the hearing and in her written submissions, the appellant provides the following information.

- Her parents assist with getting groceries etc. as she does not shop.
- She must use a bowel evacuation kit every day and before leaving her home, which takes 2 ½ or more hours, and sometimes worsens the problem by leaking after she has dressed.
- Her parents do all her cooking.
- She has had to replace and clean clothing and bedding, and have her car and other people's property professionally cleaned.
- She also describes her inability to use public transit and taxis and loss of relationships.
- She does most of her financial transactions on line.
- She is required to spend hours and hours each day on personal hygiene – including performing enemas and re-dressing after accidents. She spends her life in the bathroom and is always cleaning up after herself.
- She does not take prescription medications but in an effort to make herself more regular and alleviate symptoms, has relied on Metamucil, coffee and, in the past, drank Pepto-Bismol as though it was tea.



Need for Help

GP #1 reports that the appellant requires help from family with activities outside the home. GP #1 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 require 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.

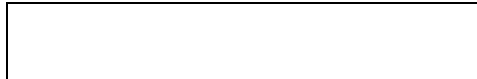
(3) For the purposes of subsection (2),

(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 fact that the appellant’s physician has provided his medical opinion that the appellant’s medical condition is severe should be enough to satisfy the legislative requirement. The legislation does not require a description, and severity need not be at the end continuum and it isn’t reasonable to require that the appellant is incontinent every day and is unable to leave her home at all. That the appellant’s condition is severe is further demonstrated by the fact that her most recent consultation with the surgeon confirmed that there are no other treatment options.

Acknowledging GP #1’s description of the appellant’s incontinence as a “severe condition”, the ministry argues that the diagnosis of a serious medical condition does not in itself determine or establish a severe impairment and that to assess the severity, the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations in mobility, physical ability, and functional skills must be considered. The ministry notes that employability or the ability to work is not taken into account. The ministry argues that the physical functional skills reported and the ability to independently manage all listed areas of mobility and physical ability are not considered indicative of a severe impairment of physical functioning. The ministry concludes that based on the assessments from GP #1, the medical documents and the statements from the appellant and her friends, a severe physical impairment has not been established.

Panel Decision

The appellant is diagnosed with fecal incontinence, described as both severe and chronic by her physicians. However, at issue is whether the ministry has reasonably concluded that the resulting physical impairment from this medical condition is severe. From the appellant’s own evidence and GP #1’s assessment of her physical and mobility abilities, as impactful as the consequences of this medical condition are, the panel cannot find the ministry unreasonable to conclude that the degree of independence in terms of the physical functions and abilities does not establish a severe physical impairment.

Mental Impairment

The appellant does not expressly argue that she has a severe mental impairment, though she does note that her incontinence has taken an emotional toll, and may be impacting her memory and she has been advised to get counselling. The appellant's advocate also confirmed that the issue of impairment for the appellant is physical.

The ministry's position is that although the appellant is currently experiencing limitations to her cognitive and emotional functioning due to factors related to incontinence, the information does not establish a severe impairment of mental functioning. In reaching its decision, the ministry notes the information that the appellant can leave her house for an hour or so, and that there is no indication whether she applies the strategies to avoid incontinence outside the home described by the surgeon. Additionally, the ministry argues that although 2 major impacts are noted for cognitive and emotional functioning, there is a moderate impact to 1 area and no impacts to 11 areas and that, respecting the assistance needed for aspects of social functioning, the frequency and duration of the support required is not described. Again, the ministry notes that employability or the ability to work is not taken into consideration for PWD designation.

Panel Decision

The appellant is not diagnosed with a mental impairment or brain injury. The information from the appellant, her friends and family, and her physicians understandably reflects an emotional impact resulting from her incontinence. However, while GP #1 reports a major impact on daily functioning in 2 of 14 areas due to a mental impairment or brain injury, the majority of areas of cognitive and emotional functioning are not impacted. Additionally, GP #1 reports the appellant as independently managing communication and all cognitive tasks of DLA, with the exception of 2 of 5 aspects of social functioning for which periodic support of an unspecified frequency and duration is required. Therefore, based on the evidence that most areas of cognitive and emotional functioning are not impacted and that where there is an impact, it does not appear to have translated into a significant impact on the ability to perform DLA, 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 argues that her incontinence affects her daily living hugely and her life completely. While she is able to prepare meals, clean her home, and physically walk, her ability to perform activities within her home is interrupted by episodes of incontinence and she cannot leave her home without the risk of having an accident. The appellant's advocate argues that the legislation does not require that the restrictions with DLA be both continuous and periodic, and that the information clearly establishes significant periodic restrictions. Furthermore, the advocate argues that the ministry has taken a strict interpretation which does not make sense given the ministry's discretion.

The ministry argues that based on the assessments of GP #1, it is difficult to establish *significant* restrictions to DLA. Specifically, the ministry notes that despite being reported as continuously restricted with mobility outside the home, the appellant is able to walk 4+ blocks unaided. While the

appellant is reported as continuously restricted with daily shopping, only periodic assistance is required. Also, for those tasks requiring periodic assistance, the GP does not describe the frequency or duration of the assistance, information which although not specifically required by the legislation, is valuable in determining the significance of the restrictions. The ministry also notes the GP's use of the term "she prefers" with regards to activities outside the home.

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 both general practitioners and the surgeon are prescribed professionals, only GP #1 has provided information respecting the appellant's ability to perform the prescribed DLA. While GP #1 indicates that shopping, mobility outside the home, use of transportation, and social functioning are all continuously restricted, and describes the degree of restriction as severe, when considering individual tasks within those DLA, he writes that the appellant prefers to do nothing outside of the house and indicates the need for periodic assistance, rather than continuous assistance, with all but 2 aspects of transportation. While GP #1 indicates that the appellant's ability to perform both personal self-care and basic housework are periodically restricted, when she has incontinence, in the AR, GP #1 indicates that the appellant independently manages all listed tasks within those 2 DLA, without any noted restriction. The AR gives the option of indicating that an applicant takes significantly longer, and while the appellant has explained that most tasks take longer, with personal hygiene taking over 2 hours each morning, GP #1 has not indicated that the appellant takes significantly longer with any tasks. To satisfy the legislative requirement, the restriction in the ability to perform DLA must be "significant" and the significant restriction must be either continuous or periodic for extended periods. While some restrictions with DLA are identified as being continuous in the PR, that the physician goes on to indicate either independence or periodic assistance with most DLA tasks, does not support the existence of significant continuous restrictions. When considering whether periodic restrictions in the ability to perform DLA are both significant and for extended periods, there is insufficient information from GP #1 to establish the restrictions as being for extended periods.

Based on the above analysis, the panel finds that the ministry has reasonably determined that there is not enough evidence to confirm that the appellant has a severe impairment that *significantly* restricts her ability to perform her 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 due to frequent and unpredictable episodes of incontinence she does need

the significant help of others, especially with activities outside the home.

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

While the panel sympathizes with the appellant's circumstances, 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.