

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 15 February 2016 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;
- 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

PART D – Relevant Legislation

EAPWDA, section 2

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

PART E – Summary of Facts

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

A PWD Application, divided in 3 sections: 1 Self Report (SR) completed by the appellant on 2 September 2015 and signed before a witness, 2 Physician Report (PR) and 3 Assessor Report (AR) both completed by the appellant's gastroenterologist (the specialist) on 20 August 2015 and who has known the appellant since 2008 and has seen her 2 to 10 times during the last 12 months:

- Section 1 – Applicant Information (SR): the appellant indicated the following:
 - She has Crohn's disease that affects her ability to digest food and expel waste normally.
 - She stated she also suffers from IBS and depression.
 - IBS causes constant diarrhea with frequent, urgent bouts from morning until night. She uses the toilet 8-15 times/day on a good day.
 - Her family helps her with cooking and running a bath if she needs one, for instance before going to a doctor's appointment.
 - Wherever she goes, she must plan ahead based on the availability of toilets and accidents happen, raising her anxiety level.
 - Constant diarrhea leaves her very exhausted, dehydrated and physically sore.
 - A special diet for her condition is very costly.
 - She often needs help with cleaning and chores when she is run down as it is hard to get energy from the food she eats for lack of appetite and pain when the food goes through her body.
 - She has no social life and is unable to work at a job she loves.
 - She currently needs help to gain control of her health since she cannot do that on her own.
 - She will have to travel to a major centre for treatment and this is going to be hard on her body.

- Section 2 – the PR:
 - Specific diagnosis: Crohn's, onset August 2005.
 - Health history: recurrent bowel movements, perianal discomfort prevents the appellant's ability to work, it relates to Crohn's disease.
 - The appellant was not prescribed medication and/or treatment that interfered with her ability to perform DLA.
 - The appellant does not require any prostheses or aids for her impairment.
 - The impairment was not likely to continue for 2 years or more from that date with the comments: unknown but new medical therapy will hopefully help.
 - In terms of functional skills, the specialist indicated that the appellant could walk 4 + blocks unaided, she could climb 5 + steps unaided, she has no limitation lifting and remaining seated and has no difficulties with communication.
 - The appellant has no significant deficits with cognitive and emotional functions.
 - To the question whether the appellant's impairment restricted her ability to perform DLA, the specialist indicated "unknown".

- Section 3 – the AR:
 - The appellant lives alone.
 - In terms of physical or mental impairments that impact DLA, the specialist indicated an

increased frequency and urgency to use the bathroom, fatigue, nausea, abdominal pain – needs to be close to a bathroom.

- The appellant's speaking, reading, writing and hearing abilities are good.
- In terms of mobility and physical ability, the specialist indicated that the appellant was independent for walking indoors / outdoors, climbing stairs, standing, lifting and carrying & holding.
- In terms of cognitive and emotional functioning, the specialist indicated a major impact for bodily functions, emotion and executive, moderate impact for motivation, minimal impact for consciousness and no impact on all the other areas (impulse control, insight & judgement, attention/concentration, memory, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems) but did not add any comment.
- For DLA the specialist provided the following assessments:
 - *Personal care*: independent in all aspects.
 - *Basic housekeeping*: independent in all aspects.
 - *Shopping*: independent in all aspects.
 - *Meals*: independent in all aspects.
 - *Pay rent and bills*: independent in all aspects.
 - *Medications*: independent in all aspects.
 - *Transportation*: independent in all aspects.
 - *Social functioning*: independent in all aspects.
 - The specialist indicated marginal functioning for immediate and extended social networks but did not provide any further comment.
- For assistance provided by others, the specialist left the whole section blank.
- There is no mention of any assistance provided through assistive devices.
- The appellant does not use a service animal.
- The specialist did not provide any additional information.
- The assessor's source of information was "telephone interview".

With her Request for Reconsideration, the appellant provided 2 letters:

- A letter dated 10 February 2016, completed and signed by the specialist indicated the following:
 - The appellant's physical health does not allow her to function normally – the stress of dealing with her symptoms is overwhelming.
 - He hopes her symptoms will change but it has been a few years that she has been experiencing her problems.
 - She will have Crohn's for 2 years or more as there is no cure for that disease.
 - The appellant suffers from diarrhea, pain, fatigue and nausea consistently every week as a result of her condition.
 - These symptoms do limit her walking, sitting and general activity on a number of days every week.
 - Her physical activity is significantly limited by her symptoms.
 - The stress and anxiety related to trying to cope with her condition for the past 10 years has also resulted in depression.
 - She is on medication for this and receiving counseling through a health clinic.
- A letter dated 9 February 2016 from a mental health and substance use clinician indicated that the appellant meets their mandate for service and is currently on a wait list to be seen by a clinician

on a priority basis.

In her Notice of Appeal dated 24 February 2016, the appellant wrote that she cannot function without assistance, that she is not well and that she will have this impairment for over 2 years. She stated it is severe enough to impact her day-to-day living and she requires assistance weekly to do her chores and errands. She just began to treat her depression and is not mentally strong - it will get worse.

At the hearing the appellant reiterated what she had included in her SR and her Notice of Appeal and testified that she had to move from her previous residence because she shared the bathroom and she needed a bathroom of her own and, as well, she had to move to another community to be closer to family and help. As a result, she had to see a new family doctor as of June or July 2015 who was not available to complete the PWD application at the time she applied. She added that the specialist who completed the PR and AR was not familiar with her other illnesses as he is a gastroenterologist and did not provide much information on the forms as to the impact of her impairments on her DLA. She also mentioned that the specialist's nurse called her in order to get more information for the AR. She confirmed that the impairments affect her everyday as she has numerous bowel movements and cannot even wear clothes over her bottom for the first part of the day due to leakage and pain. She testified that she needs her family's help not only financially but also for her DLA because she fatigues easily as a result of her condition. She suffers from depression and anxiety, always fearing an accident if she does not have access to a bathroom. In terms of medications, she mentioned that the specialist completed the PR when her treatments had been completed but now she must go back to the hospital and have new injections that are very upsetting for her.

The panel determined the additional oral evidence was admissible under s. 22 (4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration, providing more information about the impact that her medical condition has on the appellant and corroborating the evidence that was before the reconsideration officer.

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 DLA 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 DLA.

The ministry determined that two criteria, 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;

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- (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.

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 there are significant differences between the appellant's description of her impairments and their impact on DLA as opposed to that of the specialist in the PR and the AR. 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. Thus, it is the appellant's responsibility to provide such evidence from a prescribed professional to the ministry.

Severe physical impairment:

The appellant argued that her medical condition was such that it impacted her life every day and that she had difficulty with all physical tasks because of her incessant bowel movements that force her to be close to a bathroom.

The ministry argued that the evidence provided by the specialist did not confirm the severity of the appellant's limitations with walking, sitting and general activity and that it was difficult to establish a severe impairment of physical activity based on the medical practitioner's evidence.

Panel decision:

As mentioned above, a diagnosis of a serious medical condition like Crohn's disease does not by itself determine that the physical impairment is severe. The panel recognizes that the appellant faces challenges but the impacts of her physical impairments are not clear or consistent between her and the specialist and even between the PR the AR and the specialist's letter at reconsideration.

For instance, the panel notes that the specialist did not report any limitation to the appellant functional skills in the PR but that in his letter of 10 February 2016, he mentioned that the symptoms of her medical condition limit her walking, sitting and general activity on a number of days every week, adding that her physical activity is significantly limited by her symptoms. There is no indication as to the reasons for the differences between his opinion in the PR and his letter and no explanation as to how and how frequently the appellant's physical activities are impacted. In the AR the specialist also reported that the appellant was independent for walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding.

The appellant describes a very different picture of her physical impairments, which impact her daily life in many aspects. However, the prescribed professional did not confirm them.

Based on the evidence provided, the panel acknowledges that the appellant experiences limitations to her physical functioning but finds that the ministry reasonably determined that the assessments provided by the medical practitioner did not establish a severe physical impairment.

Severe mental impairment:

The appellant argued that her medical condition caused anxiety and depression that impact on all aspects of her life. She stated that she was constantly in fear of not having access to a bathroom and that has ruined her social life.

The ministry argued that based on the specialist's reports; there was not enough information to establish a severe mental impairment.

Panel decision:

The panel accepts the diagnosis of depression as stated in the specialist's letter of 10 February 2016 that is confirmed by the Mental Health and Substance Use Clinician's letter of 9 February 2016. However, none of those documents provides any description of the severity of the appellant's

depression.

As well, the panel notes significant discrepancies between the PR and the AR in terms of cognitive and emotional function: in the PR, the specialist reported no significant deficits while in the AR he reported a major impact on bodily functions, emotions and executive, moderate impact on motivation and minimal impact on consciousness, without any further explanation. There is no comment as to the discrepancy between his opinion in the PR and in the AR. It is also worth mentioning that the AR form at section 4 indicates that this section is to be completed for a person with an identified mental impairment or brain injury and there is no explanation as to why the specialist decided to complete that section even though he had not reported a mental impairment or brain injury in the PR.

The panel also notes that for DLA that are specific to a mental impairment under s. 2 (1)(b) of the EAPWDR, making decision about personal activities, care or finances and relating to, communicating or interacting with others the reports do not mention any restriction in terms of decision making and social functioning except for the mention that the appellant has marginal functioning for immediate and extended social networks but without any explanation or comment.

Thus, the panel finds the ministry reasonably determined that the information provided did not establish that the appellant had a severe mental impairment.

Daily living activities:

The appellant argued that most of her DLA are significantly impacted by her condition since she has to be constantly close to a bathroom and that increases her stress and depression. As well, she gets fatigued very quickly and needs the help of another person to perform her chores.

The ministry argued that there is not enough information by a prescribed professional to confirm that the appellant's impairment significantly restricts her ability to perform DLA. More specifically, the specialist provides no indication of restrictions to DLA in both the PR and the AR and does not describe those restrictions in his letter at reconsideration.

Panel decision:

As noted before, the appellant indicated that her medical condition does impact her DLA every day and all day. However, this is not confirmed by a prescribed professional as mandated by s. 2 (2)(b) of the EAPWDA.

In the PR, the specialist indicated "unknown" to the question whether the appellant's impairment directly restricted her ability to perform DLA and checked "unknown" for each of the DLA listed. In the AR, the specialist indicated that the appellant was "independent" for each and all of the DLA listed. There is no explanation as to the reason for the differences between the 2 reports (*unknown* in the PR and *independent* in the AR) that were signed the same day. Further, the specialist left blank all the questions about assistance provided / required from other people and through the use of assistive devices; he only indicated that the appellant did not have an assistance animal.

The only mention from a prescribed professional of restrictions to the appellant's DLA was provided in

the specialist's letter at reconsideration and was limited to stating that the appellant's symptoms – she suffers from diarrhea, pain, fatigue and nausea consistently every week – do limit her walking, sitting and general activity on a number of days every week and that her physical activity is significantly limited. There is no explanation as to what specific DLA may be impacted, how and for how long, no explanation whether assistance would be required as a result of her medical condition and no explanation as to the changes to the specialist's opinion that occurred between his assessment in the PR and AR of 20 August 2015 and his letter of 10 February 2016.

Considering that a severe impairment has not been established, given the evidence presented and taking into account the lack of information by the specialist about the restrictions to the appellant's ability to perform DLA, the panel finds that the ministry reasonably determined that there was not enough information from a prescribed professional to confirm that the appellant's *impairments directly and significantly restrict* DLA continuously or periodically for extended periods.

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

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

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

Panel decision:

The panel notes that while the appellant indicated she required help with most of her DLA, the specialist did not mention that the appellant required help to perform any of her DLA in any of his reports and letter.

Further, a finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2 (3)(b) of the EAPWDA.

Conclusion:

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