

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 15, 2016 which found that the appellant did not meet two of the five 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 she has a severe physical, though not a severe mental, impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal 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

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated September 17, 2015, a physician report (PR) dated September 17, 2015 and an assessor report (AR) dated September 28, 2015, both completed by a general practitioner who has known the appellant since 1995.

The evidence also included the appellant's Request for Reconsideration dated March 2, 2016.

Diagnoses

In the PR, the appellant was diagnosed by the general practitioner with depression and with syring of her cervical spine resulting in chronic pain, both with an onset in 1998. In the AR, when asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities, the general practitioner wrote "chronic pain- back worse with movement, depression- lack of motivation."

Daily Living Activities (DLA)

In the PR and AR, the general practitioner reported that:

- In terms of health history, the appellant has "...pain with walking short distances. Unable to do household chores; pain with most activities; has to rest frequently with any physical effort."
- The appellant has not been prescribed medications and/or treatments that interfere with her ability to perform DLA, although it is noted that she is "on narcotics" and the anticipated duration is stated to be "years."
- The appellant is independent with walking indoors and uses an assistive device (note: "uses cane") walking outdoors.
- The appellant is unable to lift and she "can carry only less than 10 lb."
- The appellant is independently able to perform every assessed task of several DLA, specifically: personal care, paying rent and bills, medication and social functioning.
- For the DLA basic housekeeping, the appellant requires periodic assistance from another person with laundry (note: "generally needs help") and continuous assistance with housekeeping, commenting "needs son to vacuum for her."
- Regarding the shopping DLA, the appellant is independent with going to and from stores [note: "only drives short distances (pain)"], reading prices and labels, making appropriate choices and paying for purchases. She requires continuous assistance from another person with carrying purchases home, with the comment: "cannot carry full grocery bags."
- For the DLA meals, the appellant is independent with meal planning and safe storage of food and requires continuous assistance from another person with food preparation (note: "can't stand for long periods") and with cooking.
- Regarding the transportation DLA, the appellant is independent with getting in and out of a vehicle and with using transit schedules and arranging transportation and is unable to use public transit, explaining: "can't stand to wait and walking to and from bus stops is difficult."
- For social functioning, the appellant is independent in each area, specifically making appropriated social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.
- In the additional comments to the AR, the general practitioner wrote that "...chronic pain which is getting worse and having more impact on daily living."

In her self-report, the appellant wrote that:

- Standing for longer than 10 minutes causes intense pain.
- Her left leg drags if she walks more than ½ city block.
- Her young adult son helps her with household things such as vacuuming, dishes and groceries, walking the dog and cooking.
- She does not sleep well and is up 3 to 4 times nightly due to pain.
- Migraines leave her helpless for up to 3 days, especially if she pushes herself too hard.

In her Request for Reconsideration, the appellant wrote that:

- As a former elite athlete, she is used to pain and pushing herself to her limits. She rarely complains and, therefore, may not have been able to accurately convey to her doctor the full devastation this disease has caused in her life.
- She cannot walk without a cane, indoors or outdoors. She cannot climb any stairs without a cane and she avoids them when possible.
- Her left leg and hip will not support her full weight.
- She has a handrail beside her bed, in the shower and beside her toilet. She has a raised toilet seat.
- Her doctor was correct in saying she can do no lifting. She has not been able to lift over ½ lb. for a long time. She often loses her balance and constantly drops things.
- Migraines occur between 3 to 10 times per month.
- This disease has had a devastatingly major impact on her life and she struggles daily trying to accept her limitations, which are progressively getting worse and will continue to do so.

Need for Help

The general practitioner reported in the AR that:

- The appellant requires assistance with physical tasks such as housework, cooking and shopping.
- The appellant's young adult son lives with her and helps her.
- The appellant uses a cane as an assistive device. None of the other listed assistive devices, including braces, toileting aids, bathing aids or any other equipment or devices were reported as being needed or used by the appellant.

Additional Information

In her Notice of Appeal dated April 2, 2016 the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that:

- She needs significant help in her daily living.
- Her son does all of the cooking, cleaning, etc. Without his help, she would have to hire someone, which is not possible on \$600 per month.

At the hearing, the appellant stated that:

- She cannot walk unassisted either inside or outside the house. She lost her balance recently and injured herself.
- She has arthritis in both wrists and has arm spasms unexpectedly which she cannot control. She has burned herself a couple of times and her son will not let her cook anymore. She cannot lift pots or open jars, etc.

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- She usually feels too sick in the morning after taking her medications to be able to eat so her son is only responsible to prepare meal.
 - She cannot lift her arms above her head, so her son must wash her hair.
 - Her condition has worsened since the PWD application was completed. She has many more problems with her left leg. She has bursitis, a condition which was diagnosed after the application.
 - She supposes that she did not mention the severe arthritis in her right hand to her doctor. She now has carpal tunnel syndrome in her left arm and wears braces on both wrists. She has worn the brace on her right wrist for many years and the brace on her left wrist for the last 2 months.
 - Although her doctor said her son does the vacuuming for her, he now has to do all the housework. She used to be able to do some chores but she cannot anymore. She cannot bend for vacuuming and she will drop dishes if she tries to clean them.
 - She can no longer go shopping. She tried to do a small shopping errand a few months ago but she cannot lift anything except maybe a loaf of bread and the stores are too large for her to walk around. She could not carry a liter of milk and she will drop items because of spasms in her arms. Her son does all the shopping now.
 - She has a seat and a grab bar in her shower because she loses her balance. Her toilet seat is raised to help her get up and down.
 - She needs a significant amount of help and she feels she is burdening her son, who is a young man, with caring for her.
 - She has a car but her son has to put gas in it to be able to drive since she cannot afford it.
 - She is not certain why her doctor indicated both that she can do no lifting and also that she can lift less than 10 lbs. because she cannot lift at all.
 - The entrance to her home has two stairs and the rest is on one level.
 - She used to be able to walk her dog occasionally but she cannot do that anymore even with her cane. Her hip is painful and the dog can pull her off balance.
 - She has a cyst on her spinal cord and the pain radiates down her back and into her legs. Migraines are also one of the symptoms of this condition.
 - She has no explanation for why her family doctor did not provide more detail about her restrictions or why she on the one hand indicated she is unable to lift and then on the other hand reported that she can carry and hold “less than 10 lbs.”

The ministry relied on its reconsideration decision, as summarized at the hearing.

Admissibility of Additional Information

The panel considered the appellant’s oral testimony as information that corroborates the extent of the appellant’s impairment as a result of a medical condition diagnosed in the PWD application, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant has a severe physical, though not a severe mental, impairment but her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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;

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- (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.

At reconsideration, the ministry was satisfied that the information provided is sufficient evidence of a severe physical impairment. At the hearing, the appellant did not argue that she has a severe mental impairment. However, as the appellant's general practitioner has diagnosed a mental health condition – depression – the panel considers it relevant to consider the severity of her mental impairment to determine whether the “decision-making” and “relating to others” DLA applicable to a person with a severe mental impairment set out in section 2(1)(b) of the EAPWDR need to be factored in when addressing the “Direct and significant restrictions in the ability to perform DLA” criterion discussed below.

As noted in the reconsideration decision, the general practitioner identified significant deficits in the appellant's cognitive and emotional functioning in the areas of emotional disturbance, motivation, attention or sustain concentration, and memory. In assessing the impacts of the appellant's mental impairment on daily functioning, the general practitioner noted no major impacts, but moderate impacts in four areas. The general practitioner assessed the appellant as independent in all listed areas of decision-making and relating to others, while describing her relationship with her immediate social network as good functioning and with her extended social networks as marginal functioning. Further, with regard to aspects of the other DLA that might be restricted due to a mental health condition, such as meal planning, taking medications as directed, and banking and budgeting, the physician has assessed the appellant as independent. Considering that no major impacts were reported by the general practitioner in the impacts of the appellant's mental health condition on daily functioning and that the general practitioner did not report any restrictions resulting from her mental health condition in her ability to perform any DLA, the panel finds that the ministry was reasonable in determining that a severe mental impairment had not been established.

Direct and Significant Restrictions in the ability to perform DLA

The appellant's position is that her severe physical impairment directly and significantly restricts her ability to perform DLA on an ongoing basis to the extent that she requires the significant assistance of another person, specifically her young adult son.

The ministry's position is that the information from the prescribed professional does not establish that the appellant's severe physical impairment significantly restricts her DLA either continuously or periodically for extended periods. The ministry argued that while it is acknowledged that the appellant experiences some limitations with DLA as a result of her severe physical impairment, the prescribed professional reported that the majority of DLA are performed independently or, based on the assessment and narrative provided, require little help from others.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the general practitioner is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the appellant's circumstances, the general practitioner has known her for about 20 years and reported in the PR that the appellant has not been prescribed medications and/or treatments that interfere with her ability to perform DLA, yet she wrote that the appellant "is on narcotics" and that she will be for "years." The general practitioner reported in the PR that the appellant has "...pain with walking short distances" and that she can walk less than 1 block unaided. The appellant wrote in her self-report that her left leg drags if she walks more than ½ city block. In her Request for Reconsideration, the appellant wrote that her left leg and hip will not support her full weight and she cannot walk without a cane, indoors or outdoors, and she cannot climb any stairs without a cane. At the hearing, the appellant stated that her condition has worsened since the PWD application was completed and she has developed many more problems with her left leg. She lost her balance recently and injured herself. Although she wrote in her self-report that she occasionally walked her dog ½ block, she can no longer walk her dog for risk of falling and her son now walks the dog. At the time that the general practitioner completed the AR, she reported that the appellant is independent with walking indoors and uses a cane as an assistive device when walking outdoors, taking her significantly longer than typical.

The general practitioner also wrote in the PR that the appellant is "...unable to do household chores; pain with most activities; has to rest frequently with any physical effort." In the AR, however, the general practitioner reported that the appellant is independently able to perform every task of several DLA, specifically: personal care, paying rent and bills, medication and social functioning. For personal care, the appellant is assessed as independently able to perform her bathing and toileting as well as transfers in/out of bed and on/off a chair, without the use of an assistive device, which does not account for the appellant's information, as set out in her Request for Reconsideration, that she has a handrail beside her bed, in the shower and beside her toilet. The appellant wrote that she has a seat in her shower and the toilet seat is raised to allow her to get up and down. At the hearing, the appellant stated that she may not have mentioned the severe arthritis in her right hand to her doctor but she has worn the brace on her right wrist for many years and the brace on her left wrist for the last 2 months due to carpal tunnel syndrome. The appellant stated that she cannot lift her arms above her head, so she cannot wash her hair by herself. For the DLA pay rent and bills and the DLA medications, there are tasks that may be performed in the community and depend on mobility, such as banking and filling/refilling prescriptions, which the general practitioner indicated the appellant does independently with no use of an assistive device and there is no further comment provided.

At the hearing, the appellant acknowledged that at the time of her self-report, she wrote that her son helps her with household things such as vacuuming, dishes, groceries, and cooking, but he now does all of these chores by himself as she is unable. The appellant stated that she has spasms unexpectedly in her arms which she cannot control and she has burned herself a couple of times and her son will not let her cook anymore due to this risk. The appellant stated that her doctor was correct in saying that she cannot lift at all and she has not been able to lift more than ½ lb. for a long

time. She cannot lift pots or open jars, etc. and she often loses her balance and constantly drops things. In the AR, the general practitioner assessed the appellant as requiring continuous assistance from another person with food preparation and with cooking, described this as “can’t stand for long periods,” which is suggestive that the appellant might perform these tasks if seated. The appellant is assessed as independently able to perform the non-physical tasks of meal planning and safe storage of food.

For the DLA basic housekeeping, the general practitioner reported that the appellant requires periodic assistance from another person with laundry and noted she “generally needs help” but does not specify how often the assistance is required with this task. The general practitioner indicated that the appellant requires continuous assistance with housekeeping, described as “needs son to vacuum for her,” which suggested that the appellant is able to perform other tasks of housekeeping and the appellant stated at the hearing she cannot. With respect to the shopping DLA, the general practitioner reported that the appellant is independent with going to and from stores and wrote that the appellant “only drives short distances (pain),” which does not address the appellant’s use of an assistive device and her lack of independent mobility. At the hearing, the appellant stated that she no longer goes shopping because she cannot walk around the stores and she cannot lift items off the shelf, other than a light item such as a loaf of bread. The general practitioner indicated that the appellant requires continuous assistance from another person with carrying purchases home, commenting: “cannot carry full grocery bags,” this is suggestive that the appellant can carry smaller amounts. The general practitioner indicated in the AR that the appellant “can carry only less than 10 lbs” and the appellant stated at the hearing that she has no explanation for the general practitioner’s assessment because she cannot lift or carry more than about ½ lb. The appellant is assessed as independently able to perform the non-physical tasks of reading prices and labels, making appropriate choices and paying for purchases.

Regarding the transportation DLA, the general practitioner reported that the appellant is independent with both the physical task of getting in and out of a vehicle and with the non-physical task of using transit schedules and arranging transportation. The general practitioner reported that the appellant is unable to use public transit, described as “can’t stand to wait and walking to and from bus stops is difficult.” The general practitioner assessed the appellant as independent in all 5 aspects of social functioning and noted that she, rather, requires assistance with “...physical tasks e.g. housework, cooking and shopping.”

In her Request for Reconsideration, the appellant wrote that as a former elite athlete, she is used to pain and pushing herself to her limits. She wrote that she rarely complains and, therefore, may not have been able to accurately convey to her doctor the full devastation her medical condition has caused in her life. There are tasks of DLA reported as independent by the general practitioner, particularly those requiring independent mobility and any lifting, that the appellant stated she is unable to perform; however, there was no further information provided by the general practitioner, as the prescribed professional, to revise her initial assessment. The panel notes that the appellant stated at the hearing that migraine headaches are another symptom of her medical condition and she wrote in her self-report that migraines leave her “helpless” for up to 3 days. At the hearing, the appellant did not elaborate on the impact of this condition on her ability to perform her DLA, yet she wrote in her Request for Reconsideration that these migraines occur between 3 to 10 times per month, and this impact was also not reflected in the assessment by the general practitioner.

In the additional comments to the AR, the general practitioner acknowledged the progressive nature

of the appellant's medical condition as she wrote that "...chronic pain which is getting worse and having more impact on daily living." The appellant wrote, in her Request for Reconsideration, that her condition has had a devastatingly major impact on her life and she struggles daily trying to accept her limitations which are progressively getting worse and will continue to do so. Although the appellant provided oral testimony about the deterioration in her abilities to perform her DLA since the PWD application was completed, there was no further information provided by the general practitioner to update the assessments as the prescribed professional.

While the appellant provided information at the hearing that elaborated on the information in her self-report and Request for Reconsideration and showed impacts to her DLA that were more global and deteriorated than those reported by the general practitioner in the PR and the AR, Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her DLA, either continuously or periodically for extended periods. There is no discretion provided to the ministry to rely on information regarding impacts to DLA that has not been confirmed as being in the opinion of a prescribed professional. Considering the inconsistencies in some of the evidence of the general practitioner, particularly with respect to the appellant's mobility and her ability to lift and carry, as well as the assessment of independence or qualified need for assistance with most tasks of DLA, the panel finds that the ministry was reasonable to conclude that there is insufficient evidence from the prescribed professional to show that the appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the significant assistance of another person to perform DLA, namely her son, as well as the use of assistive devices, specifically a cane, braces on both wrists, handrails beside her bed, in the shower and beside her toilet, a shower seat, and a raised toilet seat.

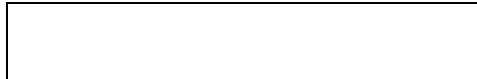
The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

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 panel finds that the evidence of the appellant's general practitioner, as the prescribed professional, establishes that the help required for DLA is provided by the appellant's family, specifically her son. While the general practitioner reported that the appellant uses a cane as an assistive device, she did not indicate that the appellant uses any braces, toileting aids, bathing aids or any other equipment or devices, such as handrails or grab bars.

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) 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 pursuant to Section 2(2) of the EAPWDA was reasonably supported by the evidence, and therefore confirms the decision.