

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of February 10, 2016 which found that the appellant did not meet three of five 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 and duration requirements but 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

EAPWDA, section 2

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

PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- CT Lumbar Spine dated November 25, 2014
- Letter from a neurologist dated February 3, 2015
- The appellant's PWD application form consisting of the appellant's self-report dated July 21, 2015 ("SR"), a physician's report, completed by the appellant's general practitioner (the "physician") on August 19, 2015 (the "PR"), and an assessor's report ("AR"), also completed by the physician on August 19, 2015
- The appellant's Request for Reconsideration ("RFR") form dated January 22, 2016
- Questionnaire written by a community service provider and completed by the physician dated February 2, 2016 (the "Questionnaire")

Diagnoses

- In the PR the physician (who has known the appellant more than one year and has seen her two to ten times in the past 12 months), diagnosed the appellant with degenerative disc disease and lumbar spine spinal stenosis. The date of onset is not indicated.
- The neurologist states that the appellant likely has neurologic claudication due to multilevel degenerative disc disease and facet joint arthropathy. He also states that her neurologic examination suggests cervical spine stenosis.
- There is no diagnosis of any mental impairment.

Physical Impairment

- In the PR, for Section B – Health History, the physician indicates that the appellant has slowly progressing lumbar spine osteoarthritis, now resulting in severe spinal stenosis.
- In the PR, for Section D – Physical Functioning, the physician indicates that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 2 to 5 steps unaided, can lift 5 to 15 pounds, and can remain seated less than 1 hour.
- Under additional comments the physician indicates that the appellant is motivated to maintain her disease at this level and that she keeps active.
- In the AR, for Section B, the physician indicates that the appellant's impairment that impacts her ability to manage DLA is severe back pain that limits mobility. For Section B, item 3, the physician indicates that the appellant is independent with standing and carrying and holding and requires periodic assistance with walking indoors (slow, must sit down), walking outdoors, climbing stairs and lifting.
- The neurologist indicates that the appellant's pain has been getting progressively worse over time, is generally a constant 4-5/10 pain which she describes as aching, throbbing pain, and maybe shooting pain at its worst, getting to an 8/10 in intensity. He indicates that her pain is precipitated by prolonged sitting and prolonged walking. He indicates that the appellant is not weak so neurosurgical intervention is not warranted at this time. The neurologist prescribed a pain medication that he hoped would alleviate the appellant's pain.
- The neurologist also indicates that the appellant reports that her legs started getting weak two years ago; this usually occurs when the appellant gets up from a seated position and is worse

when running. The weakness lasts a minute or two.

- On the Questionnaire the physician indicates that the appellant states that her legs give out on her and she requires help to climb any amount of stairs but he disagrees that the appellant's condition is severe, that she is restricted with DLA's and as a result requires assistance most or all of the time.
- In the SR, the appellant wrote that she has started to fall down as her legs lose their strength and will not support her, and that "dealing with the back pain has only recently been solved by taking medication" and, while she does not like taking medication, she is "relatively pain free."

Mental Impairment

- In the PR, the physician indicates that the appellant does not have any difficulties with communication and does not have any significant deficits with cognitive and emotional function.
- In the AR, the physician indicates that the appellant's ability to communicate with speaking, reading, writing and hearing is good. Although the physician did not indicate that the appellant has an identified mental impairment or brain injury the physician completed Section B, item 4 for cognitive and emotional functioning, indicating that there is no impact to the 14 listed areas.
- In the SR, the appellant wrote that now that she is no longer active, she finds that she is gaining weight and this is hitting her self-esteem hard. She finds she gets depressed staying home and lying down, sitting at the computer, watching the television or reading, which are all solitary activities.

DLA

- In the PR the physician indicated that the appellant has not been prescribed any medication or treatment that interferes with her ability to perform DLA.
- In the AR the physician indicates that the appellant is independent with dressing, grooming, feeding self and regulating diet, laundry, reading prices and labels, making appropriate choices, paying for purchases, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking prescriptions as directed, and safe handling and storage of medications. The physician indicates that the appellant requires periodic assistance with bathing, toileting, transfers (in/out of bed), transfers (on/off of chair), basic housekeeping (needs help), going to and from stores, carrying purchases home, getting in and out of a vehicle, using public transit and using transit schedules. The physician explains that the DLA for which periodic assistance is required take two or three times longer than typical.
- The physician did not complete Section C of the AR for impacts to social functioning.
- The neurologist indicates that the appellant had difficulty with gardening and landscaping because it involved being bent over for prolonged periods.
- On the Questionnaire, the physician indicates that the appellant always needs help to carry her purchases home, that getting dressed takes her 15-20 minutes and that she does not dress several times each month due to pain, that she cannot shower unless someone is home as she is at high risk of falling, that she cannot shave her legs or clip her toenails, that she always needs help with cleaning the bathroom, sweeping, and washing floors, that she cannot walk with purchases to and from the bus and needs help to get her purchases into her home.
- In the SR, the appellant wrote that she is capable of dressing, cooking, looking after herself but she needs to rest, lie down and straighten her back frequently. She wrote that "housework is

manageable.” She needs to walk or use public transport and most of her falls happen going to or at the bus stop. Any time she goes out, she must plan ahead and leave lots of extra time and know where her resting places are. She recently started working on day per week, which is exhausting but it gets her out of the house.

Help

- In the PR the physician reports that the appellant does not require prosthesis or aids for her impairment. In Part F – Additional Comments, the physician indicates that the appellant attends physiotherapy when she can afford it and takes vitamins and anti-inflammatory medications.
- In the AR, the physician indicates that the appellant requires assistance with DLA that is provided by family and friends. The physician indicates that the appellant routinely uses a cane and may need an electric scooter. The appellant does not use an assistance animal.

Additional information provided

In her Notice of Appeal the appellant states that she has a progressive degenerative disc disease, stenosis and spondylitis. She states that her pain medication is being changed and that her mobility is rapidly deteriorating.

Admissibility of New Information

The ministry did not object to the new information. The panel has admitted the information in the appellant’s Notice of Appeal as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information relates to the appellant’s physical impairment and her mobility.

The ministry relied on the reconsideration decision.

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on this 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 the appellant does not have a severe physical or mental impairment, that in the opinion of a prescribed professional the appellant's impairment does not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

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.

EAPWDR section 2(1):

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.

Severe Physical Impairment

The ministry's position is that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. The ministry's position is that while the appellant is limited with regards to her ability to climb stairs, a severe impairment of her physical functioning has not been established. In particular the ministry notes that the physician does not describe the way in which the appellant's mobility is affected by her lower back pain, and he does not describe the frequency/duration of the periodic assistance required with walking indoors, walking outdoors, climbing stairs, and lifting. The ministry also notes that while the neurologist diagnoses neurogenic claudication due to multilevel degenerative disc disease and facet joint arthropathy, he indicates that the appellant is not weak and surgical intervention is not warranted at this time.

The appellant's position is that she has severe degenerative disc disease, spinal stenosis, and ankylosing spondylitis, which is progressing and limiting her mobility. In the SR, the appellant states that she has an extremely sore low back and on some days she cannot stand up straight by the end of the day and has to walk bent over. She states that in the past few years she has started to fall down as her legs simply lose their strength and will not support her.

Panel Decision

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence and that the fundamental basis for the analysis is the evidence from a prescribed professional.

The appellant has been diagnosed with multi-level degenerative disc disease, lumbar spine spinal stenosis and facet joint arthropathy. In the PR, section D – Functional Skills, the physician indicates that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 2 to 5 steps unaided, can lift 5 to 15 pounds and can remain seated less than 1 hour.

In the AR the physician indicates that the appellant is independent with standing and carrying and holding but requires periodic assistance from another person with walking indoors, walking outdoors, climbing stairs and lifting. The general practitioner reported that the appellant routinely uses a cane to help compensate for her impairment, yet he indicated that walking indoors and outdoors and climbing stairs is performed without the use of an assistive device.

In the PR the physician indicates that the appellant has slowly progressive lumbar spine osteoarthritis now resulting in severe spinal stenosis but on the Questionnaire the physician states that he does not agree that the appellant's condition is severe, that she is restricted with DLA's and as a result requires assistance most or all of the time with her DLA's. The panel considers the information provided by the physician to be inconsistent, not providing a clear picture of the severity of the appellant's physical impairment.

In addition, the neurologist indicates that he has prescribed pain medication to help alleviate the appellant's pain and in the SR the appellant states that her back pain has recently been solved. The appellant states that while she does not like taking medication she is relatively pain free, that she is capable of dressing, cooking, and looking after herself but she needs to rest, lie down and straighten her back frequently. The neurologist also indicates that while the appellant reports weakness in her legs, it only lasts a minute or two at a time.

Taking all of the evidence into account, the inconsistent information provided by the physician and in particular, the physician's indication on the Questionnaire that the appellant's condition is not severe, the panel finds that the ministry reasonably determined that the information provided does not establish that the appellant has a severe physical impairment.

Severe Mental Impairment

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. In particular the ministry states that the physician did not indicate that the appellant had any difficulties with communication, significant deficits with cognitive and emotional functioning and did not describe any limitations, restrictions, or impairments related to mental functioning.

In the SR, the appellant states that she is no longer able to be as active as she was and is gaining a lot of weight; this is hitting her self-esteem and she finds she gets very depressed.

Panel Decision

Although the appellant indicates she is experiencing some depression, the physician did not diagnose any mental impairment. In the PR the physician indicates that the appellant does not have any difficulties with communication and does not have any significant deficits with cognitive and emotional

function. In the AR, the physician indicates that the appellant's ability to communicate with speaking, reading, writing and hearing is good. Although the physician did not indicate that the appellant has an identified mental impairment or brain injury the physician completed Section B, item 4 for cognitive and emotional functioning. However, the information provided indicates that the appellant does not have any impact to any of the 14 listed areas.

Given that the physician has not diagnosed the appellant with a mental health condition or any significant deficits to cognitive and emotional functioning, the panel finds that the ministry's determination that the information provided does not establish that the appellant has a severe mental impairment as required by EAPWDA section 2(2) was reasonable.

Significant Restrictions to DLA

The ministry's position is that the information provided by the physician does not establish that the appellant has significant restrictions to DLA. In particular, the ministry states that in the AR, the physician has provided information indicating that the appellant requires periodic assistance from another person with bathing (3x longer), toileting (2x longer), transferring in/out of bed (2x longer), transferring on/off chairs (2x longer), going to and from stores (2x longer), carrying purchases home (3x longer), and all listed areas of transportation (2x longer), but 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 also notes that the physician indicates that the appellant is independent with dressing, grooming, feeding self, regulating diet, laundry, reading prices/labels, making appropriate shopping choices, paying for purchases, all listed areas of meals, all listed areas of paying rent/bills and all listed areas of medications.

The ministry notes that on the Questionnaire the physician indicates agreement with multiple statements describing restrictions to various DLA but at the end of the Questionnaire the physician indicates that he does not agree with the statement that the appellant's condition is severe, that she is restricted with her DLA's and as a result requires assistance most or all of the time.

The ministry's position is that based on the information provided, it is difficult to establish significant restrictions to DLA based on the physician's assessment in the Questionnaire. The ministry's position is that the information provided does not establish that a severe impairment significantly restricts the appellant's DLA either continuously or periodically for extended periods.

The appellant's position while she is capable of dressing, cooking and looking after herself, she needs to rest, lie down and straighten her back frequently. The appellant's position is that the information provided by the physician should support a finding that she qualifies for PWD designation.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to

time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is reasonable for the ministry to require evidence of the duration and frequency of the restriction in order to be “satisfied” that this legislative criterion is met.

In the AR the physician indicates that the appellant is independent with many tasks of DLA specifically: dressing, grooming, feeding self and regulating diet, laundry, reading prices and labels, making appropriate choices, paying for purchases, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking prescriptions as directed, and safe handling and storage of medications. The physician indicates that the appellant requires periodic assistance with bathing, toileting, transfers (in/out of bed), transfers (on/off of chair), basic housekeeping (needs help), going to and from stores, carrying purchases home, getting in and out of a vehicle, using public transit and using transit schedules. The physician explains that the DLA for which periodic assistance is required take two or three times longer than typical. However, physician does not describe the frequency or duration of the assistance needed.

In addition, while there are some similarities between the information provided on the AR and the Questionnaire there are several inconsistencies for which no additional information is provided. For example, in the AR the physician indicates that the appellant requires periodic assistance with carrying purchases home, noting 3x longer, but on the Questionnaire he indicates that he agrees that the appellant always needs help to carry her purchases home. From some of the information in the Questionnaire it appears that the appellant’s level of assistance needed has increased, but the physician has not provided further information to explain what has changed between the time he completed the AR and the time he completed the Questionnaire.

In the AR the physician indicates that the appellant is independent with dressing and grooming and did not indicate that it takes her longer than typical, yet on the Questionnaire he indicates that he agrees that it takes her 15-20 minutes just to dress due to pain and she does not dress several times per month because it’s so painful.

There are also inconsistencies regarding basic housework. In the SR, the appellant states that housework is manageable and in the AR the physician indicates that the appellant is independent with laundry but requires periodic assistance with basic housekeeping. The physician explains that she “needs help” but does not provide further information regarding the frequency or duration of help needed. On the Questionnaire the physician indicates that he agrees with the statement that the appellant always needs someone to help with cleaning the bathroom, sweeping and washing floors; yet this is not consistent with the information from the appellant or the information in the AR.

On the Questionnaire the physician indicates agreement with multiple statements describing restrictions to various DLA but at the end of the Questionnaire the physician indicates that he does not agree with the statement that the appellant’s condition is severe, that she is restricted with her DLA’s and as a result requires assistance most or all of the time.

Given the inconsistencies in the information provided by the physician and his indication that he does

not agree that the appellant's condition is severe, and that she is restricted with her DLA's, and as a result requires assistance most or all of the time, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods.

Help with DLA

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

The appellant's position, based on the information in the PWD application, is that she needs assistance from family and friends, physiotherapy, medications, use of a cane and that she may need an electric scooter.

Panel Decision

In the PR the physician reports that the appellant does not require prosthesis or aids for her impairment. In Part F – Additional Comments, the physician indicates that the appellant attends physiotherapy when she can afford it and takes vitamins and anti-inflammatory medications.

In the AR, the physician indicates that the appellant requires assistance with DLA that is provided by family and friends. The physician indicates that the appellant routinely uses a cane and may need an electric scooter. The appellant does not use an assistance animal.

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.

As the panel finds that the ministry reasonably determined that the appellant does not have a severe impairment that directly and significantly restricts her ability to manage her DLA either continuously or periodically for an extended period of time, the necessary 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

The panel acknowledges that the appellant's physical impairment affects her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's reconsideration decision, which found that the information did not establish that the appellant has a severe physical or mental impairment that significantly restricts her ability to perform DLA either continuously or periodically for extended periods, and that as a result of significant restrictions she requires assistance with DLA, is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.