

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 May 20, 2016 which held that the appellant did not meet 2 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 she has 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 has a severe physical 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

The ministry was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

Information before the ministry at reconsideration

- A PWD application dated January 8, 2016 comprised of a Physician Report (PR) dated January 8, 2016 and an Assessor Report (AR) dated January 16, 2016, both completed by the appellant's general practitioner (GP) of more than 12 years.
- A support letter dated May 3, 2016 from the appellant's mother.
- A Self Report (SR) dated May 4, 2016 from the appellant.
- A letter dated May 13, 2016 from the appellant's GP.

On appeal, the appellant requested more time to get a second opinion.

The appellant testified that she has followed up with the referral by her GP and that she was expecting to hear about an appointment in the next week. The appellant reiterated her need for help.

At the hearing, the appellant provided oral testimony substantially consistent with and therefore in support of the information before the ministry at reconsideration. It was admitted in accordance with Section 22(4) of the EAA and is summarized below.

Summary of relevant evidence

Diagnoses

The appellant's general practitioner reported mood disorder, bi-polar disorder and personality disorder with an onset of 2000 and degenerative disc disease - lower back- with an onset of 2001.

Physical Impairment

In the Physician's Report and the Assessor's Report, the GP provides the following information:

- the appellant has pain issues with low back and is currently being investigated for bowel issues;
- the appellant can walk 1 to 2 blocks, it's unknown how many stairs she can climb unaided, she can lift 5 to 15 lbs., and can remain seated for less than 1 hour;
- with walking outdoors and climbing stairs, the appellant takes significantly longer than typical; and
- the appellant independently manages walking indoors, standing, lifting, carrying and holding (able to carry groceries home), although she is affected by pain.

At the hearing, the appellant testified that she suffers from back pain and after 3 or 4 days when she can't move she will end up in the hospital. Although she has back medication, she ends up in the hospital about once a month.

Daily Living Activities

In the PR, the GP reported that the appellant:

- in terms of health history has had significant mental health issues; significant mood swings - up and down-, episodes of significant aggression, at times was very depressed with suicidal ideation, has had a nervous breakdown and was admitted to a psychiatric ward;
- has been prescribed medications that interfere with her ability to perform DLA (at times she feels like a zombie);
- has no difficulties with communication; and
- was not indicated to have any restrictions with any listed DLA such as personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, management of finances and social functioning.

In the AR the GP reported that the appellant's:

- ability to communicate in all areas to include speaking, reading, writing and hearing is good;
- noted as independent with all listed DLA under Personal Care; dressing, grooming, bathing (at times significant problem keeping herself and home clean, showering happens about every 2 weeks), toileting, feeding self, regulate diet, transfers(in/out of bed)and transfers (on/off chair), Basic Housekeeping; laundry and basic housekeeping, Meals; meal planning and food preparation, cooking (cooks for daughter, does not do much cooking for self, goes days without eating) and safe storage of food, Pay Rent and Bills; banking, budgeting and pay rent and bills, Medications; filling/refilling prescriptions, taking as directed and safe handling and storage, Transportation; getting in and out of a vehicle with an additional comment "Using own vehicle";
- noted as requiring continuous assistance from another person or unable with the listed DLA under Shopping; going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home, (personal care and housekeeping are affected and neglected during the appellant's lows and she does not go to stores, avoids people and her parents do her shopping);
- not indicated to have any restrictions with the listed DLA under Social Functioning; appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to deal appropriately with unexpected demands and able to secure assistance from others; and
- noted to have very disrupted functioning in both her immediate and extended social networks.

Under comments the GP stated that the appellant avoids human contact and does not really have friends and that her parents are very supportive and are her safety net.

In her Self Report, the appellant stated that:

- She struggles not daily but hourly and sometimes by the minute, she cannot go out in public, can't get her groceries or prescriptions, panics and becomes frustrated, afraid of losing it and hurting someone, doesn't know who's going to come out in her at any time – nice and caring can change in an instant to a cold heartless psychotic mean person who is capable of doing damage to another person or property;
- She isolates herself for days, doesn't answer her phone for fear of having to talk to someone

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and locks herself away from everyone when having an episode. She finds it hard to keep herself safe from herself, has horrible rapid thoughts of failure, thoughts of suicide, urge to cut to take the pain away and most days can't get out of bed and cries for days on end;

- Her medication turns her into a zombie at night, she is in a fog all day and takes a long time to figure out what was real or a dream from the night before. Her meds have caused a weight gain of 100 lbs which brings down her esteem, depresses her and she avoids her own reflection, is an emotional basket case, doesn't have a social life, cannot maintain relationships and has severe OCD.
- She has a safety plan in place with her parents to keep her daughter safe when she crashes, has been waiting so long to see a professional psychiatrist and according to her doctor her violent tendencies keep her from finding one and she doesn't want to hurt people, she just can't control her actions.

In the GP's letter dated May 13, 2016, he wrote that the appellant has significant medical issues and that he has referred her for further opinion.

In the support letter from the appellant's mother, she talks about the changes in her daughter's life for many years as a result of bi-polar disorder. The mother indicates that after 10 years of medication and several visits to her doctor there is very little positive result. She states that every couple of months, the appellant crashes hard going into a totally different world. "There have been several talks about suicide on her bad days."

At the hearing, the appellant testified that 45 minutes after taking her medication she cannot function. She provided a recent example where she described being unaware of a fire directly across the hall when emergency crews attended. The appellant clarified that the continuous assistance from another person or unable to perform all aspects of DLA under "Shopping" was directly related to being unable to go into a store. The appellant stated that she panics, can't use public transit and uses her vehicle to drive her daughter to school.

Need for Help

The GP reported in the PR that the appellant does not require any prostheses or aids for her impairment.

In the AR, the GP notes that the appellant is provided assistance by family and that she does not have an assistance animal.

At the hearing, the appellant testified that she brings her mother everywhere. Her parents are her safety net for her daughter.

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 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.

Physical Impairment

The appellant's position is that she has chronic back pain, takes medication and when she is unable to move after 3 or 4 days goes to the hospital for treatment. The appellant argues that her back is messed up so it takes her a lot longer to do what she used to do. She believes it has to do with her weight gain because she never had any problems with her back or the physical aspect of her life until she started this medication. Now the appellant is "lucky to be able to walk for more than a few minutes with severe pain or her back will completely seize up".

The ministry's position is that the functional skills assessment in the PR indicates that the appellant can walk 1-2 blocks, lift 5 to 15 lbs. unaided and remain seated for less than an hour, while it is not known how many steps the appellant can climb unaided, this is not considered indicative of a severe impairment of functioning. The ministry also notes that the appellant takes significantly longer than typical with walking outdoors and climbing stairs while it is not described how much longer than typical the appellant takes with this activities. The GP also indicates that the appellant is independent with the majority of listed areas of mobility and physical ability.

The ministry argues that based on the assessments provided by the appellant's physician in her PWD application/reconsideration, the appellant's mother's letter and the appellant's SR, a severe impairment of physical functioning has not been established.

Panel Decision

The appellant is diagnosed by her GP with degenerative disc disease - lower back pain - since 2001.

As the ministry notes, the information provided by the GP respecting the impact on the appellant's physical functioning is not considered indicative of a severe impairment of functioning. In the PR, the physical functional skills assessment indicates a level of independent functioning, which the ministry has reasonably viewed as not reflecting a severe impairment. However, in the AR, the GP reports that with walking outdoors and climbing stairs, the appellant takes significantly longer than typical; and with walking indoors, standing, lifting, carrying and holding, while the appellant manages independently she is affected by pain. The GP does not provide how much longer the appellant takes and the information respecting the appellant's ability to manage the physical tasks of other DLA appears more in keeping with the functional assessment in the PR. The information provided by the GP does not support the level of impairment or address the physical medical conditions described by the appellant. Based on this analysis, the panel finds that the ministry reasonably determined that the assessments provided have not established a severe physical impairment.

Restrictions in the ability to perform DLA

The appellant's position is that she cannot go out in public, can't get her groceries or prescriptions, panics and becomes frustrated and is afraid of losing it and hurting someone.

The ministry's position is that the GP does not describe the frequency or duration of the appellant's low periods during which she neglects personal-care and housekeeping. It is further noted that the GP indicates the appellant is independent with all listed areas of personal-care and basic housekeeping as well as with the majority of listed DLA in her PWD application. The ministry relies on the medical opinion and expertise from the GP and other prescribed professionals to determine that the appellant's impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods. The ministry makes the decision regarding PWD eligibility based on the physical, mental and daily living assessments provided by the prescribed professionals. Based on the appellant's physician's assessments in her PWD application/reconsideration, the appellant's mother's letter and the appellant's SR, the ministry acknowledges that the appellant experiences restrictions with regards to activities requiring a lot of public interaction. However, the ministry finds there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform daily living activities continuously or periodically for extended periods; therefore, not meeting the legislative criteria.

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.

In the appellant's case, her GP has reported that she has been prescribed medications that interfere with her ability to perform DLA and indicates that at times she feels like a zombie; the appellant states that her medication turns her into a zombie at night, keeps her in a fog all day and that she takes a long time to figure out what was real or a dream from the night. The appellant's GP has also confirmed that she requires continuous assistance from another person or unable with all the listed DLA under Shopping; going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home. Additional comments from the GP state that personal care and housekeeping are affected and neglected during the appellant's lows and she does not go to stores as she avoids people. The appellant has also confirmed this in her SR and oral testimony.

As the ministry notes, the GP does not describe the nature, frequency or duration of the required continuous assistance in order to establish the degree of the restrictions, that is, whether the ability to perform DLA is "significantly" restricted either periodically or continuously for extended periods. In the absence of further information from the GP, 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 DLA continuously or periodically for extended periods as required by Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that due to her mental impairment, she requires assistance from her family with some of her DLA such as Shopping and to provide a safety net for her daughter when she crashes. The appellant also indicates that she brings her mother everywhere.

The ministry argues that the GP reported in the PR that the appellant does not require any prostheses or aids for her impairment and in the AR, the GP notes that the appellant is provided assistance by family. The ministry's position is that as 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

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. The appellant was not successful on her appeal.