

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“ministry”) reconsideration decision dated April 4, 2016 in which the ministry found the appellant was not eligible for designation as a Person With Disabilities (“PWD”) because she did not meet all of the criteria in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry was satisfied that the appellant has reached 18 years of age and that her impairment is likely to continue for at least 2 years. However, based on the information provided in the PWD Designation Application (“PWD application”) and Request for Reconsideration, the minister was not satisfied that:

- the appellant has a severe mental or physical impairment; and
- the impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- as a result of these restrictions, the appellant requires help to perform those activities through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

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 reconsideration consisted of the following:

1. A PWD application comprised of the Applicant Information and Self-report (“self-report”) signed by the appellant on September 30, 2015, as well as a Physician Report (“PR”) and Assessor Report (“AR”) both dated September 18, 2015 and both completed by a general practitioner (“the physician”). In the PR and AR, the physician indicates the appellant has been her patient for more than 2 years and reports that she has seen the appellant 11 or more times in the past 12 months. In the AR, the physician indicates she completed the form by way of an in-office interview and file/chart information and that she is the appellant’s family physician.

The PWD application included the following information:

Diagnoses

PR and AR

In the PR, the appellant is diagnosed with arthritis, rheumatoid arthritis, Vitamin B12 deficiency, and chronic back pain with no date of onset provided. Under *Degree and Course of Impairment*, the physician reports that “patient’s diagnosis is likely to deteriorate with time.” In the AR, the physician lists the above impairments as impacting the appellant’s DLA, and indicates that the appellant has two types of arthritis, as well as hypertension, allergic rhinitis, and wrist neuropathy in addition to her other conditions.

Physician’s letter

For *Health history* in the PR, the physician provided a letter dated August 17, 2015, listing the appellant’s conditions: osteoarthritis, rheumatoid arthritis, hypertension, allergic rhinitis, wrist neuropathy, B12 deficiency, and lower back chronic pain. The physician reports that the appellant has “severe arthritis pain” that affects various part of her body which in turn causes a great deal of pain and discomfort. She requires various medications to manage her symptoms and she also reports hot flashes, overactive bladder, and insomnia.

Self-report

The appellant listed all of the above-noted conditions as well as “change of life.” She notes that her conditions have a major impact on her life because her symptoms are greatly uncomfortable and affect various parts of her body. She reports right wrist stitches, nerve damage, and numbness and weakness. Her arthritis causes painful joints, “cartilage in (her) left hand, knee, hip, and ankle”, and swelling and stiffness at the same time. Her B12 deficiency causes a lack of energy, her “change of life” causes hot flashes, overactive bladder, and trouble sleeping, and she reports that she is getting depression and anxiety attacks from not being able to do the things she used to be able to do. She reports that she loses her concentration and is only able to function with prescription medicines.

Functional Skills

PR

The physician provided the following information regarding any functional limitations:

- The appellant can walk 4+ blocks unaided on a flat surface [comment, “depending on arthritis pain this can be much less”];
- Climb 5+ steps unaided [comment, “depending on arthritis pain”];
- Lift under 5 pounds;
- Remain seated for 1 -2 hours;
- Has no difficulties with communication; and
- Has significant deficits with cognitive and emotional function in the areas of Emotional disturbance, Motivation, and Attention/ sustained concentration.

Physician’s letter

Regarding functional skills, the physician indicates that the appellant requires various medications to manage her symptoms “but is greatly compromised of range of motion, ability to sit or stand for more than 2 hours at a time.”

AR

The physician provided the following information for *Mental or Physical Impairment (Abilities)*:

- Ability to Communicate: Speaking – Good, and Reading, Writing and Hearing – Satisfactory;
- Mobility and Physical Ability: The appellant is independent but takes significantly longer with Walking indoors, Walking outdoors, Climbing stairs, and Standing [comment, “Depending on arthritis pain – this can be debilitating to achieve.”];
- Mobility and Physical Ability: The appellant requires continuous assistance from another person and uses an assistive device for Lifting, and Carrying/holding [comment, “wears brace on wrist, no lifting greater than 5 lbs., severe pain.”];
- The physician indicates “N/A” regarding any impacts to Cognitive and Emotional Functioning.

Self-report

The appellant reports that walking, standing or sitting for long periods “hurts (her) back and ankle, inflammation chronic.”

Daily Living Activities (DLA)

PR

The physician checked *No*, the appellant has not been prescribed medication/treatment that interferes with her ability to perform DLA, and did not fill out Part E of the PR – *Daily Living Activities*.

AR

The physician provided the following information:

- The appellant is independent with all areas of Personal care, but takes significantly longer with Dressing, Grooming, Bathing, Toileting, Transfers in/out of bed, and Transfers on/off of chair with the comment, “Due to arthritis – wrist pain – takes significantly longer to complete these tasks.”
- She requires continuous assistance with all areas of Basic housekeeping (Laundry and Basic housekeeping) with the comment, “Requires help from family/ friends.”
- She is independent with all areas of Shopping except Carrying purchases home – requires continuous assistance with the comment, “unable to carry items home, requires assistance.”
- She is independent with all areas of Meals, except Food preparation – requires periodic assistance from another person.
- The appellant is independent with all areas of Pay rent and bills, Medications, Transportation, and Social Functioning and the physician checked that she has good functioning in both her immediate and extended social networks. The physician did not identify any safety issues.
- The physician did not fill in *Additional comments* for any DLA.

Self-report

The appellant reports that her disability makes it hard to do daily tasks such as washing, brushing hair, cooking, dishes, etc.

Need for Help

PR

- The physician check marked Yes, the appellant requires prostheses or aids for her impairment, noting that the appellant uses a wrist brace for neuropathy.

Physician's letter

The physician indicates that the appellant “uses the assistance of a brace on her left ankle and right hand; this is due to the constant swelling in her ankle caused by inflammation from her arthritis.”

AR

- The physician indicates the appellant lives with family or friends.
- The physician left blank the section for support/supervision required that would help maintain the appellant in the community.
- The appellant requires help from family/friends for laundry and basic housekeeping, and she requires continuous assistance with carrying purchases home and periodic assistance with food preparation.
- Under assistance provided by other people, the physician checked that help is provided by family and friends and left the *Comments* section blank.

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- Under Assistance provided through the use of assistive devices, the physician check marked *Braces* and wrote, “Brace used on right and left hand due to neuropathy – swelling and pain due to arthritis.”
 - The physician checked *No*, the appellant does not have an assistance animal.

Self-report

The appellant reports that she wears a wrist band for her right wrist condition and an ankle brace for walking.

2. A Medical Report – Employability signed by the physician on September 21, 2015 and indicating the following:

- Primary medical condition: “osteoarthritis, rheumatoid arthritis, neuropathy (wrist), fibromyalgia.”
- Secondary medical condition: “B12 deficiency, hypertension, and lower back pain (chronic).”
- The medical conditions are “moderate”, expected to last for more than two years, and are not episodic in nature.
- Regarding restrictions, “patient has decreased range of motion, chronic pain, joint pain, ability to sit/stand compromised.”

3. A Request for Reconsideration signed by the appellant on March 1, 2016 with the following documents attached:

- A letter dated March 1, 2016 in which the appellant requests an extension for her “reconsideration disability forms”. She indicates that she has been in contact with the physician who would provide more information to support the application for PWD designation;
- A one page submission that records her next appointment with the physician: March 4, 2016; and
- An amended copy of the appellant’s PWD application (“amended application”) with edits made to the PR and AR indicating more severe impairments and restrictions, and providing additional information regarding the appellant’s need for assistance. There are no initials, signatures, or dates next to the amendments and the physician’s signature pages and dates (September 18, 2016) remain unchanged from the original PR and AR.

4. Information from the ministry record of decision indicating the following:

- The ministry did not include or assess the information in the amended application in making the reconsideration decision as the author of the amendments could not be established. The ministry states there is no indication that the physician or another medical practitioner or qualified assessor made the changes to the PR and AR.

Additional submissions

Subsequent to the reconsideration decision, the appellant filed the following documents:

1. Her Notice of Appeal signed on April 11, 2016 in which she states that she did not have enough time to get the information together.

2. A one-page letter to the tribunal panel dated May 24, 2016 in which she states that she did not have enough time to have all of the paperwork for the PWD application in hand and she is not sending any other paperwork to the panel because the paperwork is not done and was not done right, from the beginning, in order to fulfill the requirements.

The panel accepts the submissions as argument in support of the appellant's submissions for the reconsideration in which she indicates that she had an appointment with the physician and would be providing additional information. The panel will address both parties' arguments in *Part F – Reasons for Panel Decision*.

Procedural matters

With the consent of both parties, the appeal proceeded as a written hearing pursuant to section 22(3)(b) of the Employment and Assistance Act. In an email to the Tribunal of May 30, 2016, the ministry states that its submission for the appeal will be the reconsideration summary.

The ministry granted the appellant an extension of time for the reconsideration, until April 4, 2016, to submit any additional documents or new information. The ministry noted that as of the April 4 due date, no additional documents or new information was received subsequent to the appellant's March 1, 2016 Request for Reconsideration with attached submissions.

The tribunal chair, by letter dated April 28, 2016, also approved the appellant's request to extend the deadline to provide a submission for her written hearing. The appellant filed her submission indicating that she did not have enough time to provide all of the paperwork. No additional medical reports or documents were provided.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration decision of April 4, 2016, which found that the appellant was 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. Based on the information provided in the PWD application and Request for Reconsideration, the ministry was not satisfied that the following criteria in EAPWDA section 2(2) were met: the appellant has a severe mental or physical impairment; and the impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods; and, as a result of these restrictions, she requires help to perform those activities.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

- (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.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in section 2 of the EAPWDR:

Definitions for Act

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;

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;

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- (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.

Decision

First, with regard to the amended application, the panel finds that the ministry was reasonable in not including or assessing the information in the amended PR and AR. As noted by the ministry, the amended information was not endorsed by the physician in the form of an updated signature, or initials, or a new date, and the ministry could therefore not confirm who provided the information. Further, there was no explanation to explain discrepancies in the information between the amended application, and the original PR and AR.

With regard to the legislative criteria, the panel provides the following analysis based on the evidence the ministry considered at the reconsideration:

Severe mental or physical impairment

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or provide evidence of a severe impairment. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how, and the extent to which, a medical condition restricts daily functioning must be considered. This includes the evidence from the appellant and from a prescribed professional regarding the nature of the impairment and its impact on the appellant's ability to manage the DLA listed in section 2(1) of the EAPWDR. However, section 2(2)(b) of the EAPWDA clearly sets out that the fundamental basis for the analysis of restrictions is the evidence from a prescribed professional - in this case, the physician.

Appellant's position - Severe mental impairment

In her self-report, the appellant does not include a mental impairment in her list of medical conditions, but she nevertheless argues that she is getting depression and anxiety attacks from her physical conditions because she cannot do the things she used to be able to do. She submits that she is losing her concentration and lacks energy and can only function with her prescription medications.

Ministry's position - Severe mental impairment:

The ministry argues that a severe impairment of mental functioning has not been established on the basis of the physician's assessments and self-reports. The ministry notes the following evidence and arguments:

- The physician has not diagnosed or described a mental disorder or brain injury.
- In the PR, the physician reports no difficulties with communication; in the AR as well, reading, writing, hearing, and speaking are reported to be satisfactory or good.
- In the PR, she indicates significant deficits in 3 areas of cognitive and emotional function. Nevertheless, in the AR, she does not indicate major, moderate, or minimal impacts to cognitive/emotional functioning and she marked these as "N/A".

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- The appellant is independent with social functioning, has good functioning in her social networks, and there is no indication she needs supports or supervision to be maintained in the community, or has any safety issues with regards to social functioning.

Panel's decision – Severe mental impairment

The panel finds the ministry reasonably determined, on the basis of the information provided, that the appellant does not have a severe mental impairment. Not only is there no diagnosis of a mental impairment, the physician did not confirm the symptoms of depression and anxiety that the appellant describes in her self-report, except to check mark in the PR that the appellant has significant deficits in 3 out of 12 areas of cognitive and emotional function: Emotional disturbance, Motivation, and Attention/ sustained concentration. While Emotional disturbance is defined on the form as including depression and anxiety (*for example*), the physician provides no comments or explanation to link the appellant's emotional disturbance to a severe impairment of mental functioning.

Furthermore, as noted by the ministry, there is no indication in the PR or AR that the appellant is impaired in her communication or social functioning or has any degree of impacts (minimal, moderate, or major) for any of the areas of cognitive and emotional functioning listed in the AR (the physician instead wrote, "N/A"). Based on the evidence provided in the PWD application, the panel finds that the ministry reasonably determined a severe mental impairment under section 2(2) of the EAPWDA was not established.

Appellant's position – Severe physical impairment

In her self-report, the appellant indicates that she has a lot of pain in various parts of her body and has difficulty with tasks that involve her wrist and hand, as well as walking, standing, or sitting for long periods. The physician, in her letter of August 17, 2015, indicates that the appellant is "greatly compromised of range of motion" due to pain and swelling, and in the PR, the appellant's function is reported to be restricted to the greatest degree in the area of lifting (the appellant is limited to lifting less than 5 lbs.). In her submission on appeal, the appellant states that she did not have enough time to gather additional information regarding her restrictions.

Ministry's position - Severe physical impairment:

The ministry acknowledges that the appellant is limited with regard to her ability to lift but argues that a severe impairment of physical functioning has not been established based on the information provided. The ministry notes the following evidence and arguments:

- As reported in the PR, the appellant can walk 4+ blocks and climb 5+ steps unaided. While the physician indicates "this can be much less" depending on arthritis pain, she does not describe "the frequency or duration of periods" in which the appellant's arthritis pain results in decreased function with walking and climbing stairs.
- The appellant's reported abilities in the areas of walking, climbing stairs, and remaining seated for 1 to 2 hours are not considered by the ministry to be indicative of a severe physical impairment. In her letter of August 17, 2015, the physician indicates that the appellant is compromised in her ability to sit or stand "for more than 2 hours at a time."
- Further, the physician does not describe the nature or severity of the appellant's compromised range of motion, the severity of her chronic pain, or how often she has insomnia.

Panel's decision – Severe physical impairment

The panel finds that the ministry reasonably determined a severe physical impairment has not been established on the basis of the information provided. As argued by the ministry, the reported range of function in the PR and AR are not at the severe range of impairment (except in the area of lifting). Further, the physician indicates that the appellant is largely independent with DLA.

Moreover, the evidence is that the appellant's pain is more severe on days when her arthritis is flaring up; however, as noted by the ministry, there is no information on how often this occurs or how severe her pain and restricted range of motion are. The appellant was granted extensions of time (by both the ministry and the tribunal office) to provide further information but there is no additional medical report in the record. Based on the totality of the evidence available on appeal, the panel finds that the ministry reasonably determined a severe physical impairment under EAPWDA section 2(2) was not established.

Restrictions in the ability to perform DLA

Appellant's position

In her self-report, the appellant submits that due to her pain and other symptoms she has difficulty with daily tasks including washing, brushing hair, cooking, dishes, etc. and she can no longer do the things she used to be able to do.

Ministry's position

The ministry acknowledges that the appellant is restricted in activities that involve heavy lifting but argues there is not enough evidence to confirm she has a severe impairment that significantly restricts her DLA continuously or periodically for extended periods as required under the EAPWDA. The ministry notes the following evidence and arguments:

- The physician indicates the appellant is not taking any medications or treatments that interfere with her ability to perform DLA.
- While the appellant takes significantly longer than typical with dressing, grooming, bathing, toileting, and transferring to and from bed and chairs due to her wrist pain, the physician does not describe how much longer she takes to perform these activities.
- Similarly, the physician does not describe the frequency and duration of the periodic assistance the appellant requires with food preparation.
- The ministry acknowledges that the legislation does not specifically require the frequency and duration of restrictions to be explained but notes that the minister finds the information helpful in determining the significance of the restrictions. The ministry argues that it is difficult to establish *significant* restrictions to DLA based on the physician's assessments in the AR.

Panel's decision – Restrictions to DLA

Subsection 2(2)(b)(i) of the EAPWDA requires the minister to be satisfied that in the opinion of a prescribed professional an applicant's severe impairment directly and significantly restricts DLA either continuously, or periodically for extended periods. In this case, the appellant's physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, 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 either continuously or periodically for extended periods.

The panel finds that the ministry reasonably determined the evidence does not establish that the appellant's DLA are directly and significantly restricted either continuously or periodically for extended periods. The evidence in the AR indicates that the appellant is largely independent with DLA. She takes significantly longer with most areas of Personal care but the physician does not elaborate on how much longer she takes to perform those activities, or indicate that she requires any assistance to perform them. While she is reported to require periodic assistance with Food preparation, the physician does not provide information on the frequency and duration of the periodic assistance required. The legislation does not require information on duration; however, the panel finds that the ministry reasonably required such information in order to get a complete picture of the appellant's restrictions.

In addition, while the appellant requires continuous assistance with Laundry, Basic housekeeping, and Carrying purchases home, the physician indicates in the PR and AR that her limitations and restrictions depend on the severity of her arthritis pain. The physician does not describe how severe her pain and restricted range of motion are, or how often her arthritis flares up. The legislation requires significant restrictions to DLA either continuously or periodically for extended periods as a result of the applicant's impairment. The panel finds that the ministry reasonably determined the information provided by the prescribed professional does not confirm that the legislative criteria in subsection 2(2)(b)(i) of the EAPWDA were met.

Help to perform DLA

Appellant's position

The appellant submits that she needs wrist and ankle braces for her condition and assistance from other people to perform several DLA.

Ministry's position

The ministry acknowledges the appellant's need for assistive devices but argues that despite her requirement for prostheses, as it has not been established that DLA are significantly restricted, it cannot be determined that *significant* help is required.

Panel's decision – Help to perform DLA

Subsection 2(2)(b)(ii) of the EAPWDA requires a prescribed professional to confirm that as a result of significant restrictions to DLA, the person requires help to perform an activity. Where another person is providing the help, the level of assistance or supervision required must be significant as set out in subsection 2(3)(b)(ii) of the EAPWDA. While the physician indicates that the appellant requires hand and ankle braces due to constant swelling from arthritis, neither the panel nor the ministry found that the physician's information reasonably confirms significant restrictions to DLA as a result of the appellant's impairment. The panel therefore finds that the ministry reasonably determined the criterion for help under EAPWDA subsection 2(2)(b)(ii) was not met.

Conclusion

The panel finds that the ministry's reconsideration decision denying the appellant PWD designation under section 2 of the EAPWDA was reasonably supported by the evidence. The panel confirms the decision pursuant to sections 24(1)(a) and 24(2)(a) of the *Employment and Assistance Act*.