

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 April 28, 2016, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years. However, 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, 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 following documents were before the ministry at reconsideration.

- 1) PWD application comprised of the appellant's Self-report (SR) dated October 20, 2015, a Physician Report (PR), and an Assessor Report (AR). Both the PR and AR were completed by the appellant's general practitioner (GP) of 9 years and dated September 28, 2015.
- 2) Medical documentation, some of which dates back to 2008. The most recent information is provided in Outpatient Progress Notes from a rheumatology clinic, dated February 19, 2015 (3 of 3 pages) and April 15, 2015 (1 of 2 pages).
- 3) 2 pages of internet information describing the symptoms of rheumatoid arthritis and osteoarthritis.
- 4) Undated 4-page handwritten submission from the appellant describing the impact of her medical conditions.
- 5) A 1-page typewritten request for reconsideration submission comprised of argument.

On appeal, the appellant provided a 6-page typewritten advocate's submission comprised of argument, which did not introduce additional evidence. The ministry did not provide additional evidence on appeal, and relied on its reconsideration summary. The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses

In the PR, the GP diagnoses rheumatoid arthritis and osteoarthritis.

Physical Impairment

The GP provides the following information.

- Intermittent joint pain, stiffness and swelling. Symptoms vary from day to day.
- Chronic condition with slow progression.
- Regular flare-ups of symptoms lasting days to weeks – joint pain, stiffness, swelling and reduced mobility.
- Headaches due to neck pain.
- Fatigue due to symptoms.
- No aids or prostheses required.
- The appellant has these limitations during a flare-up of symptoms:
 - walk 1 to 2 blocks unaided;
 - climb 2 to 5 steps unaided;
 - lift under 5 lbs; and
 - remain seated for 1 to 2 hours.
- Walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding require periodic assistance from another person. These activities are difficult and take significantly longer during a flare-up. No restrictions and independent when condition is stable.

In her SR, the appellant lists her medical conditions and the medications she takes. She notes that she was unable to see the rheumatoid arthritis specialist until April 2015. In her 4-page written submission, the appellant writes that the severity and unpredictability of her disease determine what she is able to do in a day. Tasks including washing her hair, dressing, and preparing food take twice as long to perform, with housework taking three times longer. Going up and down stairs is difficult, and she must use railings and stop every couple of steps to rest. Due to pain, she has to sit and rest when walking more than 20 minutes. Sitting in a regular chair for more than an hour is difficult. Her shoulders, neck, elbows, wrists, hands, hips, knees, and feet are affected – both fine and gross motor skills.

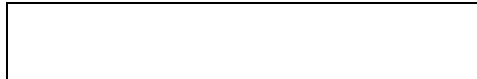
In the February 19, 2015 Progress Note, the consulting physician reports that the appellant is known to have osteoarthritis and mild anti-CCP positive rheumatoid arthritis. The appellant is noted as having had problems with episodic pain at various sites, especially the right knee. “Perhaps 6 times in the last past couple of years she has had an episode of sudden catching sensations at the right knee associated with pain followed by right knee swelling with a sensation of heat.” The appellant has had about 4 episodes of episodic severe left, more than right, shoulder pain, which seems to come on spontaneously, and when pain occurs, she can barely lift her arms. These episodes sometimes are improved symptomatically with medication. The appellant is also reported as noting episodic pain with swelling at the right wrist, having had a few episodes over the past couple of years. The consulting physician assesses episodic articular symptoms, suspected as related to mechanical/degenerative problems, and evidence quite suggestive of osteoarthritis of the knees. Medication for the rheumatoid disease seems to be working and appropriate analgesics, at the GP’s discretion, are recommended.

In the most recent Progress Note, dated April 15, 2015, the same consulting physician notes that on examination, the appellant had no active joints and that she does not have symptoms of active inflammatory arthritis. The physician reviews the appellant’s medications and comments “As she is doing so well, I have not made specific arrangements to see her again, but would be happy to review her perhaps every year or two, at your [the GP] discretion, or earlier, at your discretion should the need arise.”

Mental Impairment

The GP provides the following information.

- No difficulties with communication. Speaking, reading, and hearing are good. Writing is worse during flare-up.
- No significant deficits with cognitive and emotional function.
- In the section of the AR listing 14 areas of cognitive and emotional functioning, a moderate impact on daily functioning is reported for bodily functions, emotion, motivation, and motor activity. No impact is reported for the remaining areas. Difficulty with these activities during a flare-up of rheumatoid arthritis. Chronic nature of conditions causes decrease in motivation, can make her feel helpless and depressed.
- Social functioning is managed independently, with the GP commenting “No mental impairment.”



DLA

In the PR, the GP reports that personal self-care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, and use of transportation are continuously restricted. Restriction can be mild, can be severe during flare-ups of arthritis.

In the AR, the GP notes that conditions are affected by flare-ups of rheumatoid arthritis once to twice per month, at times flare-ups lasting a week at a time. These episodes cannot be predicted. Respecting the appellant's ability to perform individual DLA, the GP reports as follows.

- Personal care – dressing, grooming, bathing, and toileting require periodic assistance from another person. Transfers in/out of bed and on/off of chairs, feeding self, and regulate diet are all managed independently without any noted limitation.
- Basic housekeeping – laundry and basic housekeeping require periodic assistance from another person.
- Shopping – going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases are managed independently. Carrying purchases home requires periodic assistance from another person.
- Meals – meal planning and safe storage of food are managed independently. Food preparation and cooking require periodic assistance from another person.
- All listed tasks of paying rent and bills, medications and social functioning are independently managed without any noted limitation.
- Transportation – getting in and out of a vehicle and using public transit require periodic assistance from another person. Using transit schedules is managed independently.

Need for Help

The GP reports that during flare-ups the appellant requires help from family and friends. She struggles to manage "ADL's" when no help is available. These episodes cannot be predicted. No assistive devices are required. The appellant does not require an assistance animal.

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 or mental impairment was not established;
- the appellant's 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 an assistive device, the significant help or supervision of another person, or the services of an assistance animal 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.

Preliminary Matters

The appellant and her advocate raise a number of broad based arguments as to why the ministry was unreasonable in denying PWD designation. The panel will address these arguments prior to its analysis of the individual criterion at issue on appeal.

In summary, the appellant and her advocate argue that it was unreasonable for the ministry to come to a decision when there was insufficient information to adjudicate the decision and that it was unreasonable to apply an adverse presumption when sufficient information was not provided by the physician. Furthermore, it is the ministry's fault that the physician provided insufficient details given the inadequacies in the PWD application itself - the application does not solicit the necessary details, including requiring a description of the frequency and duration of required assistance, and provides insufficient space to provide all the information required by the ministry. The ministry should be responsible for obtaining necessary details when the physician neglects to enter them into the application rather than placing the burden on applicants who cannot afford to acquire supporting documentation, may not have the mental capacity to understand the effect and responsibilities of a presumption, and generally don't have the choice of switching to a new physician who will adequately fill out the application. Additionally, the ministry appears to largely ignore information provided by the appellant.

The panel notes that the reconsideration decision does not state that there was insufficient information upon which to adjudicate but rather, that the information was insufficient to meet the legislated criteria. The onus of establishing eligibility for ministry benefits rests with the appellant – the role of the ministry is one of decision-maker and as such, the ministry is not obligated to obtain information in support of an applicant's application or to ensure eligibility is established by the information provided. Respecting perceived deficiencies with the PWD Application form, the panel has no authority to consider this matter, as the panel is limited by the legislation to determining whether the ministry reconsideration decision was reasonable. The panel also notes that the reconsideration decision does state that the appellant's own information was considered.

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 ministry's position is that a severe physical impairment is not established as the reported physical functional limitations are more in keeping with a moderate degree of physical impairment. The ministry notes that the functional skill limitations and the need for assistance arise during a flare-up of symptoms and that no information is provided explaining the degree and duration of assistance from another person required during a flare-up of symptoms. Further, the appellant does not require

any prostheses or aids.

Panel Decision

The GP diagnoses the appellant with osteoarthritis and rheumatoid arthritis, which intermittently impair physical functioning during flare-ups of the symptoms of pain, swelling, and stiffness. The GP notes that the functional skills identified in the PR, including being limited to walking 1 to 2 blocks unaided, represent limitations the appellant experiences during flare-ups of her symptoms. Similarly, in the AR, the GP notes the need for periodic assistance with all aspects of mobility and physical ability when the appellant's symptoms have flared-up, again commenting that there are no restrictions when the appellant's condition is stable. The GP indicates that no assistive devices or aids are required. The appellant reports that flare-ups of her symptoms are unpredictable and that due to pain, she has to sit and rest when walking more than 20 minutes and must use railings and take rest breaks when climbing stairs. As the ministry notes, the GP does not indicate the degree or duration of the periodic assistance required when the appellant experiences a flare-up of her symptoms, though the GP does indicate that the appellant experiences a flare-up of rheumatoid arthritis once or twice a month and that these episodes can last for up to one week. The February 19, 2015 Progress Note indicates that episodes of increased symptoms occur less frequently, and that the appellant's condition is quite well managed with medication.

Based on the above information, the panel finds that the ministry reasonably viewed the information respecting the functional skill limitations as being more in keeping with a moderate degree of impairment and that the information provided is not evidence of a severe physical impairment.

Mental Impairment

The appellant does not expressly argue that she has a mental impairment, though on her SR she wrote that she needed help to complete and understand the PWD application.

The ministry notes that a mental condition is not diagnosed and argues that although some moderate impacts are reported for daily cognitive and emotional functioning and the appellant feels down (depressed) due to her inability to perform duties during a flare-up, all other areas of cognitive and emotional functioning are not impacted. Additionally, the appellant's ability to communicate is good and while the ability to write is worse during a flare-up, no information is provided to indicate the appellant's ability to write during this time. The ministry concludes that the information provided does not establish a severe mental impairment.

Panel Decision

The appellant is not diagnosed with a mental health condition or brain injury. The information from the appellant in her SR and other written submissions addresses her physical functioning, except for indicating the need for assistance completing the PWD application. The GP identifies moderate impacts on daily functioning in 4 areas of cognitive and emotional functioning, and that the chronic nature of the appellant's physical medical conditions cause decreased motivation and can make her feel helpless and depressed. However, the GP does not report a major impact on daily functioning for any of the 14 listed areas of cognitive and emotional functioning. Further, the GP does not identify

cognitive problems with communication (writing is impacted by arthritis symptoms) or any problems with social functioning or decision-making. The GP also expressly states that the appellant does not have a mental impairment.

Based on the above analysis, the panel finds that the ministry reasonably determined that the information does not establish that the appellant has a severe mental impairment.

Restrictions in the ability to perform DLA

The appellant argues that the symptoms of osteoarthritis and rheumatoid arthritis determine what she is able to do in a day. Personal care and preparing food take twice as long, and housework takes three times longer. Due to pain, she has to sit and rest when walking more than 20 minutes.

The ministry notes that the GP identifies continuous restrictions with most DLA, which can be mild, or severe during flare-ups of arthritis at which time the appellant requires assistance from family members. The ministry argues that while the GP reports that flare-ups occur once to twice per month, at times lasting a week at a time, the frequency, degree, type and duration of assistance required remains unclear. The ministry also notes that social functioning is managed independently. The ministry concludes that as the majority of DLA are performed independently or require little help from others, the information from the prescribed professional does not establish that impairment *significantly restricts* DLA either continuously or periodically for extended periods.

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 this case, the appellant's GP, a prescribed professional, indicates in the PR that the appellant's ability to perform DLA is continuously restricted for personal care, basic housekeeping, shopping, meals and transportation, noting that the restrictions can be mild, and can be severe during flare-ups of arthritis at which time she requires assistance from family members. When assessing those DLA in terms of individual tasks in the AR, the GP reports that periodic assistance is required for most physical tasks within those DLA. The appellant is not restricted in her ability to manage medications, finances, or social functioning at any time. The GP's narrative throughout the PWD application clearly links limitations to physical functioning and restrictions with DLA to episodes of flare-ups of the appellant's symptoms. As such, the panel finds that the ministry reasonably determined that a direct and significant "continuous" restriction in the ability to perform DLA is not established on the evidence of a prescribed professional. While both the GP and the consulting physician, also a prescribed professional, provide information respecting the frequency of the episodes of increased symptoms,

the information is inconclusive. The consulting physician describes what are reasonably viewed as somewhat infrequent episodes. The GP's description of flare-ups occurring once or twice a month at times for up to one week, encompasses a great range of variability, and as such does not establish how often the appellant is restricted or that she is restricted for extended periods. Based on the level of independence with which the appellant manages DLA when not experiencing a flare-up, and as the frequency and duration of the flare-ups is not established by the prescribed professionals' information, the panel finds that the ministry reasonably determined that a severe impairment that significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA has not been established.

Help to perform DLA

The appellant argues that she requires the assistance of family members when she is experiencing the symptoms of osteoarthritis and rheumatoid arthritis.

The ministry's position is that because 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 DLA.

The establishment of direct and significant restrictions with DLA are 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 is not successful on appeal.