

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated May 20, 2016 which found that the appellant did not meet three of the five statutory requirements of Section 2 (2) and (3) 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 her impairment 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 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance Persons with Disabilities Regulation (EAPWDR) Section 2

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of: 1) the applicant information and self-report dated December 15, 2015, 2) a physician report (PR) dated December 16, 2015 completed by a general practitioner other than her personal physician but who reported they have seen the applicant between 2 and 10 times in the previous 12 months and who works at the clinic the applicant has attended since 2014, and 3) an assessor report (AR) dated December 16, 2015 completed by the same physician.

The evidence also included the following documents:

- An undated letter from the appellant's counselor;
- A letter from the appellant's personal physician dated May 5, 2016; and
- Two progress reports from the appellant's physiotherapist dated January 6, 2016 and May 9, 2016;

Diagnoses

In the PR, the appellant was diagnosed by the general practitioner with Generalized Anxiety Disorder and Depression, with an onset of June 2015 and Chronic Pain Syndrome with an onset of November 2014.

Physical Impairment

In the PR, the general practitioner reported the appellant:

- Can walk 4+ blocks unaided;
- Can climb 5+ steps unaided;
- Is limited to lifting 2-7kg (5-15 pounds); and
- Can remain seated for 1-2 hours;
- Has developed chronic pain syndrome following a motor vehicle accident (MVA);
- Does not require any prosthesis or aids for impairment.

In the AR, the general practitioner indicated the appellant:

- Is independent in walking indoors and outdoors, climbing stairs, standing, carrying and holding;
- Has difficulty with lifting "groceries etc."; and
- Does not require any assistive devices or assistance animals.

Mental Impairment

In the PR, the general practitioner reported the appellant:

- Is suffering from severe depression and anxiety going on 10-12 months;
- Has significant deficits with cognitive and emotional function, specifically:
 - Memory (ability to learn and recall information)
 - Emotional disturbance (e.g. depression, anxiety)
 - Attention or sustained concentration

In the AR, the general practitioner indicated the appellant:

- Has good ability to communicate, specifically in speaking, reading, writing and hearing;
- Has good social functioning with her immediate social network and is independent in all categories related to social functioning, specifically; making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing

appropriately with unexpected demands and securing assistance from others;

No comments were offered to answer the question about what help or support the appellant requires to maintain her in the community and the assessment pertaining to extended social networks was marked "N/A".

In her self-report, the appellant reports she struggles daily with stress, fear of driving which prevents her from going out, anxiety about meeting new people and finds it almost impossible to be in a social group. She also gets anxious waiting in lines, such as at the doctor's office or in a grocery store.

In the letter dated May 5, 2016 the appellant's personal physician wrote:

- The appellant has been attending the clinic since May 2015 and has been followed closely ever since, essentially every 2 weeks;
- While she has suffered from mental health problems all her life, her accident in November 2014 brought about significant deterioration in her mental health, including worsening anxiety and depression as well as adjustment issues for which she has tried a variety of treatments; Her improvement seems to have plateaued and while her coping skills may improve, her conditions will likely remain a challenge for the rest of her life;
- The appellant is not fit to go back to work or be gainfully employed and does not recommend that she look for work.

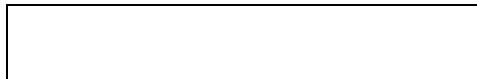
Daily Living Activities (DLA)

In the PR, the general practitioner indicated that the appellant:

- Has not been prescribed any medications and/or treatments that interfere with her ability to perform DLA;
- Has no restrictions to DLA specific to personal self-care, meal preparation, management of medications, mobility inside or outside the home, use of transportation or management of finances;
- Has periodic restrictions to DLA related to daily shopping, no specific comments are offered to rate the degree of impairment, the impact this has on the appellant's daily functioning or the period that the restrictions are likely to apply to;
- Has continuous restrictions in DLA related to daily housework for which no specific comments are offered in this section of the application as to the degree of impairment or the impact this has on the appellant's daily functioning or how long a period the restrictions apply;
- Has continuous restrictions in DLA related to social functioning and a comment is attached specifying "avoid social gatherings, depressed mood and anxiety" but does not specify how long these restrictions are likely to continue.

In the AR, the general practitioner reported the appellant:

- Struggles with laundry and has difficulty with basic housekeeping. The section asking what assistance is required to manage restrictions in this area and whether it is periodic, continuous, requires assistive devices or takes longer than usual was not filled out;
- Is independently able to perform most tasks related to shopping such as going to and from stores, reading prices and labels, making appropriate choices and paying for purchases but requires help "at times" with carrying purchases home.
- Is able to perform every task of several listed DLA, namely: meals (meal planning, food preparation, cooking, safe storage of food), pay rent and bills (banking, budgeting, pay rent



and bills), medications (filling/refilling prescriptions, taking as directed, safe handling and storage), transportation (getting in and out of a vehicle and using public transit).

The general practitioner did not rate DLA related to personal care such as dressing, grooming, bathing, toileting, feeding self, regulating diet or transfers in and out of bed or in and out of a chair.

In her Request for Reconsideration, the appellant wrote that:

- She would be unable to function without daily help from her mother and eldest daughter;
- All manner of DLA, including personal self-care, meal preparation, management of medications, mobility with in and out of the home, use of transportation and management of finances are affected and basic housework and daily shopping, are affected on a continuing basis because of unbearable pain related to her shoulder injury and mental health issues that she suffers from.

Need for Help

In the PR, in the section for specific comments about what assistance such as help from another person, equipment and assistance animals the appellant needs with DLA, the general practitioner wrote "N/A".

In the AR, the general practitioner indicated assistance is provided by family but no specifics were supplied. The question about what assistance would be necessary if help was not available was marked "N/A" and the question related to assistive devices was marked "Nil".

Additional Information

In her Notice of Appeal dated May 27, 2016, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that the information provided on her application form was mostly incorrect and had been filled out by the general practitioner not her personal physician. She also took issue with the fact that the general practitioner filled out the AR.

At the hearing, the appellant stated her personal physician was away for the period of time that she submitted her application and his colleague, the general practitioner, filled in the required forms. This was the first time that he had seen her and she did not check over the information that was provided on the form. She feels some of the information is not correct and it did not provide sufficient detail. The panel notes that the general practitioner specified this was not his first contact with the appellant and indicated he had contact with her between 2 and 10 times in the previous 12 months and that he relied on file/chart information.

The appellant also provided more detail about her chronic pain, which she stated impacts her inability to work and that on some days she is unable to get out of bed.

The ministry relied on its reconsideration decision as summarized at the hearing and did not provide any additional evidence.

Admissibility of Additional Information

The ministry did not raise an objection to the oral testimony of the appellant, which contained information about the impact of the appellant's medical conditions, the diagnoses of which were before the ministry at reconsideration. The panel admits this information as being consistent with and therefore in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for 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. The ministry found that the appellant does not have a severe mental or physical impairment and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that it could not be determined that, as a result of those restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA. The ministry stated that since all five criteria in Section 2 (2) and (3) of the *Employment and Assistance for Persons with Disabilities Act* were not met, the appellant did not qualify for the PWD designation.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

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

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

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- (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.

Section 2(2) of the EAPWDR defines prescribed profession as follows:

- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,if qualifications in psychology are a condition of such employment.

Severe Physical Impairment

The appellant submits that she suffers from chronic pain, which is diagnosed and being treated by her physician but which has plateaued and is unlikely to improve further. She maintains that even with the use of pain killers she is precluded from working and that some days she cannot get out of bed.

The ministry's position is that there is not sufficient detailed information from the general practitioner to confirm that the appellant has a severe physical impairment. The ministry argued that the general practitioner assessed the appellant as able to walk 4 or more blocks, climb 5 or more stairs, able to sit for up to 2 hours at a time and independent in most aspects of mobility and physical ability. The ministry also argued the evidence indicates the appellant is independent in almost all aspects of DLA except the restriction on lifting objects weighing more than 15 pounds, which impacts carrying things like groceries for which she needs occasional assistance. The ministry also notes that the letter from the appellant's personal physician does not describe limitations/restrictions in mobility, physical ability or functional skills.

Panel Decision

An “impairment” is a medical condition that results in restrictions to a person’s ability to function independently or effectively. A diagnosis of a serious medical condition does not by itself determine PWD eligibility or establish a “severe” impairment. One has to assess the severity of the impairment and also the related impact on daily functioning and how it restricts a person, as well as assess the period for which the restriction will apply. The evidence to determine this is gleaned from the PR and AR. These reports therefore must contain sufficient detail so that a clear determination of the impairment and its impact can be made.

In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant’s general practitioner who filled out both the PR and AR.

The appellant is diagnosed with chronic pain syndrome. In the PR, the general practitioner reported that the appellant does not require an aid for her impairment, that she can walk 4 or more blocks unaided, climb 5 or more steps, has restrictions on lifting anything over 15 pounds, and can remain seated for periods up to 2 hours. She was also assessed as independent in most areas of mobility and physical ability with the only exception being difficulty with lifting “groceries etc”. Specifically, she has no restrictions and is independent with walking indoors and outdoors, climbing stairs, standing, and carrying and holding. The letter from the appellant’s personal physician does not specify limitations to physical functional skills or indicate that the general practitioner’s assessment is inaccurate. Given the absence of details regarding the frequency and degree of impact the impairment in lifting poses to the appellant’s physical functioning, and the level of independent functioning reported for all other functional skills, the panel finds that the ministry reasonably determined that the evidence does not establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant’s position is that while she has suffered from depression for most of her life, she was able to cope with it until she was involved in a MVA but now she has severe depression and extreme anxiety, which has made it difficult for her to build social support and friendships or hold a job which has made it necessary for her to seek assistance. She does not see this improving in the foreseeable future.

The ministry’s position is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry acknowledged that the general practitioner assessed the appellant’s social functioning is continuously impacted and that there are findings with respect to memory, emotional disturbance, attention or sustained concentration, depressed mood, anxiety, motivation and that she avoids social gatherings. However, the Ministry indicated that there is insufficient detail to assess how much impact these issues are having for example on restrictions related to social gatherings, which may be occasional rather than continuous. The ministry also pointed out the AR indicates that the appellant is able to assertively contribute to maintaining good functioning within her immediate social network including developing and maintaining positive relationships, making appropriate social decisions, interacting appropriately with others and is able to secure assistance from others. The ministry stated there are no impediments to communication and that the appellant has good ability to speak, write, hear and read and that there is no mention of any

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safety concern which would indicate a severe mental impairment. The ministry pointed out that the PWD application is not intended to assess employability or vocational abilities, as employability is not an eligibility criterion for designation as a PWD.

Panel Decision

The appellant has been unable to work, and states she is socially isolated. Her personal physician provided a letter, which supports her claim that she is unable to work. The ability to work is not, as the ministry notes, the basis upon which eligibility for PWD is established as it is not a criterion in section 2(2) of the EAPWDA and is not listed among the prescribed DLA in section 2 of the EAPWDR. Further, the personal physician does not provide sufficient detail to conclude that the work-related restriction is related to severe mental impairment or the extent to which other factors would confirm a severe mental impairment. While depression and anxiety may be serious and severe, there is not enough detail to conclude that they are having a serious impact on the appellant's ability to function mentally.

Specifically, the evidence shows the appellant has no restrictions with respect to making decisions about her finances, shopping, or about her personal activities or personal care. There is insufficient detail to determine the degree of support required to address restrictions related to her social functioning, which is reported to be impacted continuously, but in the AR is identified as being managed independently.

Asked to describe the support/supervision that would help to maintain the appellant in the community, the general practitioner left this section of the AR blank.

Given the evidence, which demonstrates some moderate impacts reported to the appellant's cognitive, emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that her mental and physical impairment directly and significantly restricts her ability to perform DLA on an ongoing basis to the extent that she requires the significant assistance of another person, including her mother and her eldest daughter.

The ministry's position is that the information from the general practitioner does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry states that the majority of the listed tasks of DLA are performed independently by the appellant and that sufficient information has not been provided to establish that there is a significant restriction in the appellant's ability to perform these activities.

Panel Decision

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

According to the PR, the appellant has not been prescribed medications that interfere with her DLA. The general practitioner indicated that the appellant's impairment periodically restricts her ability to do basic housework but no further details are offered as to the degree of restriction or whether this is on an ongoing basis. Daily shopping and social functioning are reported as continuously restricted and under "Social Functioning" it is noted "avoid social gatherings, depressed mood and anxiety" but no other details are offered. The panel notes that the AR denotes "difficulty with lifting groceries", however limited details to determine the degree of restriction are offered.

The general practitioner also assessed the appellant as not being restricted with the remaining listed DLA, specifically: personal self-care, meal preparation, management of medications, mobility inside and outside the home, use of transportation and management of finances.

In the AR, the general practitioner did not fill out the section to rate the appellant's ability to tend to her personal care (dressing, grooming, bathing, toileting, feeding self, and transfers in and out of bed or a chair). No restrictions with personal care are raised anywhere else in the evidence.

The general practitioner reported the appellant is independently able to perform every task of several listed DLA, namely: meals (meal planning, food preparation, cooking, safe storage of food), pay rent and bills (banking, budgeting, pay rent and bills), medications (filling/refilling prescriptions, taking as directed, safe handling and storage) and transportation (getting in and out of a vehicle, using public transit, using transit schedules and arranging transportation).

The general practitioner indicated that the appellant is independently able to perform most tasks of the DLA, shopping (going to and from stores, reading prices and labels, making appropriate choices and paying for purchases) with respect to carrying purchases home the appellant "needs help at times". The report does not indicate that help is needed with this DLA at all times and the evidence suggests restrictions apply to lifting purchases that weigh more than 15 pounds. The DLA of basic housework is rated as restricted but the general practitioner has not rated these restrictions to clarify whether they are restricted continuously or periodically and to what degree. Laundry is described simply as a "struggle" and basic housekeeping is described as "difficulty." The available evidence indicates there are restrictions to basic housekeeping and to carrying purchases home after shopping, but there is no clear indication of the degree of these restrictions.

At the hearing the appellant stated that the information on the AR and PR was inaccurate and that her DLA are much more significantly impacted by her condition but she acknowledged there could have been more detail provided.

The panel finds that the evidence demonstrates that the appellant manages most of her DLA without assistance and that the ministry reasonably determined that there is insufficient information to determine that the periodic support/supervision that is required for daily shopping or the continuous restrictions related to basic housekeeping, and social functioning is required for extended periods of time or on an ongoing basis. Therefore, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the significant assistance of her family on an ongoing basis to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry argued that no assistive devices are required and the appellant does not require the services of an assistance animal.

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.

In the AR, the general practitioner reported that the help required for DLA is provided by family. In the section of the AR relating to assistance provided through the use of assistive devices, the general practitioner indicated "nil".

The panel finds that the ministry reasonably determined that while impairments to the appellant's ability to perform some DLA exist, there is insufficient evidence to confirm that these impairments are severe enough to pose direct and significant restrictions in the appellant's ability to perform DLA and it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the appellant. The panel therefore confirms the decision. The appellant is not successful on appeal.