

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated June 9, 2016 which found that the appellant did not meet all of the 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 an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or 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 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 for 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:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:
 - The Applicant Information and Self-report ("SR") completed by the appellant and dated October 10, 2015;
 - The Physician Report ("PR") dated October 10, 2015 and the Assessor Report ("AR") dated October 10, 2015, both prepared by the appellant's general practitioner ("GP") of over 2 years who treated the appellant 2-10 times in the 12 months prior to completing the PR and AR. The source of the information used to complete the PWD application was "office interview with applicant" and "family/friends/caregivers – sister";
2. The appellant's Request for Reconsideration (RFR) dated April 20, 2016 in which she states:
 - Depression, anxiety, pain in lower stomach;
 - Dizzy, mind goes blank [for a] few seconds;
 - Lower sugar, epilepsy, bad head ache, weakness in the whole body, feel scared to travel alone so my sister assists me.
3. A note from the GP signed but not dated that states "please reassess this patient's PWD application. She cannot work [because] of various medical issues".

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with epilepsy (on set 2015), depression and anxiety (both with no onset date).

Physical Impairment

In the SR, the appellant described her disability as including "epilepsy...back pain, [hypoglycemia], can't walk [too] much, back pain lower, pain in lower abdominal, [pressure] low, dizzy, weakness, can't climb getting tired easy".

In the PR, the GP reports that the appellant is diagnosed with epilepsy, and that she is not prescribed medication and/or treatment that interfere with her ability to perform DLA. The GP indicates that the conditions are likely to continue for 2 years or more, the appellant can walk 1-2 blocks unaided on flat surfaces, climb 5+ steps, lift 15-35 lbs, and it is unknown how long she can remain seated.

In the AR, the GP reports that the appellant is independent in all listed areas of mobility and physical ability.

Mental Impairment

In the SR, the appellant described her disabilities as "depression, anxiety...that [she] can take care of [herself] but stressed. Can't travel [alone], feeling scared that someone is following [her]...[too] many people in public sound makes me feel [nervous]."

In the PR, the GP has diagnosed the appellant with depression and anxiety with no onset dated for

either and indicated that she has significant deficits with cognitive and emotional function in the areas of emotion, motivation, psychotic symptoms and attention or sustained concentration, with a note that states "patient has expressed a belief in supernatural possession that may have affected her cognition".

In the AR, the GP notes that the appellant's ability to speak, read, write and hear are good. Under cognitive and emotional functioning, the GP indicates that the appellant has a major impact in the area of emotion, and all other listed areas of cognitive and emotional functioning have either moderate, minimal or no impacts.

Daily Living Activities

In the PR, the GP indicated that the appellant is restricted in the areas of daily shopping, mobility outside of the home, use of transportation and social functioning with a note that states "anxiety/depression impairs her ability at times to leave her house and perform her ADL's". There is no indication whether the restricted DLA are restricted either continuously or periodically.

In the AR, the GP indicated that the appellant is independent in all listed areas of DLA except laundry, basic housekeeping, going to and from stores, meal planning, food preparation, cooking, safe storage of food, able to deal appropriately with unexpected demands and able to secure assistance from others. The restricted DLA tasks are indicated to be restricted periodically with no explanation as to what assistance is required, its frequency or duration. There are tasks listed under shopping, paying rent and bills, medication and social functioning where the GP began the check mark in the independent box and extended it to the periodically restricted box, and provided no explanation for this.

Need for Help

In the PR, the GP notes that the appellant does not require any prostheses or aids for her impairment. In the AR, the GP indicates that the appellant receives help required for DLA from her sister and but does not use an assistive device.

Evidence On Appeal

A Notice of Appeal (NOA) signed and dated June 15, 2016 in which the appellant describes her medical conditions, which includes a high liver enzyme count, pain in her whole body, anxiety, inability to move her right arm, low blood count, and forgetting things easily for seconds.

Appellant's Oral Evidence at Hearing

The appellant reiterated what was stated in the SR, RFR and NOA and added that:

- When she was hospitalized it was due to her liver functioning and it was discovered that she needs a liver transplant;
- While in hospital the ministry was informed by the appellant's sister of her severe medical conditions and witnessed by a ministry social worker who came to the hospital to have the appellant sign documents;
- Her conditions have become worse since the completion of her PWD application;

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- Her income assistance benefits and child benefits are not enough, she cannot work and she needs PWD;
 - She needs to see a psychiatrist for her mental stress and wants to be hypnotized so she can feel better;
 - She was so weak that the hospital had to give her 2 units of blood and she has had episodes of seizures;
 - She can only sit for a few seconds before her back hurts and then requires assistance to stand with that assistance coming from her children;
 - While in hospital for 1 month, she lost her ability to walk and was using a walker in the hospital but not since she was discharged; and
 - She cannot afford the extra nutrients, such as Ensure, which are recommended by her doctors so she can regain her strength.

The ministry relied on the reconsideration decision.

Admissibility of Additional Evidence

Oral Evidence

The appellant gave oral evidence at the hearing. She described her physical condition, the associated impairment and its impact on her ability to perform tasks of DLA. On review of the evidence, the panel notes that most of the appellant's oral evidence was in support of or corroborates the evidence that was before the ministry at the time of reconsideration. However, the panel finds that the oral evidence the appellant presented at the hearing regarding her liver transplant and right arm is 'new information' as it does not support or corroborate information that was before the ministry at the time of reconsideration. The panel therefore finds that the appellant's oral evidence is admissible, except her reference to her liver transplant and right arm, as it is in support of the information and records that were before the minister when the decision being appealed was made, pursuant to 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 under section 2 of the *EAPWDA*, 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 met the age requirement and that she has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or physical impairment;
- the appellant's 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.

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

Definitions for Act

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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.

Positions of the Parties

The appellant argued that she has severe mental and physical conditions that prevent her from her daily functioning. She also argued that the ministry is aware of her medical conditions and can see from her hospital records that she is disabled but refuses to help her.

The ministry's position as set out in the Reconsideration Decision is that the appellant is ineligible for designation as a Person With Disabilities on the basis that the appellant had not satisfied the legislative requirements in the *EAPWDA*.

Severity of impairment

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning. 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 GP.

Severity of mental impairment

The appellant argued that she suffers from depression, anxiety, confusion, and fear of being in public alone.

The ministry's position as set out in the Reconsideration Decision is that the evidence does not support a finding that the appellant suffers from a severe mental impairment.

Panel Decision

On review of the evidence, the GP has diagnosed the appellant with depression and anxiety. In the PR, the GP indicated that the appellant has significant deficits in the area of psychotic symptoms, emotional disturbance, motivation and attention or sustained concentration which corroborates the appellant's position. However in the AR, the GP indicates that speaking, reading, writing and hearing are all good and that of the listed areas under cognitive and emotional functioning only emotion has a major impact while all other listed areas have either moderate, minimal or no impacts and provides no explanation for the inconsistent information. Furthermore, the GP provides no additional narrative in the comments section other than what he had previously stated in the PR, namely that the appellant has anxiety, depression and she is of the opinion that she is possessed by the supernatural. The panel finds that the information provided by the GP does not demonstrate a severe mental impairment.

After reviewing the evidence as a whole as set out above, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe mental impairment as provided by section 2(2) of the *EAPWDA*.

Severity of physical impairment

The appellant takes the position that she suffers from liver disease, her right arm is weak, she is weak in her body, experiences dizziness and cannot walk.

The ministry's position as set out in the Reconsideration Decision is that the evidence as a whole, including the appellant's functional skill limitations, does not support a finding that the appellant has a severe physical impairment.

Panel Decision

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. To determine whether or not a physical impairment is severe, the prescribed professional's opinion of the appellant's functional ability is necessary. In the PR, the GP states that appellant can walk 1-2 blocks and climb 5+ steps unaided, and lift 15 – 35 lbs. In the AR, the GP indicates that the appellant is independent in all listed tasks of mobility and physical ability. The panel finds that the information provided by the GP demonstrates that the appellant has good physical functioning. While the appellant does face challenges, the ministry reasonably viewed that the challenges are not indicative of a severe impairment.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently or effectively. The evidence given by the GP indicates that the appellant's functional ability is good.

Therefore the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment.

Restrictions in the ability to perform DLA

The appellant argues that that she is afraid to travel alone, so her sister and her young children must be with her when she leaves home; she cannot walk distances, and cannot work.

The ministry's position as set out in the Reconsideration Decision is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by his physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*.

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 his or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence at the hearing of the challenges that she faces with DLA, the legislation is clear that to satisfy the criteria the evidence must come from a prescribed professional. In the present case, this evidence has been provided by one prescribed professional - the GP.

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 DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

The GP addresses DLA's in both the PR and AR. In the PR, the GP indicates that the appellant is restricted in the areas of daily shopping, mobility outside of the home, use of transportation and social functioning. However, the GP did not indicate whether these activities are either continuously or periodically restricted, and did not indicate the frequency and duration of the restriction. In the AR, the GP has indicated that the appellant is independent or between independent and periodically restricted for the preponderance of the tasks listed under DLA and has provided no explanation for why she falls in between the two categories. The panel finds that the evidence presented by the GP in the PR and AR is inconsistent and incomplete and therefore it does not establish that the appellant's DLA are directly and significantly restricted. Also, in the SR and oral evidence at the hearing she did not provided information to clarify the GP's information; namely, the appellant did not describe how, due to her physical or mental impairment, her DLA are restricted.

In making its decision in this matter the panel must consider the evidence that was provided by the GP and that was before the ministry at reconsideration. Therefore, considering the evidence of the GP as set out in the PR and AR, the panel concludes that the ministry reasonably concluded that the evidence was insufficient to establish that the appellant's impairment significantly restricts her ability to perform tasks of DLA either continuously or periodically for extended periods.

Help with DLA

The appellant argues that she requires help with being in public with that help coming from her sister and that while in hospital she used a walker for mobility.

The ministry's position as set out in the Reconsideration Decision is that because it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant 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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period. Furthermore, the appellant did not describe the ways in which she requires assistance and stated that she no longer uses a walker when walking.

Given the panel's finding that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel further finds that the ministry's conclusion that 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*, was reasonable.

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 a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision. The appellant was not successful in her appeal.