

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated May 26, 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

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

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 September 25, 2015;
 - The Physician Report ("PR") dated November 10, 2015 and the Assessor Report ("AR") dated November 10, 2015, both prepared by the appellant's general practitioner ("GP") of less than 1 year and who treated the appellant 2-10 times in the 12 months prior to completing the PR and AR, and that the source of the information used to complete the PWD application was "office interview with applicant";
2. 7-page hand written self-assessment, which is not signed or dated and explains the appellant's various environmental sensitivities and how her body reacts to them.
3. 2-page letter from the appellant's GP, signed and dated May 12, 2016, in which the GP describes the appellant's conditions and their effects, and states in part that:
 - New medical information has come to light;
 - The appellant's chemical sensitivities are now affecting virtually every aspect of her life to the point where she cannot consider gainful employment and struggles with her DLA;
 - "It appears that here is additional information that was not clearly portrayed [in the PWD application]";
 - "I [the GP] was unaware that she was requiring as much assistance from her roommate in the area of bathing and household tasks"; and
 - "I [the GP] would be happy to revise her [the appellant's] original PWD application for completeness".
4. 1-page list of toxic products that the appellant reacts to; dated May 10, 2016.
5. 14-page self-assessment signed by the appellant but not dated, which describes the symptoms she experiences, her chemical sensitivities, how her roommate helps her in daily living, her physical limitations and how her DLA are affected.
6. 9-page 'diary' from 2010 which describes the symptoms she experiences and her chemical sensitivities.
7. 1-page of doctor's notes dated stamped June 28, 2010 and August 17, 2010.
8. 1-page of doctor's chart notes dated stamped May 11, 2010.
9. 2-page doctor's assessment notes dated August 5, 2010. The assessment included a physical examination and nerve conduction studies which were concluded to be normal. The clinical impression points to fibromyalgia as a possible cause of diffuse pain and sensitivity. The assessment includes 4-pages of test results.

10. 14 pages of various diagnostic results dating from March 31, 2010 to July 2, 2010.

11. Request for reconsideration (RFR) signed and dated May 13, 2016 which states that her unique situation has not been fully understood and her condition will continue to worsen with exposure.

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with environmental sensitivities (onset unknown and peaked in 2009) and fibromyalgia (onset unknown).

Mental Impairment

In the SR and her other self-assessments, the appellant reports that her medical conditions have caused her to be socially isolated and feel confused. She also reported that she feels depressed and anxious but has learned to deal with these symptoms.

In the PR, the GP has not diagnosed the appellant with a mental disorder and has answered "unknown" to the question of whether the appellant has any significant deficits with cognitive and emotional function. In the AR, the GP notes that the appellant's ability to speak, read, write and hear are good, and the GP indicates "N/A" for cognitive and emotional functioning.

Physical Impairment

In The SR and her other self-assessments, the appellant describes her medical condition as environmental sensitivities and the resulting symptoms. She also stated that she cannot remain seated for longer than 30 minutes.

In the PR, the GP's functional assessment of the appellant is: she can walk 4+ blocks unaided, climb 5+ steps unaided, lift 5-15lbs and remain seated without limitation. In the AR, the GP's assesses the appellant's mobility and physical ability as independent in walking indoors, climbing stairs, standing, lifting, and carrying and holding. The appellant is not assessed either independent, requiring periodic assistance or requiring continuous assistance in walking outdoors, but it is indicated that she takes significantly longer than typical without indication as to how much longer and that she is "limited by exposure risk".

Daily Living Activities

In the SR and her other self-assessments, the appellant did not specifically speak to DLA and how they are restricted.

In the AR, the GP indicated that the appellant is independent in all listed areas of DLA, except in the areas of making appropriate social decisions, being able to develop and maintain relationships and interacts appropriately with others, which all require periodic assistance. Also bathing, laundry, basic housekeeping, using public transit, and using transit schedules are indicated as taking significantly longer. The GP also indicates that the appellant has marginal functioning with her immediate and extended social network.

Need for Help

In the SR and her other self-assessments, the appellant reported the need of a cane for support. 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 does not receive help required for DLA from family members and friends or through the use of an assistive device.

Evidence On Appeal

A Notice of Appeal (NOA) signed and dated June 14, 2016 in which the appellant states “I am severely disabled and can’t complete my day-to-day tasks because of it”.

Prior to the hearing the appellant submitted the following information:

1. 3-page letter from the appellant’s advocate dated July 5, 2016 in which an argument is made that in its reconsideration decision the ministry failed to correctly interpret the information provided by the GP in the follow up letter dated May 12, 2016 and that the GP provides a further letter dated May 31, 2016 to further clarify the information provided in the PWD application;
2. 1-page letter from the GP signed and dated May 31, 2016 in which the GP states “the majority of [the appellant’s] symptoms are subjective and largely based on her description and self - assessment, as implied by my use of ‘according to’ and ‘apparently’. Her symptoms and assessment are however consistent with her condition”;
3. 27-page print-out outlining information on environmental illnesses; and
4. Medical report – employability signed by the appellant’s GP and dated June 7, 2016 which lists the appellant’s primary medical condition as “Multiple Environmental Sensitivities” and her secondary medical conditions as “Anxiety, agoraphobia, social isolation” and the appellant’s restrictions as “limited by exposure avoidance, chronic pain, walking limitation by lower extremity pain”.

Admissibility of Additional Evidence

On review of the evidence, the panel found that the submissions made prior to the written hearing provided additional detail or disclosed information that was in support of the information addressed in the reconsideration. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) 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 establishes 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

[]

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 the ministry did not correctly interpret the additional information given by her GP in the May 12, 2016 letter and has largely dismissed the information provided in the self-reports. She also argues that the ministry has not completely considered the "Hudson vs. Employment and Assistance Tribunal" decision or section 8 of the Interpretation Act.

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 2 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 the prescribed professional – in this case, the GP.

Severity of mental impairment

The appellant did not argue that she suffers from a specific mental condition or impairment but only

that her environmental sensitivities have led her to be isolated, anxious and depressed.

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 not diagnosed the appellant with a mental impairment or condition. In the PR, the GP answers "Unknown" to the question of whether the appellant has any significant deficits with cognitive and emotional function and similarly in the AR, the GP indicates that the appellant does not experience any impact on daily functioning as a result of a mental impairment or brain injury. Though both the appellant and GP mention that the appellant experiences anxiety, depression and self-imposed isolation, the panel finds that the evidence provided fails to establish 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 is in pain on a daily basis and that her environmental sensitivities constitute a severe physical impairment.

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. The appellant faces challenges but panel is of the view that the impacts of her physical impairments are not clear. The appellant states that she cannot walk, shower, or sit comfortably. In the PR the GP, who conducted an office interview, mentioned that the appellant could walk 4+ blocks *unaided*, climb 5+ stairs, lift under 5 – 15lbs and has no limit to remaining seated. In the AR the same GP states that the appellant is independent in walking indoors, climbing stairs, standing, lifting, and carrying and holding, and takes significantly longer to walk outdoors.

In his letter dated May 12, 2016, the GP indicates that the information provided in the PWD application was incomplete. The GP indicates that new medical information has come to light, however the GP does not explain what this new medical information is nor does he rely on it in the assessment provided in the May 12, 2016 letter. The GP states that the severity of the appellant's impairment is such that she is profoundly limited in her ability to perform self-care or walk any distance. The GP also provides a reassessment of the appellant's functional skills. However, the GP does not provide an explanation as to why revised functional skills assessment differs from the original assessment in the PWD application other than to indicate that the appellant provided

additional information. In fact, much of the restrictions the GP refers to are not clearly described in terms of severity. Further the GP's assessment in the May 12, 2016 letter is based on the appellant's self-assessment as is evident from his use of language such as "apparently and appears".

In his May 31, 2016 letter, the GP further explains that though the appellant's symptoms are consistent with her medical conditions, her symptoms are subjective and largely based on her self-assessment. The legislation, however, is clear that the fundamental basis for the analysis is the evidence from the prescribed professional.

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 in the PWD application indicates that the appellant's functional ability is good and there is no indication that she requires help. In his subsequent letters, the GP indicates that the appellant is profoundly limited in her ability to perform self-care but does not provide a medical explanation changing his opinion. 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 she is restricted in her ability to perform tasks of DLA due to the pain and other symptoms she suffers from her environmental sensitivities. She argues that the GP, in the May 12, 2016, letter indicates that she is "limited [in] her ability to do much physical activity and she fatigues easily. This has resulted in her being largely house confined". She also argues that doctors do not typically conduct in-home assessments therefore they must rely on the patients' self-assessment for complete information.

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 information 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. Although the appellant provides a Medical Report-Employability form as part of her evidence, 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 the AR. The GP indicated that the appellant is independent in all listed areas of DLA, except in the areas of making appropriate social decision, able to develop and maintain relationships and interacts appropriately with others, which require periodic assistance but it is not indicated how often assistance is required. Also bathing, laundry, basic housekeeping, using public transit, and using transit schedules are indicated as takes significantly longer but it is not indicated how much longer it takes the appellant to complete these tasks. In the SR provided, the appellant largely focuses her argument on her environmental sensitivities and does not clearly establish how her environmental sensitivities restrict her DLA. Similarly, in the May 12, 2016 letter, the GP provides further information on the appellant's restrictions but does not provide any information as to whether the DLA are restricted either continuously or periodically. The appellant has argued that her GP cannot provide an in-house assessment, however, the legislation is clear that such assessment are acceptable from other medical professionals such as nurses, occupational therapists and physical therapist.

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

Help with DLA

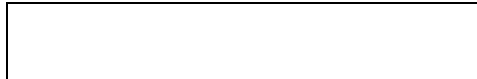
The appellant argues that she requires help with various tasks of DLA with that help coming from her roommate and that she uses a cane for support.

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.

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 is not successful in her appeal.