



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 May 11, 2016 declaring the appellant ineligible for designation as a Person with Disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, Section 2. Specifically, the ministry determined that the information provided did not establish that in the opinion of a prescribed professional the appellant's severe mental and physical impairments:

- (i) directly and significantly restrict her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 3 criteria: she has severe physical and mental impairments, has reached 18 years of age and in the opinion of a medical practitioner her impairment is likely to continue for at least 2 years.

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 ministry was not in attendance at the hearing. After determining that the ministry had been notified, the hearing proceeded under Section 86 (b) of the Employment and Assistance Regulation.

Evidence before the Ministry at Reconsideration

The evidence before the ministry at the time of the reconsideration decision included the PWD application comprised of the appellant's self report (SR), Physician Report (PR) and Assessor Report (AR), all dated November 20, 2015. The PR and AR were both completed by the appellant's general practitioner (the GP), who has known the appellant for 3 ½ years and who has seen the appellant 2 to 10 times in the past 12 months.

The evidence at reconsideration also included the following documents:

- March 29, 2016 letter from the ministry to the appellant denying her PWD application and enclosing the ministry's Designation Decision Summary;
- Request for Reconsideration received by the ministry on May 4, 2016, in which the appellant writes that:
 - her anxiety is worsening to the point that it is hard to leave her house and she requires more help doing daily chores;
 - she is awaiting back surgery to remove part of a disc in her lower back;
 - she has problems doing dishes and cleaning the house.

PWD APPLICATION:

Diagnoses

In the PR the GP notes that the appellant suffers from two diagnoses: depression with anxiety with 2011 as the date of onset, and a back injury with disc protrusion with an onset date of 2014.

Appellant's Self Report

In her SR the appellant described her disabilities as depression, anxiety and a bulging disc in her lower back that pushes on the sciatic nerve, causing pain and numbness. She added that her depression keeps her at home because it is hard to be around people. As a result of her depression and her back pain she finds it hard to become motivated and to do household chores.

Physical Impairment

In the PR the GP reported that the appellant has a slipped disc, causing severe sciatica. She is unable to perform physical labour. Even housework causes the pain to flare. She needs assistance with household tasks. The appellant can:

- walk less than 1 block unaided;
- climb 2-5 steps unaided;
- is limited in lifting under 2 kg;
- can remain seated for 1-2 hours.

In the AR the GP reported that the appellant requires periodic assistance from another person and takes significantly longer (*"at least three times longer"*) to climb stairs and to walk indoors and outdoors. The GP notes that the appellant can stand independently.

Mental Impairment

In the PR the GP noted that the appellant has severe depression and anxiety, is uncomfortable leaving her house, lacks motivation to accomplish personal hygiene and housework, and due to lack of focus is unable to handle a computer/desk job. In additional comments the GP notes: "*Severe depression and anxiety with failure to respond to various treatment modalities*".

In the AR the GP indicates the following:

- good ability with all listed areas of communication;
- impacts to areas of cognitive and emotional functioning include:
 - major impacts in bodily functions ("*eating and sleeping majorly affected*"), emotion ("*major anxiety and depression – difficulty leaving house. Severe mood swings*") and motivation ("*major lack of motivation*");
 - moderate impacts in consciousness ("*drowsy due to lack of sleep*") and impulse control;
 - minimal to moderate impacts in motor activity ("*fluctuating agitation*");
 - no impacts in the areas of insight/judgment, executive, language, psychotic symptoms, other neuropsychological problems, and other emotional/mental problems.
- impacts to social functioning include:
 - requiring periodic support/supervision in dealing with unexpected demands;
 - very disrupted functioning with her immediate social network;
 - marginal functioning with her extended social networks;
 - independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and securing assistance from others.
- additional comments: "*Severe depression and anxiety unresponsive to treatment. Impacts all aspects of daily living.*"

DLA

In the PR the GP noted that the appellant:

- is not prescribed any medication that interferes with her ability to perform DLA;
- is unable to perform physical labour due to severe sciatic back pain. ("*Even housework causes the pain to flare. Needs assistance with household tasks.*")

In the AR the GP notes that the appellant:

- is independent with dressing, grooming, bathing, toileting, feeding self and regulating diet;
- is independent with going to and from stores, reading prices and labels, making appropriate shopping choices and paying for purchases;
- is independent with all meals-related DLA, paying rent and bills, handling medications and filling prescriptions, and using transit schedules/arranging transportation;
- is independent but takes 2-3 times longer to transfer in and out of bed and on and off chairs;
- requires continuous assistance from another person with laundry, basic housekeeping, and carrying purchases home;
- requires periodic assistance from another person and takes significantly longer getting in and out of vehicles
- in the area of social functioning, requires periodic support/supervision in dealing with unexpected demands ("*depends on the day and the demand*") and is independent in making appropriate social decisions, developing/maintaining relationships, interacting appropriately with others and securing assistance with others.

The GP also notes that the appellant has very disrupted functioning ("*major withdrawn*") in her immediate social network and marginal functioning ("*little more than minimal acts to fulfill basic*")

needs”) with her extended social network.

Assistance Required

In the PR the GP noted that the appellant does not require prostheses or aids for her impairment.

In the AR the GP noted that the appellant requires assistance from family and friends.

Additional Information in the AR

In the AR the GP writes: “*Severe depression and anxiety unresponsive to treatment. Impacts all aspects of daily living.*”

Additional Information at the Hearing

At the hearing the appellant provided the following oral evidence:

- she is unable to do much on her own anymore;
- she has approximately 2 “good” days out of every 10, adding that the anxiety alone makes it extremely hard for her to leave the house or do anything;
- she takes medication for depression and anxiety and strong pain killers for her back pain;
- she recently underwent back surgery, with the result that her sciatic pain is gone but the chronic back pain has not subsided and is not expected to subside. She is not allowed to do any physical activity for 6-8 weeks while her back heals from the surgery.

Evidence of Witness L:

Witness L identified himself as the father of the appellant. He stated that the appellant’s mental and physical conditions have deteriorated in the past 5 years. She has nerve problems and is extremely depressed. He assists the appellant approximately every second day, by cleaning up the house and yard. He also drives the appellant and her son, because she finds it too difficult to drive. His wife drops off the appellant’s shopping requirements almost every night.

Evidence of Witness J:

Witness J stated that he has been the appellant’s boyfriend for the past 3 years. He lives with the appellant, and does all the household chores except cleaning the silverware, which is something the appellant is still able to do. He added that the appellant’s ability to function in every area has decreased in the past 3 years. He stated that while they would go camping and hiking together 3 years ago, they can no longer do that. J does not drive, and stated that the appellant only drives once or twice per month on short trips because it is so difficult for her to get in and out of the car and to sit for too long. In the past 3 months he has had to help her bathe and wash her hair approximately 4 times.

J also described the appellant’s mental state as extremely anxious and depressed, adding that about 5-6 days per week she is unable to leave the house even if it’s only out to the yard to get some fresh air, and 4 times each month she can’t even leave her bedroom.

Admissibility of Additional Information

The panel considered the oral evidence of Witness L and Witness J. Both witnesses provided additional detail to information that was before the ministry at reconsideration, namely the severity of the appellant’s physical and mental conditions and the extent to which they assisted the appellant in performing her DLA. Both witnesses described impairments and restrictions that dated back at least

3 years. The panel therefore determined that the evidence of the witnesses L and J were admissible under Employment and Assistance Act (EAA) Section 22 (4) (b) as evidence in support of the information that was before the ministry at reconsideration.

The panel also considered the oral evidence of the appellant. Following the reconsideration decision she underwent back surgery, which successfully treated her sciatic pain but not her non-sciatic back pain. Although this surgery occurred after the reconsideration decision, reference to the upcoming surgery was made by the GP in the PWD application. The remainder of the appellant's oral evidence added greater detail to the information considered by the ministry at reconsideration, but did not contain new information. The panel therefore determined that all of the appellant's oral evidence was admissible under EAA Section 22 (4) (b) as evidence in support of the information that was before the ministry at reconsideration.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision of May 11, 2016 that determined that the appellant did not meet two of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a PWD is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement, has severe physical and mental impairments and her impairments are likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- 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 relevant legislation is as follows:

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.

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

(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.

At reconsideration the ministry found that the appellant met the first three criteria for PWD designation, namely that she has severe physical and mental impairments, has reached 18 years of age and in the opinion of a medical practitioner her impairments are likely to continue for at least 2 years. The panel will therefore consider the two remaining legislative criteria required for PWD designation, which are:

- whether in the opinion of a prescribed professional the impairments directly and significantly

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- restrict DLA continuously or periodically for extended periods; and
 - whether the person requires an assistive device, the significant help of another person, or the services of an assistance animal to perform the directly and significantly restricted DLA.

Restrictions in Ability to Perform DLA

Appellant

The appellant's position is that her back pain significantly restricts her ability to perform DLA. She is unable to get in and out of her car and on most days cannot help with dishes or cleaning. Her evidence is supported by Witness L, who states that he assists the appellant approximately every second day by cleaning up the house and yard and drives the appellant and her son because she finds it too difficult. L adds that his wife drops off the appellant's shopping requirements almost every night. Witness J states that he does almost all of the household chores, including cleaning, vacuuming, cooking and washing up, and recently has had to assist the appellant with her personal hygiene.

The appellant also argues that her depression and anxiety make it hard for her to leave the house or be around people, and that even when she is not in pain she lacks motivation to perform DLA. Both Witnesses L and J described the appellant's mental state as extremely anxious and depressed, with J adding that about 5-6 days per week she is unable to leave the house, and 4 times each month she can't even leave her bedroom.

Ministry

In the reconsideration decision the ministry determined that there was insufficient evidence to establish that the appellant's impairments "directly and significantly" restricted her DLA "continuously" or "periodically for extended periods". In coming to its determination the ministry noted the following:

- in the PR the GP indicated that the appellant is not prescribed medication that interferes with her ability to perform DLA;
- in the PR the GP indicated that because of her back pain the appellant is unable to perform physical labour and needs assistance with household tasks, but did not describe the tasks that were restricted or the frequency or duration of the restrictions;
- in the AR the GP indicated that the appellant is:
 - independent with dressing, grooming, bathing, toileting, feeding self and regulating diet;
 - is independent with going to and from stores, reading prices and labels, making appropriate shopping choices and paying for purchases;
 - is independent with all meals-related DLA, paying rent and bills, handling medications and filling prescriptions, and using transit schedules/arranging transportation;
 - is independent but takes 2-3 times longer to transfer in and out of bed and on and off chairs;
 - requires continuous assistance from another person with laundry, basic housekeeping, and carrying purchases home;
 - requires periodic assistance from another person and takes significantly longer getting in and out of vehicles;
 - in the area of social functioning, requires periodic support/supervision in dealing with unexpected demands ("*depending on the day and the demand*") and is independent in making appropriate social decisions, developing/maintaining relationships, interacting

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appropriately with others and securing assistance with others.

Panel Decision

The legislation set out in EAPWDA Section 2(2)(b) requires that a “prescribed professional” – in this case, the GP – confirm that the appellant’s impairments directly and significantly restrict her ability to perform his DLA continuously or periodically for extended periods. The panel notes that although a prescribed professional may indicate that, because of a restriction, an individual requires assistance either continuously or periodically for extended periods, this does not necessarily meet the legislative test of being a “direct and significant restriction.” The DLA to be considered for a person with a severe impairment are, as set out in subs. 2(1) of the EAPWDR, as follows:

- Prepare own meals;
- Manage personal finances;
- Shop for personal needs;
- Use public or personal transportation facilities;
- Perform housework;
- Move about indoors and outdoors;
- Perform personal hygiene and self care;
- Manage personal medication;
- Make decisions about personal activities, care or finances; and
- Relate to, communicate or interact with others effectively

In Section C of the AR the GP indicates that the appellant is independent in almost all DLA, except transfers to/from bed and chairs (“2-3 times longer”), laundry (“*carrying laundry downstairs and transferring it to the dryer*”), basic housekeeping, carrying purchases home (“*Needs help. Cannot carry*”) and getting in and out of a vehicle. The GP does not add any additional comments in the spaces provided at the bottom of Pages 19 and 20 of the AR. The GP also indicates that the appellant is independent in all areas of social functioning except in her ability to deal appropriately with unexpected demands (“*depends on the day and the demand*”), but has very disrupted functioning (“*withdrawn*”) in her immediate social network and marginal functioning in her extended social networks.

In Section E of the AR the GP adds the following additional information: “*Severe depression and anxiety unresponsive to treatment. Impacts all aspects of daily living.*” However, the GP does not describe the severity or frequency of the impacts to DLA, and as stated earlier, the GP indicates that the appellant is independent in most of her DLA.

At the hearing witnesses L and J provided evidence to indicate that the appellant’s ability to perform DLA as has been steadily declining over the past 3 years as a result of her severe mental and physical impairments. J described the appellant as a person who was directly and significantly restricted in performing almost all of her DLA most of the time.

The panel found the evidence of L, J and the appellant to be credible. However, the legislation requires the ministry be satisfied that, *in the opinion of a prescribed professional*, the severe impairment directly and significantly restricts a person’s ability to perform DLA either continuously or periodically for extended periods. The panel finds that the ministry reasonably determined that the GP did not provide sufficient evidence to satisfy the ministry that the appellant’s ability to perform

DLA was directly and significantly restricted either continuously or periodically for extended periods. The panel also notes that between March 29, 2016 (the date the PWD application was denied) and the May 11, 2016 reconsideration decision the appellant did not submit additional information from the GP.

The panel acknowledges that the appellant's severe physical and mental impairments restrict her ability to manage DLA. However, in considering the evidence as a whole, particularly the evidence of the GP contained in the PR and AR, the panel concludes that the ministry reasonably determined that the evidence is insufficient to establish that in the opinion of a prescribed professional the appellant's ability to perform her DLAs is directly and significantly restricted either continuously or periodically for extended periods.

Help in Performing DLA

In the AR the GP notes that the appellant is provided assistance from family and friends, but does not offer any additional comments. The combined evidence of the appellant and witnesses L and J indicate that the appellant requires the significant help of another person in order to perform almost all of her DLA on a daily or near-daily basis.

Panel Decision

EAPWDA Section 2(b)(ii) states that in order to meet the final PWD eligibility criterion, namely that a person requires significant help to perform DLA, it must first be established that the person's ability to perform DLA is directly and significantly restricted either continuously or periodically for extended periods. In other words, Subsection 2 (b)(ii) can only be met if Subsection 2 (b)(i) has first been met. For the reasons provided above Subsection 2 (b)(i) has not been established in the appellant's circumstances. The panel therefore finds that the ministry reasonably concluded that because DLA were determined not to be directly and significantly restricted, it cannot be determined that significant help is required from other persons.

Conclusion

The panel acknowledges that the appellant suffers from severe physical and mental impairments that negatively affect her ability to perform DLA and cause her to require help in performing DLA. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision and the appellant is not successful in her appeal.