

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 July 26, 2016 which held that the appellant did not meet 2 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years. The ministry was satisfied that the appellant has a severe mental impairment. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe 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 those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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

Information before the ministry at reconsideration

- A PWD application, comprised of a 3-page typewritten Self-report (SR) dated September 2, 2015, as well as a Physician Report (PR) and an Assessor Report (AR) both dated March 8, 2016 and completed by a general practitioner (GP) who had known the appellant for 3 months and seen the appellant 2 to 10 times in the past 12 months.
- An updated 3-page typewritten SR (updated SR), which was received by the ministry on March 29, 2016.
- A 2-page typewritten reconsideration submission from the appellant dated July 4, 2016.
- A 2-page Electroencephalogram Report (EO Report) with date of study April 13, 2016.
- Copy of a drugstore Personal Medication History for the appellant.
- July 12, 2016 letter from the appellant's psychiatrist.

Information provided on appeal

The appellant provided a 2-page typewritten letter dated August 3, 2016 by the GP which describes the appellant's functioning and need for assistance with DLA. The appellant and her mother explained that the information provided by the GP in the PWD application was based on two brief visits with the appellant while she was in hospital following her first seizures, and that this letter represents a more accurate and updated assessment of the appellant's functioning. The ministry objected to the letter being admitted into evidence on the basis that the information therein is very different from the information available at reconsideration.

Section 22(4) of the Employment and Assistance Act (EAA) limits the evidence that the panel may admit to information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration. The panel determined that the information provided in the GP's letter is substantially different from the information previously provided by the GP, as the GP reports the need for the continuous assistance from another person with all aspects of DLA, including DLA tasks for which the GP previously indicated that the appellant either required periodic or no assistance. As the information provided by the GP in this letter substantially conflicts with the information he previously provided, the panel finds that the letter is not admissible under section 22(4) of the EAA as it is not in support of the information before the ministry at reconsideration.

The ministry did not provide additional evidence on appeal, and relied on its reconsideration summary.

Summary of relevant evidence

Diagnoses

The GP diagnoses neuropathic chronic pain syndrome (following a motor vehicle accident (MVA) in

June 2014), depression (treated reasonably effectively until MVA), Post-Traumatic Stress Disorder (PTSD), and seizure disorder NYD.

Physical Impairment

In the PR and AR, the GP provides the following information.

- The appellant is able to:
 - walk 4+ blocks unaided (very slowly);
 - climb 5+ steps unaided (slowly);
 - lift under 5 lbs.; and,
 - remain seated less than 1 hour.
- Walking indoors is managed independently. “Periodic assistance from another person is almost required for walking out of doors, climbing stairs, standing, lifting and carrying except for very light activities. Anything approaching normal to heavy activities would require continuous assistance. Periodic assistance clearly required more than half the time.”
- A combination of depression, PTSD, chronic pain and seizure disorder contribute to significant mental and physical impairment.
- May be dealing with psychogenic seizures. Regardless of origin, the seizures do cause significant impairment.

The EO Report Interpretation states “The recording is within normal limits. Two seizure-like events were captured. Based on the clinical and electroencephalographic findings, these spells are almost certainly psychogenic nonepileptic (sic) seizures.” Suggest patient be seen by a psychiatrist as well as through mental health for counselling. No anti-seizure medications were suggested.

In her SR and updated SR, the appellant reports that as a result of her 2014 MVA, she has constant extreme lower back pain and almost continuous back muscle spasms. Due to the pain, she frequently faints and is continuously nauseous with frequent vomiting. She has not been able to work since the MVA due to these symptoms. She cannot stand at the sink, counter, or stove for more than 5 minutes at a time. She is terrified that she will fall and not be able to get up off of the floor.

In her reconsideration submission, the appellant reports that she averages two seizures a day and because of this she cannot be left alone or safely leave her home. She cannot walk 4+ blocks unaided or safely climb 5+ steps unattended. Performing the simplest of tasks causes her neuropathic pain to become extreme, which causes a seizure. Medications do not help psychogenic seizures which are due to three factors: neuropathic pain + PTSD + stress (from seizures, depression, poor memory, lack of money etc.). She is not physically or mentally capable of functioning independently at this time, or in the foreseeable future.

At the hearing, the appellant’s mother stated that despite ongoing treatment, including surgery three weeks ago which was intended to reduce pain, the appellant’s neuropathic pain, which is caused by damage to the nerves in her lower back, has worsened since the PWD application was completed, though her seizures have been reduced to two per week since that surgery. The appellant’s mother stated that for the last two years she has spent 80% of her time away from her own community to assist her daughter who cannot be left alone due to her condition and that friends also stay with the

appellant.

DLA

In the July 12, 2016 letter, the psychiatrist writes that the appellant's emotional difficulties have significantly impacted on areas of her functioning, and most importantly her occupational functioning. She could not cope at work because of her chronic pain and emotional problems.

The GP provides the following information.

- The appellant has been prescribed medications that interfere with her ability to perform DLA.
- Level of functioning in terms of activities of daily living are severely impaired.

Move about indoor/outdoors

- As described under the heading Physical Impairment.

Personal care

- Dressing, grooming, and bathing require periodic assistance from another person.
- Toileting, feeding self, regulate diet, transfers (in/out of bed and on/off chair) are independently managed.

Basic Housekeeping

- Laundry and basic housekeeping require continuous assistance from another person.

Shopping

- Going to and from stores requires periodic assistance from another person.
- Carrying purchases home requires continuous assistance from another person.
- Reading prices and labels, making appropriate choices, and paying for purchases are managed independently.

Meals

- All tasks are managed independently - meal planning, food preparation, cooking, and safe storage of food.

Paying Rent and Bills

- All tasks are managed independently – banking, budgeting, and pay rent and bills.

Medications

- All tasks are managed independently – filling/refilling prescriptions, taking as directed, and safe handling and storage.

Transportation

- Independently gets in and out of a vehicle.
- Requires periodic assistance of another person for using public transit and transit schedules/arranging transportation.

Social Functioning

- Marginal functioning with both immediate and extended social networks.
- Four aspects require periodic support/supervision – appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, and able to secure assistance from others. The remaining aspect, able to deal appropriately with unexpected demands, requires continuous support/supervision.

Need for Help

The GP reports that assistance is provided by family, health authority professionals, and community service agencies. No assistive devices are used and the appellant does not require an assistance animal.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that:

- a severe physical impairment was not established;
- the appellant's daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not requires help, as it is defined in the legislation, to perform DLA?

Relevant Legislation

EAPWDA

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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



(iii) the services of an assistance animal.

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

EAPWDR

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

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

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Severe Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed

professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define “impairment”, the PR and AR define “impairment” as a “loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.” While this is not a legislative definition, and is therefore not binding on the panel, in the panel’s opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

The legislation does not require the existence of both a severe physical and a severe mental impairment, as either is sufficient to meet this legislative criterion, and the ministry determined that the appellant has met this criterion having been satisfied of a severe mental impairment. However, the panel will still consider the reasonableness of the ministry’s determination that a severe physical impairment was not established.

Physical Impairment

The appellant’s position is that she is severely physically impaired by her medical conditions.

The ministry notes that the GP does not describe how much less than 1 hour the appellant can remain seated or how much longer than typical walking and climbing stairs take. Also, the ability to walk 4+ blocks unaided and climb 5+ steps unaided is not indicative of a severe impairment of physical functioning. While the GP identifies the need for periodic to continuous assistance in the AR for walking outdoors and climbing stairs, he also indicates the ability to walk 4+ blocks and climb 5+ steps, both unaided. The GP’s statement that the combination of physical and mental conditions contribute to significant mental and physical impairment does not describe limitations with mobility, physical ability, or functional skills. The ministry acknowledges that the appellant is limited with regards to her ability with lifting, but concludes that the medical information and that provided by the appellant does not establish a severe impairment of physical functioning.

Panel Decision

The appellant is diagnosed by the GP with neuropathic chronic pain syndrome and seizure disorder. The appellant reports that she cannot safely walk or climb stairs unattended. The GP reports that the appellant can remain seated less than 1 hour, lift less than 5 lbs., walk indoors independently, walk 4+ blocks unaided (very slowly), and climb 5+ steps unaided (slowly), and that no assistive devices are required. The GP also reports that periodic assistance from another person is required more than half the time for walking outdoors, climbing stairs, and lifting/carrying/holding and that continuous assistance is required with normal to heavy activities. Based on this information, it appears that assistance, periodic or continuous, is required for distances greater than 4+ blocks, climbing more than 5+ steps, and lifting more than 5 lbs. The panel finds the ministry reasonable to conclude that

the ability to walk 4+ blocks unaided and climb 5+ steps unaided is not indicative of a severe impairment of physical functioning. Additionally, as the ministry also notes, it is unclear for how much less than 1 hour the appellant can remain seated.

Based on the above analysis, the panel finds that the ministry has reasonably determined that the information provided by the appellant and the health care professionals establishes limitations to functioning, a severe impairment of physical functioning has not been established.

Restrictions in the ability to perform DLA

The appellant's position is that the information originally provided by the GP was not accurate and that the information provided in the letter submitted on appeal establishes that her ability to perform DLA is significantly restricted.

The ministry notes that the legislation requires restrictions be both significant and either continuous or periodic for extended periods. While the legislation does not specifically require the frequency and duration of restrictions be explained, the minister finds this information valuable in determining the significance of the restrictions. The GP does not describe the frequency or duration of the periodic assistance from another person identified as required for certain DLA tasks and indicates that the appellant is independent with the majority of listed daily activities. The ministry concludes that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

As the GP's letter provided on appeal was not admitted into evidence and the information provided by the psychiatrist does not address the ability to perform DLA, the panel's analysis will be focus on the information provided by the GP in the PWD application.

The GP identifies the need for periodic assistance with some of the tasks of the DLA personal care (dressing, grooming, and bathing), shopping (going to and from stores), and transportation (using public transit and using transit schedules). The GP does not indicate how often or for what duration periodic assistance is required for these activities in order to determine if the restrictions are for extended periods. Respecting the DLA move about outdoors and indoors, as previously discussed, assistance ranging from periodic to continuous is required for walking outdoors for distances longer

than 4+ blocks and the appellant independently manages walking indoors. While the GP describes the frequency for the need for assistance with mobilizing outdoors, again, there is no description of the duration of the assistance required.

The GP identifies the need for continuous assistance with both listed tasks of the DLA basic housekeeping (laundry and basic housekeeping) and for one task of the DLA shopping (carrying purchases home).

Other than the above noted restrictions, the appellant is reported as independently managing all other tasks listed for the 8 prescribed DLA that are applicable to a person with a physical or mental impairment – 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, and manage personal medication.

With respect to the 2 DLA relating to a person with a mental impairment – make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively, with the exception of requiring continuous support/supervision to deal with unexpected demands, the appellant is reported as requiring periodic support/supervision or as independent. Again, the information provided by the GP does not establish the need for periodic support/supervision as relating to periodic restrictions which are for extended periods.

Based on the information provided by a prescribed professional, in this case, the GP, and the above analysis, the panel finds that the ministry reasonably determined that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that due to her physical and mental impairments, she requires the continuous assistance and supervision of another person.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds

that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)((b)(ii) of the EAPWDA.

Conclusion

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, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.