

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of July 14, 2016, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report form dated January 16, 2016 ("SR"), a physician's report ("PR") and an assessor's report ("AR"), both completed by the appellant's physician (the "physician") on January 13, 2016.
- Letter from the appellant's physician dated June 15, 2016 (the "physician's letter").
- The appellant's Request for Reconsideration ("RFR") form dated June 21, 2016.

Diagnoses

- In the PR the physician diagnosed the appellant with osteoporosis, glaucoma, anxiety, and osteoarthritis noting a date of onset being "multiple years". The physician indicates that the appellant has been his patient for 5 years and he has seen her 2 to 10 times in the past 12 months.
- For Section B – Mental or Physical Impairment in the AR, the physician indicates that the appellant's mental or physical impairments that impact her ability to manage DLA are low vision and anxiety.
- The physician's letter indicates that the appellant has long-standing glaucoma, cataracts, photophobia, osteoarthritis, reactive anxiety and depression, and is compliant with medical therapy of same.

Physical Impairment

- In the Health History portion of the PR, the physician states that the appellant has glaucoma. He indicates that her height and weight are not applicable.
- In terms of physical functioning, the physician reported in the PR that the appellant can walk 1 to 2 blocks on a flat surface unaided, can climb 2 to 5 steps unaided, can lift 5 to 15 pounds and can remain seated less than 1 hour.
- In the AR the physician reports that the appellant independently manages walking indoors, lifting and carrying and holding but requires continuous assistance from another person with walking outdoors, climbing stairs and standing, commenting that the appellant has pain with movement secondary to osteoarthritis and that her hands swell.
- In the SR the appellant states that her conditions are continuously getting worse. She has cataracts, glaucoma and her eyes are very sensitive to light and her vision is diminishing rapidly. She reports that she has had 2 surgeries over the last few years and although her sight has improved slightly, she realizes that eventually she will barely be able to see or be blind. The appellant states that she suffers from osteoarthritis that causes her hands and legs to swell and ache and that she is in constant pain from degenerating discs in her low back. The appellant states that her pain is constant and that she cannot sit or stand for any length of time as it becomes painful and she has to move around. She reports that sleeping is also difficult due to pain and swelling.

The physician's letter indicates that the appellant reports that on 4/7 days she has trouble sitting and standing and has muscle cramps in her legs and hands, particularly with preparing food. The appellant also reports intermittent nausea which contributes to weight loss and weakness.

Mental Impairment

- In the Health History portion of the PR, the physician states that the appellant has long-standing anxiety.
- In the Functional Skills portion of the PR, the physician indicates that there are difficulties with communication other than a lack of fluency in English, but the physician does not specify the cause. The physician did not check off the box indicating that the appellant has significant deficits with cognitive and emotional function but checked off the boxes indicating that there are deficits evident in the areas of perceptual psychomotor and emotional disturbance.
- In the AR the physician indicates that the appellant's ability to communicate with speaking, reading, writing, and hearing are satisfactory. He explains that these areas are impaired by chronic sleep deprivation, decreased attention and poor memory.
- In the AR the physician indicates that the appellant has major impact to 10 areas of cognitive and emotional functioning being bodily functions, emotion, impulse control, insight and judgment, attention/concentration, executive, memory, motivation, other neuropsychological problems and other emotional or mental problems, noting that she has panic attacks. The physician indicates that she has moderate impacts to consciousness and language, and no impact in the areas of motor activity and psychotic symptoms.
- In the SR the appellant states that the worry over her diminishing eyesight raises her anxiety levels. She reports that her physical conditions cause her anxiety, which is high at the best of times and her sleep is disrupted because of anxiety. She states that on her worst days she does not go out as she is fearful of having a panic attack so she isolates at home and waits until it passes.

DLA

- In the PR, the physician indicates that the appellant has not been prescribed any medication and/or treatments that interfere with her ability perform DLA.
- In the PR the physician did not check off the box to indicate that the appellant's impairment directly restricts her ability to perform DLA. He indicates that the appellant's personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, mobility outside the home and management of finances are not restricted. He indicates that use of transportation is restricted. He did not check off the box to indicate that the appellant's social functioning is restricted but then comments below that her social functioning is impacted by severe anxiety.
- In the AR the physician indicates that with respect to personal care the appellant is independent with toileting, requires periodic assistance with transfers in/out of bed and transfers on/off of chair, and takes significantly longer than typical with dressing, grooming and bathing. The physician indicates that the appellant requires continuous assistance with laundry and basic housekeeping. With respect to shopping, the physician indicates that the appellant is independent with going to and from stores and reading prices and labels, takes significantly longer with making appropriate choices and requires periodic assistance with paying for purchases and carrying purchases home. The physician indicates that the appellant requires periodic assistance from another person with meal planning, food preparation, and cooking, but is independent with safe storage of food. The physician indicates that the appellant requires periodic assistance with all aspects of paying rent and bills, filling/refilling prescriptions and safe handling and storage of medications but is independent with taking

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medications as directed. With respect to transportation the physician indicates that the appellant requires periodic assistance with getting in and out of a vehicle and continuous assistance with using public transit and using transit schedules.

- The physician indicates that the appellant requires periodic supervision with all aspects of social functioning. He indicates that she has marginal functioning with respect to her immediate and extended social networks.
- In the SR the appellant states that on her worst days she is unable to move around at all and can't go out as she tires quickly walking, she can't shop because her hands are so swollen she can't hold on to anything, and that pain and swelling prevent her from cooking, doing housework, and having showers. The appellant states that she does not like being around a lot of people as her anxiety begins to escalate and she has gotten off buses, as she has felt crowded in and on the verge of a panic attack. She states that she is unable to work because of her anxiety, loss of sight and pain and swelling of hands and legs.
- In the RFR, the appellant indicates that her situation is only getting worse as time goes by. She states that doing daily life chores is becoming more and more difficulty and her eyes are becoming worse so she can't really see clearly.

Help

- In the PR and the AR, the physician reports that the appellant may benefit from a community support worker. In the AR the physician indicates that the appellant receives assistance from friends.
- The physician indicates that the appellant does not require any prosthesis or aids or the use of an assistance animal.

Additional information provided

In her Notice of Appeal the appellant states that osteoporosis and osteoarthritis affects her ability to complete many tasks on her own. On her worst days she cannot complete the simplest tasks. The appellant states that her mental health seriously affects her ability to access public transportation and her thought processes. She states that as she ages she has noticed that her condition worsens.

At the hearing the appellant stated that on good days she is okay but on painful days she is often over a basket or the toilet bowl in the morning due to severe nausea, has a hard time keeping food down but tries to keep a positive attitude. She reports that she is very stiff and has constant pain in her hands and legs and cannot get comfortable in any position. She lives in a rooming house on the main floor and is not even able to keep her small room clean. She reports that there is another woman who lives in another room upstairs who will sometimes help her but the appellant is a private person and has a hard time asking for help. The appellant reports that she will bag the garbage but someone else at the rooming house takes the garbage out.

At the hearing the appellant's advocate provided oral testimony that the appellant is obviously disabled because of her osteoporosis, glaucoma, anxiety, and osteoarthritis. He also stated that she has symptoms of fibromyalgia although he is not certain if that diagnosis has been made. The advocate reported that although the physician has been the appellant's doctor for five years he did not talk to the appellant prior to completing the PR and the AR and his assessments indicating that she is quite independent are not very accurate. The advocate stated that he provided the physician with a sample PWD application and advised that it needs to be completed in the appellant's "worst

case scenario” but that the physician did not do that. The advocate reports that the appellant has daily nausea due to anxiety and depression and that the ministry’s denial of PWD designation based on information from the physician that the appellant can walk 1 to 2 blocks unaided is too restrictive. The advocate states that the appellant does not have a bus pass and when she runs out of money she has no choice but to walk to the store to buy milk or other groceries, despite her pain and restrictions. The advocate states that the appellant is not independent with stairs and needs to hold on to the railing. The advocate states that the EAPWDA is a little too strict and that the ministry needs to delve into the appellant’s situation a bit more and will clearly see that she should receive PWD designation.

Admissibility of New Information

The ministry did not object to information in the Notice of Appeal, the appellant’s oral evidence or the advocate’s oral evidence. The panel has accepted the information in the Notice of Appeal, the appellant’s oral evidence and the advocate’s oral evidence, as it is information in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information provides further explanation about the appellant’s medical condition and impacts on her DLA.

At the hearing, the ministry relied on the reconsideration decision.

PART F – Reasons for Panel Decision

The issue on this 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 the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help 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 section 2(1):

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.

Severe Physical Impairment

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. The ministry's position is that a diagnosis of serious medical conditions does not in itself determine PWD eligibility or establish a severe impairment. The ministry states that in order to assess the severity of a physical impairment the ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations/restrictions in mobility/physical ability/functional skills.

The ministry's position is that although the physician in the AR indicates that the appellant requires continuous assistance with walking outdoors and climbing stairs due to pain, it is unclear why this assistance is required or the amount that is being provided given that the same physician in the PR reports that the appellant can walk 1 to 2 blocks unaided and climb 2 to 5 stairs unaided and uses no assistive devices. The reconsideration decision states that it is also unclear about the level of periodic assistance that is required and the level of impairment that the appellant experiences with DLA.

The ministry's position is that the functional limitations reported by the physician demonstrate that the appellant experiences limitations to her physical functioning due to her medical conditions but that the assessments provided by the physician are not considered indicative of a severe impairment of physical functioning.

The appellant's position is that she has a severe physical impairment of osteoporosis and osteoarthritis that cause her constant pain with walking and make it difficult to complete household tasks. The appellant's position is that her glaucoma causes vision problems and her conditions are

getting worse as she gets older. The appellant's position as set out by the advocate is that although the information provided by the physician has some inconsistencies and does not accurately describe the appellant's situation, it is ludicrous that the appellant would not be accepted for PWD designation as it is clear that she is severely disabled.

Panel Decision

A diagnosis of a serious medical condition 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. Likewise the use of the word "severe" in and of itself does not establish a severe impairment.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional.

The panel finds that while the appellant has some functional limitations due to her osteoporosis, osteoarthritis, and glaucoma, the ministry reasonably determined that the information provided in the PR which indicates that the appellant is able to walk 1-2 blocks unaided on a flat surface, can climb 2 to 5 steps unaided, can lift 5 to 15 pounds and can remain seated less than one hour, is not indicative of a severe physical impairment. The panel notes that the information provided by the physician in the PR and the AR is not consistent as it is not clear why the appellant requires continuous assistance with walking outdoors, climbing stairs and standing, as reported in the AR, given the functional skills reported in the PR.

Although the physician's letter indicates that the appellant reported to the physician that she has trouble sitting, standing, muscle cramps in her legs and hands on four of seven days, the physician does not provide any further information to indicate that her functional skills are more limited than he previously indicated or that his opinion with respect to the appellant's restrictions to DLA has changed. While the appellant states that her conditions are getting worse, the physician does not confirm this information.

Although the advocate argues that the ministry ought to look beyond the information provided by the physician and delve into the appellant's situation further, the panel finds that the ministry did consider all of the information provided and reasonably determined that the information from the prescribed professional, the physician, does not provide sufficient information to determine that the appellant's physical impairment is severe. The appellant and her advocate stated that they understood that the information provided by the physician was inconsistent and not sufficient and while the information provided may not accurately describe the appellant's condition, the ministry's primary information source comes from the PR and the AR.

Taking all of the foregoing into account the panel finds that the ministry was reasonable in determining that the physical limitations reported speak to a moderate rather than severe physical impairment.

Severe Mental Impairment

The ministry's position is that although the physician has reported cognitive and emotional deficits with depression, anxiety and visual/spatial he has not confirmed that they are significant, and does not identify deficits in any other areas. The ministry notes that in the AR the physician reports major impacts with the majority of the appellant's cognitive and emotional functioning and that the appellant has severe anxiety and panic attacks. The ministry's position is that while the physician reports major impacts with the appellant's mental functioning, it is unclear why the PR and the AR differ so significantly in this area and why this level of deficit does not appear to extend into the appellant's ability to manage her DLA. Given these inconsistencies the ministry's position is that it is unable to conclude that the appellant has a severe mental impairment.

The appellant's position is that she has severe anxiety and panic attacks that cause her to isolate at home. She states that the combination of her pain and anxiety prevent her from working. The appellant's position as argued by the advocate is that the ministry ought to look beyond the inconsistencies in the PR and the AR and see that the appellant is disabled within the meaning of the legislation.

Panel Decision

While the ministry notes that the physician did not, in the PR, check off the box to indicate that the appellant has significant deficits with cognitive and emotional function, the physician has indicated that the appellant has deficits in the areas of perceptual psychomotor and emotional disturbance. The panel notes that the information provided in the AR is very different than the PR, as the physician in the AR reports that the appellant has major impacts to 10 areas of cognitive and emotional function being bodily functions, emotion, impulse control, insight and judgment, attention/concentration, executive, memory, motivation, other neuropsychological problems and other emotional problems. In the AR, the physician indicates that the appellant has moderate impacts in the areas of consciousness and language and no impact in the areas of motor activity and psychotic symptoms. In the AR the physician also notes that the appellant has panic attacks.

While the information in the AR is more consistent with the information provided by the appellant regarding her mental impairment, the physician has not provided any further information to explain the significant inconsistencies between the information provided in the PR and the AR. Given these inconsistencies, the panel finds that the ministry was reasonable in determining that it was difficult to assess the severity of the appellant's mental impairment.

While the appellant indicates that she is unable to work because of the pain and anxiety she experiences, the panel notes that employability is not a criterion for determination of a person's PWD eligibility.

Taking all of the foregoing into account the panel finds that the ministry was reasonable in determining that the information provided does not establish that the appellant has a severe mental impairment.

Significant Restrictions to DLA

The reconsideration decision states that the ministry is not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA continuously or periodically for extended periods.

The ministry's position is that the prescribed professional's opinion is fundamental in the determination of whether the ministry is satisfied that the appellant's impairment directly and significantly restricts DLA's. The ministry states that the physician reports that the appellant is only restricted with her use of transportation and that while her anxiety is reported to be severe and that she may benefit from a community support worker, all other DLA are reported not to be significantly restricted. The ministry notes that the physician does report that the appellant takes significantly longer with dressing, grooming and bathing, and making appropriate choices and that she needs periodic assistance in many areas, but that the physician does not provide any detail on the amount of assistance she requires or receives or how often she requires assistance. The ministry's position is that the lack of information from the physician makes it difficult to establish the appellant's level of restriction with her DLA's. The ministry's position is that although the appellant has a visual impairment and has troubles with some of her activities; the information provided does not demonstrate that she has a direct and significant restriction to her ability to perform DLA's continuously or periodically for extended periods.

The appellant's position is that although the information provided by the physician is not consistent, the ministry should look at all of the information provided, including the SR and her evidence and find that she does have a severe impairment that does restrict her DLA. The advocate argues that it is ludicrous that the appellant would not qualify for PWD designation given her constant pain and restrictions. The appellant argues that she lives in a small room in a rooming house and due to her physical and mental impairment is unable to even keep her small room clean. The appellant argues that her pain restricts her from walking, shopping, cooking, housework and taking showers is painful. The appellant's position is that her anxiety keeps her isolated and she has difficulty in crowds due to panic attacks so her social functioning is significantly impacted.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one, which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

In the PR the physician does not indicate that the appellant has an impairment that directly restricts the appellant's ability to perform DLA. The physician indicates that the appellant's use of transportation is restricted but all other listed DLA of personal self care, meal preparation,

management of medications, basic housework, daily shopping, mobility inside the home, mobility outside the home and management of finances are not restricted. The physician did not indicate whether the appellant's social functioning was restricted but notes that she has severe anxiety.

In the AR the physician indicates that the appellant is independent with tasks of toileting, going to and from stores, reading prices and labels, safe storage of food and taking medications as directed. The physician indicates that she takes significantly longer with dressing, grooming, bathing, and making appropriate choices with shopping but he does not indicate how much longer that typical it takes the appellant to perform these tasks. In the AR, the physician indicates that the appellant requires continuous assistance with laundry and basic housekeeping and that she requires periodic assistance with feeding self, transfers in/out of bed, transfers on/off of chair, paying for purchases, carrying purchases home, meal planning, food preparation, cooking, banking, budgeting, paying rent and bills, filling/refilling prescriptions, safe handling and storage of medications and all aspect of social functioning.

While the information provided in the AR is more consistent with the information provided by the appellant, the physician has not provided any information about the frequency or duration of the assistance that the appellant requires. In addition, the physician has not provided any information to explain the significant inconsistencies between the PR and the AR, especially considering that the forms were completed at the same time. Although the physician's letter indicates that the appellant reported to him that she gets cramps in her hands when preparing food and intermittent nausea which contributes to weight loss and weakness the physician did not provide any further information to explain the inconsistencies between the information provided in the PR and the AR.

The physician's letter provides a little more information regarding the appellant's difficulty with preparing food because of cramps in her hands, but the physician did not provide additional information regarding the frequency or duration of assistance needed with DLA, or further information to explain the inconsistencies between the information in the PR and the AR.

While the appellant argues that the AR and her evidence should be preferred over the PR, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods as required by EAPWDR section 2(2)(b).

Help with DLA

The ministry's position is that, as it has not been established that DLA are significantly restricted; therefore, it cannot be determined that significant help is required from other persons.

The appellant's position is that she requires assistance from a community support worker and needs help with DLA including cooking, shopping, and cleaning.

Panel Decision

The physician indicates that the appellant receives assistance from friends and may benefit from a community support worker. The physician indicates that the appellant does not require any prostheses or aids for her impairment and does not have an assistance animal.

However, while the appellant may benefit from a community support worker and help from friends, a finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. As the panel finds that the ministry reasonably determined that the appellant does not have a severe impairment that directly and significantly restricts the appellant's ability to manage her DLA either continuously or periodically for an extended period of time, the necessary precondition has not been satisfied in this case.

The panel finds that the ministry's decision that the appellant did not satisfy the legislative criteria of EAPWDA section 2(3)(b) was reasonable.

Conclusion

The panel acknowledges that the appellant has serious medical conditions that impact her functional limitations and makes it more difficult to complete her 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 reasonable based on the evidence and 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.