

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated August 9, 2016 which found that the appellant did not meet all of the statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a Person With Disabilities (PWD). The ministry found that the appellant met the age requirement and that she has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

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

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – Summary of Facts

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:
 - The Applicant Information and Self-report ("SR") completed by the appellant and dated February 25, 2016;
 - The Physician Report ("PR") dated March 9, 2016 and the Assessor Report ("AR") dated March 9, 2016, both prepared by the appellant's general practitioner ("GP") of 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 an "office interview with applicant and file/chart information";
2. Letter from the GP signed and dated February 24, 2016 which states that the appellant cannot work due to pain;
3. 3-page additional SR that is not signed or dated. In it the appellant describes her symptoms, limitations, the help she requires, her emotional/mental stated and the medications she uses to manage her pain.
4. Letter from the GP signed and dated July 15, 2016 which states that the appellant has on-going back problems which limit her ability to bend, stand and lift, she needs help with laundry and basic housework and that she cannot continuously walk for 100 metres.
5. Letter from the GP signed and dated July 18, 2016 which states that the appellant has joint pain, she can lift 15-20lbs, stand 45 minutes to 1 hour with breaks, uses side rails for climbing stairs, experiences tightness and pain when sleeping and cannot hold down a job.
6. 2-page diagnosis from a chiropractor signed but undated, which states that the appellant has degenerative disc facet joint OA.
7. MRI test results signed and dated March 5, 2016 which rule out spinal stenosis;
8. A second MRI test results signed and dated March 5, 2016 which rule out spinal stenosis;
9. CT scan results signed and dated February 11, 2016;
10. Medical report – employability, signed and dated March 14, 2016, which indicates the appellant's limitation as bending and lifting and does not specify the duration of the appellant's medical condition;
11. Investigation results dated April 6, 2016 which indicate that there is no surgical solution for the appellant;
12. Request for Reconsideration (RFR) signed and dated July 26, 2016 which describes her health complications, pain management, support letters from her GP, medical reports and summarizes her SR and additional SR. The appellant states that all of this information must be considered as a whole in the application process.

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with Muscular Skeletal Back Pain and Hepatitis C with no date of onset for either condition.

Physical Impairment

In the SR, the appellant describes her disability as including back pain and experiences difficulty with personal daily activities.

In the PR, the GP states that the appellant has back pain with pain in both legs. The GP indicates that the conditions are likely to continue for 2 years or more, the appellant can walk 4+ blocks unaided on flat surfaces, climb 5+ stairs, lift 5-15lbs, can remain seated for less than 1 hour and did not indicate if she has difficulties with communication. The GP adds that the appellant has not been prescribed any medication or treatment that interfere with her ability to perform DLA's and does not require any prostheses or aids for her impairment but does use a hearing aid.

In the AR, the GP reports that the appellant takes significantly longer with walking outdoors, climbing stairs, standing, lifting, and carrying and holding. The panel notes however that the GP has not indicated whether the appellant is independent with these tasks or if she requires assistance, either periodic or continuous, or how much longer it takes the appellant to complete these tasks.

Mental Impairment

In the SR and additional SR the appellant states she is depressed, lacks motivation and is anxious due to her pain.

In the PR, the GP has not diagnosed the appellant with a mental disorder and did not answer the question of whether the appellant has any significant deficits with cognitive and emotional function but did check off the boxes next to emotional disturbance, motivation and impulse control and added "patient prone to anxiety and depression".

In the AR, the GP notes that the appellant's ability to speak, read and write are good but hearing is poor. In response to the question whether the appellant is impacted by way of a mental impairment or brain injury the GP indicates a major impact in the area of emotion, a moderate impact in the area of motivation and all others listed areas in this section have either a minimal impact or no impact. The GP also notes that the appellant is independent with good functioning in all aspects of social functioning listed on the PWD application.

Daily Living Activities

In the SR, the appellant describes that she needs on-going assistance with DLA from her spouse.

In the PR, the GP has indicated that the appellant is continuously restricted with mobility outside the home and periodically restricted with personal self-care, basic housework and daily shopping with no explanation provided.

In the AR, the GP indicates that the appellant is independent in all listed tasks of daily living except, dressing, bathing, toileting, laundry, basic housekeeping, carrying purchases home, meal planning, food preparation, cooking, getting in and out of a vehicle and using public transit which are all described as being periodically restricted without indicating the frequency or duration of the restriction.

Need for Help

In the SR, the appellant states she requires help from her spouse and daughter. In the PR, the GP notes that the appellant requires a hearing aid. In the AR, the GP indicates that the appellant receives help required for DLA from family members and friends.

Evidence On Appeal

A notice of appeal (NOA) signed and dated August 16, 2016. Included with the NOA was a signed letter from the appellant's advocate which argues that the SR and letters from the GP support PWD eligibility.

Prior to the hearing the appellant submitted the following evidence:

1. Canada Diagnostic Centres – pain management sheet;
2. 4-page, signed but not dated, letter from the appellant's spouse, which describes the appellant's physical and mental challenges and the ways in which he helps her with her DLA;
3. Letter from the GP, signed and dated September 6, 2016 which describes new measures taken for pain management, that she is unable to work, unable to work at home and is depressed;
4. 5-page, signed but not dated, letter from the appellant in which she describes her medical conditions and symptoms, how they affected her and her ability to perform her DLA, and the help she requires;
5. 2-page list of the medication that have been prescribed to the appellant from January 19, 2016 to September 6, 2016;
6. Prescription for a back brace dated August 8, 2016;
7. Exam preparation instructions;
8. Letter from the GP, signed and dated September 1, 2016, which indicates that the appellant is unable to work from September 1, 2016 to October 3, 2016; and
9. An email from the appellant's son, dated September 7, 2016, which expresses the son's concerns for the challenges the appellant faces.

Evidence At Hearing

The appellant's witness (her spouse) reiterated the information presented in his 4-page letter that was submitted prior to the hearing and stated that:

- 75%-80% of the household tasks are completed by him, including the appellant's personal care, and the remaining tasks are completed by the appellant and her daughter;
- 2-3 times per week the appellant's legs will give-out when she's walking. At that point she must sit and have her feet, legs and back rubbed before she is able to walk again;
- Due to pain the appellant is unable to work. Since she takes many medications and cannot walk much, money is spent on taxis and prescriptions. As a result there is a financial strain on

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- the family who also support one dependent child; and
 - The appellant is suicidal.

The appellant reiterated the information in her SR and additional SR and stated that:

- There is sufficient evidence to support a claim for PWD designation;
- The GP and specialist have given evidentiary letters and support that she cannot complete her DLA or work outside of the home;
- Her back is inoperable, though injections may help, medication does not and makes her tired;
- Her spouse helps her with all her DLA all of the time and this causes feelings of helplessness and depression. At times she feels suicidal;
- After 14-years of suffering from pain she now has a doctor that has been proactive and has gotten her MRIs, CTs, new pain killers, prescribed a back brace and sought alternative treatment (injections);
- She is off work, which is confirmed by her doctor, and due to the inability to keep up to the demands of her job;
- She is afraid to be alone out of fear of falling or dying;
- Her legs give-out because a disc in her back is pressing up against a nerve and therefore she cannot walk or stand for long periods.

The appellant's advocate highlighted the evidence as presented by the spouse, appellant, and doctors and argued that the evidence establishes that the appellant has met the legislative requirements for PWD designation.

The ministry relied on its reconsideration decision.

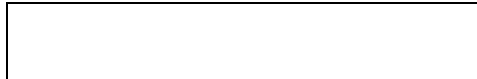
Admissibility of Additional Evidence

On review of the evidence, the panel notes that the additional information provided by the appellant prior to the hearing was not "new evidence" but rather, it specifically related to and referred to the documents that were before the ministry at reconsideration. The panel therefore finds that the appellant's additional evidence is admissible as it is in support of the information and records that were before the minister when the decision being appealed was made, pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

Oral Evidence

The appellant and her spouse gave oral evidence at the hearing. Both described her physical and mental condition, the associated impairment and their impact on her ability to perform tasks of DLA. On review of the evidence, the panel notes that the appellant's spouse's reference to the appellant's suicidality is not in support of or corroborates the evidence that was before the ministry at the time of reconsideration. The panel therefore finds that the appellant's or her spouse's reference to suicide is not admissible as in support of the information and records that were before the minister when the decision being appealed was made, pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

The panel finds that the remaining oral evidence from the appellant and her spouse was not "new evidence" but rather, it specifically related to and referred to the documents that were before the



ministry at reconsideration. The panel therefore finds that the appellant's additional evidence is admissible as it is in support of the information and records that were before the minister when the decision being appealed was made, pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's Reconsideration Decision, which found that the appellant is not eligible for designation as a PWD under section 2 of the *EAPWDA*, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that she has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence 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

At the hearing, the appellant argued that the evidence presented by her GP, specialists, her SR and additional SR, and her spouse's testimony all support the claim of PWD designation.

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 prescribed professionals – in this case, the GP.

Severity of mental impairment

The appellant argued that she suffers from depression, anxiety, impulse control and lack of motivation.

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, in the AR, the GP notes that the appellant's ability to speak, read and write are good but hearing is poor. The GP also notes that the appellant is independent with good functioning in all aspects of social functioning listed on the PWD application. In the AR, the GP indicates a major impact in the area of emotion, a moderate impact in the area of motivation and all others listed areas under cognitive and emotional functioning have either a minimal impact or no impact. In the PR, the GP does indicate that the appellant is prone to anxiety and depression and lacks motivation and impulse control. However, the GP has not diagnosed the appellant with a mental impairment or condition. Without a diagnosis and with good cognitive and emotional functioning, 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 which causes an inability to work, sleep or function in daily life, and that her muscular skeletal back pain constitutes 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 previously, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. The assessment of severity of a physical impairment is largely based on functional ability. The appellant states that she cannot walk for long periods without a break, that her legs give-in so she must sit, and that she must use handrails to climb stairs. She did not speak to her ability to lift or remain seated. In her additional SR the appellant reports that she can walk from her home to town but must take breaks. She also stated that she can lift 15-20lbs and stand for 45 minutes to 1 hour with breaks. In the medical report - employability, the GP states that the appellant is restricted in bending and lifting. However, in the PR the GP, who conducted an office interview, indicated that the appellant can walk 4+ blocks *unaided*, climb 5+ stairs *unaided*, lift 5-15lbs and sit less than 1 hour. In the AR the same GP states that the appellant is independent in walking indoors and takes significantly longer to walk outdoors, climb stairs, stand, lift and carry, and hold but there is no indication as to how much longer or if the appellant is independent in these tasks or requires either periodic or continuous assistance. In the GP's letter dated July 18, 2016, he repeats that the appellant can lift 15-20lbs and stand 45 minutes to 1 hour with breaks.

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

due to her medical condition however the evidence demonstrates that her functional ability is good. Therefore the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment.

Restrictions in the ability to perform DLA

The appellant argues that she is restricted in her ability to perform tasks of DLA due to the pain she suffers.

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

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence of the challenges that she faces with DLA, the legislation is clear that to satisfy the criteria the evidence must come from a prescribed professional. In the present case, this evidence has been provided by one prescribed professional - the GP.

DLA are defined in section 2(1) of the *EAPWDR* and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

The GP addresses DLA's in the PR, AR and the letter dated July 18, 2016. In the PR the GP has indicated that the appellant is continuously restricted in the task of mobility outside the home and periodically restricted in personal self-care, basic housework, daily shopping with no indication of the frequency or duration of the restriction. In the AR, the GP indicates that the appellant is periodically restricting in the tasks dressing, bathing, toileting, laundry, basic housekeeping, carrying purchases home, meal planning, food preparation, cooking, getting in and out of a vehicle, and using public transit with no indication of the frequency or duration of the restriction. In the letter dated July 18, 2016 the GP again states that the appellant is challenged with lifting her grandchild, doing basic housework and needs help with cleaning floors, doing laundry, and packing groceries. However, he does not state that the appellant is restricted in these tasks of daily living continuously or periodically for extended periods and if periodically how often and for what duration. It is reasonable to expect that in order to determine if the appellant is restricted from a task of daily living periodically for extended periods, information regarding the frequency and duration of the restriction ought to be provided. In this case, in the PR, AR and his July 18, 2016 letter the GP does not provide any information regarding the frequency and duration of the appellant's restriction.

In making its decision in this matter the panel must consider the evidence that was provided by the

prescribed professional. In considering the evidence of the GP as set out in the PR, AR and the additional information submitted prior to the hearing, 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 all tasks of DLA with that help coming from her spouse, who does 75%-80% of the appellant's DLA, and her daughter.

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.