

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of July 21, 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:

- Operative report dated July 19, 2011 indicating that the appellant underwent a gastroscopy and colonoscopy
- Letter from a rheumatologist office dated July 21, 2011 confirming the appellant's appointment of December 16, 2011
- Abdominal and Pelvic CT report from a hospital dated August 5, 2011 indicating that the appellant had complete obstruction to the right common iliac artery and recommending a pelvic ultrasound
- The appellant's PWD application form consisting of the appellant's self-report form dated April 28, 2016 ("SR"), a physician's report ("PR") dated April 20, 2016 and an assessor's report ("AR") dated April 28, 2016, both completed by the appellant's general practitioner (the "physician") who has known the appellant for two years and seen the appellant 11 or more times in the last year
- Letter from the appellant dated July 4, 2016 providing additional medical information
- Letter from the physician dated July 4, 2016 inquiring how to proceed to appeal the reconsideration decision
- The appellant's Request for Reconsideration ("RFR") form dated July 11, 2016
- Letter from the appellant's counselor (the "counselor") dated July 7, 2016

Diagnoses

- In the PR the physician diagnosed the appellant with osteoarthritis, lumbar spine scoliosis, degenerative disc disease lumbar spine, fibromyalgia (date of onset indicated to be a long time), alcohol, cannabis, and cocaine use from 1990, depression since 2013 and post-traumatic stress disorder (PTSD) since 2000.

Physical Impairment

- In the Health History portion of the PR, the physician states that the appellant has severe low back pain, tender point pain from fibromyalgia and poor sleep. He also indicates that she cannot stand or sit for long periods. He indicates that the appellant is 5 feet and 4 inches and weighs 140 pounds.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 1 to 2 blocks unaided on a flat surface unaided, can climb 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, walking outdoors, and climbing stairs but indicates that it takes significantly longer than typical. The physician also indicates that the appellant is independent with standing and lifting. The physician indicates that the appellant requires continuous assistance with carrying and holding, explaining that her friend helps her carry groceries.
- In the SR the appellant states that she has lower back pain, poor circulation, right leg numbness after a little bit of walking and poor sleeping due to her back and legs. She explains that at least once a day she is hunched over in a fetal position due to severe back pain. She

also indicates that six years ago she suffered a fall due to her poor balance and injured her right shoulder; and despite surgery, she still cannot raise her right arm without the support of her other arm. She also states that she has a digestion disorder and that every day she is in pain in all or different parts of her body. In particular she states that she has daily right hip pain that makes it hard to sit or stand for long. She also states that she suffers from headaches every day or every few days.

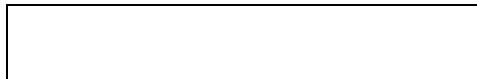
Mental Impairment

- In the Health History portion of the PR, the physician indicates that the appellant has low mood that varies a few times a month (stress related), that she has PTSD from childhood trauma, and frequent panic attacks. He indicates that there are no difficulties with communication other than a lack of fluency in English.
- In the Health History portion of the PR the physician did not check the box indicating that the appellant has significant deficits with cognitive and emotional function but did check off the box indicating that there are deficits in the area of emotional disturbance, commenting that the appellant has depression from chronic pain, poor motivation, anxiety from PTSD, poor sleep and panic attacks.
- In the AR the physician indicates that the appellant's ability to communicate with speaking is good and her ability to communicate with reading, writing, and hearing are satisfactory.
- In the AR the physician indicates that the appellant has major impact to two areas of cognitive and emotional functioning being emotion and attention/concentration; moderate impacts to six areas being bodily functions, executive, memory, motivation, motor activity, and other neuropsychological problems. The physician indicates that she has no impact to the areas of consciousness, impulse control, insight and judgment, language, psychotic symptoms and other emotional or mental problems. The physician comments that the appellant has poor sleep/sleep disturbance, depression and anxiety with a long history of PTSD symptoms, difficulties concentrating, poor memory and motivation (uses cannabis daily), needs someone to help her pay her bills and she tells me that she has a learning disability.

In the letter from the counselor, he indicates that he met the appellant on January 25, 2012 and that the appellant has had consistent appointments since that time. The counselor states that the appellant's post-traumatic stress disorder includes complex trauma, developmental trauma and intergenerational trauma, which have had a major impact on the appellant's quality of life as well as her day-to-day functioning. The counselor states that the appellant's levels of anxiety will often compromise how she expresses herself and how she hears what is being said which undermines her ability to participate in everyday activities, such as being out in public or accurately describing her circumstances. The counselor indicates that the appellant has been making progress managing both her levels of anxiety and depression; however they still continue to limit the quality of her functioning as she has difficulty expressing her thoughts and feelings, her short and often long term memory is often fragmented, and difficulty with recall. The counselor indicates that the appellant often has low motivation and learning difficulties and executive functioning continue to have a major impact on her decision-making.

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, but she takes cannabis for her



chronic back pain and she wants to continue using cannabis indefinitely.

- In the PR the physician indicates that the appellant's impairments do not restrict her ability to perform DLA.
- In the AR the physician indicates that the appellant is independent with all aspects of DLA except paying rent and bills, noting that the ministry pays her rent directly. The physician explains that the appellant struggles getting in and out of bed and on and off of chair and that she requires continuous counseling for PTSD and helping paying utility bills and rent.
- With respect to social functioning, the AR indicates that the appellant is independent with all aspects of social functioning but that she has marginal functioning with respect to her immediate and extended social networks, commenting that she is socially isolated.
- In the SR the appellant states that she has a hard time leaving the house to attend medical appointments or gatherings.

Help

- In the AR the physician explains that the appellant requires ongoing counseling for her PTSD. He also states that help required for DLA is provided by family and health authority professionals. The physician indicates that the appellant feels an electric bed would help her when the pain is severe and makes her immobile.

Additional information provided

In her Notice of Appeal dated August 4, 2016 the appellant states that a detailed explanation of restrictions will be coming from the physician. With her Notice of Appeal, the appellant provided a letter from the physician dated August 4, 2016 (the "physician's letter") in which he states that he was disappointed with the decision to reject the appellant's PWD application. The physician states that the appellant suffers from fibromyalgia, degenerative disc disease, and osteoarthritis of the lumbar and scoliosis, which leave her in constant pain. The physician also indicates that the appellant suffers from moderate to severe depression, PTSD and suicidal ideation, extreme anxiety in social settings and tries to take a support worker with her to appointments as she frequently has difficulty expressing herself and remains uncomfortable around men. The physician indicates that the appellant has been subject to sexual abuse in the past and she has suffered from intergenerational abuse.

The physician indicates that the appellant is unable to do any kind of physical activity without aggravating her existing pain and that if she walks more than 10-15 feet, her pain increases and she will require 30-60 minutes to return to her usual pain levels. She requires a handrail to climb stairs and is unable to sit without constantly changing her position to try and alleviate the increase in her pain. Lifting 5 pounds will also aggravate her pain and require her to take 30-60 minutes to recover to her normal pain levels. Numbness in her right leg puts her at danger of falls. The physician indicates that standing causes her a great deal of pain and the problems standing in line ups impede her ability to do banking, pay bills and fill prescriptions and that engaging in all household tasks for even a few minutes, exacerbates her pain, requiring 1-2 hours to return to her usual pain levels.

The physician indicates that personal grooming, toileting, and dressing all require slow movements so as not to aggravate her pain. Standing, sitting down, getting in and out of the tub, and arm movements required for these tasks all aggravate her pain and put her in danger of falling. She has

difficulty wiping herself when she toilets because of pain caused by twisting her back.

With regards to mental health issues, the physician indicates that the appellant suffers from chronic moderate to severe depression causing extreme sleep disturbance, feelings of hopelessness, a poor memory and a form of inertia particular to people with depression which is sometimes described as a lack of motivation, making it impossible for her to do the simplest of tasks. She has an overwhelming fatigue that she must fight constantly and lack of sleep aggravates her pain. He indicates that she seldom manages to sleep more than two hours at a time. The physician also states that her depression and anxiety at being around people makes any walking outside the house, grocery shopping, and socializing almost impossible and it is a struggle to do any of these things even with the assistance of another person to give her emotional support. She requires from several hours to several days to recover emotionally from her exertions. Due to past experiences the appellant is unable to bathe herself during daylight hours without suffering severe panic attacks and she must wait until the evening to force herself to bathe.

The physician indicates that the appellant's physical disabilities are of a degenerative nature and given her age and the current modalities of treatment available to her, are unlikely to improve and they will get worse with time.

The ministry provided a letter dated August 31, 2016 (the "submission") indicating that at the time of the reconsideration decision there was not enough evidence to determine that the appellant had a severe mental or physical impairment that directly and significantly restricted her daily living activities and that she required assistance with daily living activities as a result of significant restrictions which has now been provided with her written submission. The ministry states that had this information been provided with the RFR, it may have resulted in the ministry making a different decision regarding the appellant's eligibility for PWD designation.

Admissibility of New Information

The ministry did not object to information in the Notice of Appeal or the physician's letter. The panel has accepted the physician's letter as it is evidence 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 physician's medical opinion regarding the appellant's impairments, her ability to perform DLA, and help needed.

The panel has accepted the information in the ministry's submission as argument.

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

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 the information provided by the physician indicates that the appellant is able to independently manage most area areas of mobility and physical ability. Although the physician indicates that the appellant takes significantly longer with walking indoors, walking outdoors, and climbing stairs, no information is provided to explain how much longer the appellant takes to manage these activities. 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 more in keeping with a moderate degree of physical impairment.

The appellant's position is that she has lower back pain, poor circulation, right leg numbness, difficulties with her right shoulder, right hip pain, headaches and a digestive disorder and that she is in pain in all or different parts of her body every day. She states that at least once a day she is in the fetal position due to severe back pain. The appellant's position is that the information provided by the physician establishes that she has a severe physical impairment.

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 PR indicates that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated less than one hour. The AR indicates that the appellant takes significantly longer with walking indoors, walking outdoors and climbing stairs but she is independent with standing and lifting. The AR also indicates that the appellant requires continuous assistance from another person with carrying and holding but the physician did not provide any further information in the PR or the AR to explain how much longer the appellant takes to manage these activities.

In the physician's letter, the physician provides further explanation indicating that the appellant is unable to do any kind of physical activity without aggravating her existing pain and that if she walks more than 10-15 feet, her pain increases and she will require 30-60 minutes to return to her usual pain levels. She requires a handrail to climb stairs and is unable to sit without constantly changing her position to try and alleviate the increase in her pain. Lifting 5 pounds will also aggravate her pain and require her to take 30-60 minutes to recover to her normal pain levels. Numbness in her right leg puts her at danger of falls. The physician indicates that standing causes her a great deal of pain and the problems standing in line ups impede her ability to do banking, pay bills and fill prescriptions and that engaging in all household tasks for even a few minutes, exacerbates her pain, requiring 1-2 hours to return to her usual pain levels. The physician also states that her physical disabilities are of a degenerative nature and will get worse with time.

In the submission the ministry indicates that had the information in the physician's letter been provided at the time of reconsideration, the ministry might have made a different decision.

The panel finds that the additional information provided from the physician in the physician's letter addresses the ministry's questions regarding how much longer it takes the appellant to manage these activities and demonstrates that the appellant is severely limited in her physical mobility, particularly as she can only walk 10-15 feet before experiencing significant pain and needing to rest.

Based on all of the information, the panel finds that the ministry was not reasonable in determining that the appellant does not have a severe physical impairment.

Severe Mental Impairment

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The ministry notes that the physician indicates that the appellant has two major impacts in the areas of emotion and attention/concentration and that the remaining areas are either moderate or no impact. The ministry also notes that the information provided indicates that the appellant has no difficulties with communication and that her ability to speak is good and her ability to read, write and hear is satisfactory. The ministry's position is that the actual functional impacts noted indicate a moderate as opposed to severe impairment of mental functioning.

The appellant's position is that the information provided by the physician and the counselor establishes that she has a severe mental impairment from her depression, PTSD, anxiety and panic attacks.

Panel Decision

In the PR, the physician did not check off the box to indicate that the appellant has significant deficits with cognitive and emotional functioning but he did check off the box indicate that she has deficits in the area of emotional disturbance, commenting that the deficits are from depression from chronic pain, poor motivation, anxiety from PTSD, poor sleep and panic attacks. In the AR, the physician indicates that the appellant has two major impacts in the areas of emotion and attention/concentration but the remaining areas are of moderate to no impact.

The letter from the counselor indicates that the appellant's PTSD has a major impact on the appellant's quality of her life and her daily functioning explaining that her anxiety levels will often compromise how she expresses herself and how she hears what is being said. However, the counselor does not express how often this occurs and he indicates that she has been making progress in managing her levels of anxiety and depression.

The counselor indicates that the appellant's short term and often long term memory is often fragmented and in the AR the physician indicates that the appellant has moderate impact in the area of memory. The counselor indicates that the appellant often has low motivation and that learning difficulties and executive functioning continue to have a major impact on her decision-making, but in the AR the physician indicates that the appellant has moderate, not major impacts, in the areas of motivation and executive.

In the physician's letter he provides further explanation regarding the appellant's mental impairment indicating that she suffers from chronic moderate to severe depression, explaining that her pain and depression cause her to have sleep problems, a poor memory and lack of motivation. However, he does not indicate how often her impairment is moderate as compared to severe; and in the AR, the physician indicates that the areas of memory and lack of motivation have a moderate, not major impact.

The information provided indicates that the appellant has some functional limitation due to her mental impairment but that they are more in keeping with a moderate as opposed to severe impairment. 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 ministry's position is that a severe impairment has not been established. The ministry's position is that as the majority of the appellant's DLA are performed independently or require little help from others, the information provided does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

The appellant's position is that she has pain every day and that she has difficulty with DLA including grocery shopping as she is only able to carry 1 or 2 bags and that one to three times per month she

calls a support worker to help her with transportation to and from appointments and/or obtaining groceries. The appellant states, in the SR, that she has difficulty leaving her house to go to medical appointments or social gatherings.

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 indicates that the appellant’s impairment does not restrict her ability to perform DLA and he indicates that she is not restricted in any DLA. In the AR, the physician indicates that the appellant is independent with all aspects of DLA except paying rent and bills, noting that the ministry pays her rent directly. The physician explains that the appellant struggles getting in and out of bed and on and off of chairs and that she requires continuous counseling for PTSD and helping paying utility bills and rent. With respect to social functioning the AR indicates that the appellant is independent with all aspects of social functioning but that she has marginal functioning with respect to her immediate and extended social networks, commenting that she is socially isolated.

The counselor’s letter states that the appellant’s impairment impacts her ability to express her thoughts and feelings and that her motivation is often low, and that her impairment has had a major impact on the quality of her life and her day-to-day functioning. However, the counselor does not provide any further information on how the appellant’s impairment impact or restrict her ability to perform DLA.

In the physician’s letter he provides further information indicating that personal grooming, toileting and dressing all require slow movements so as not to aggravate the appellant’s pain and that standing, sitting down, getting in and out of the tub, and arm movements required for these tasks all aggravate the appellant’s pain and put her in danger of falling. He also notes that she has difficulty wiping herself when she toilets because of the pain caused by twisting her back. However, the physician does not provide further information to indicate that his opinions provided in the PR have changed; namely that she is independent with all DLA. While the information in the AR and the physician’s letter do indicate some restrictions to DLA, the information in the AR indicates that the appellant is independent with the majority of listed DLA.

Given the significant degree of independence reported and the lack of information regarding the frequency and duration of assistance needed with the appellant’s DLA, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant’s ability to

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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 needs ongoing counseling as well as help from family and a support worker to go to and from appointments and help getting groceries.

Panel Decision

In the AR the physician indicates that the appellant obtains assistance from family and health authority professional and that she feels that she would benefit from an electric bed to help her pain. The counselor indicates that she requires ongoing counseling.

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.

In addition, while the physician indicates that the appellant feels that she would benefit from an electric bed, the physician does not indicate that he is of the same view and it is not clear whether he is recommending an electric bed for the appellant.

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. The panel finds that the ministry was not reasonable in determining that the appellant does not have a severe physical impairment.

However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's reconsideration decision finding that the appellant does not have a severe mental impairment, and that the appellant's impairment does not directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods and that as a result of a severe impairment she needs help to perform DLA, 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.