

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 18, 2016, which found that the appellant did not meet three of the five 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 her 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,
- 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 the Persons With Disabilities (PWD) Application comprised of the applicant information and self-report dated April 5, 2016, and a physician report (PR) and an assessor report (AR) dated April 7, 2016, both completed by a general practitioner (GP) who has known the appellant for more than a year and has seen her 2 to 10 times in the past year.

The appellant submitted a Request for Reconsideration dated August 3, 2016 and the ministry recorded notes of a conversation with the GP following a fax dated July 18, 2016.

Diagnoses

In the PR, the GP diagnosed the appellant with osteoporosis, malignant neoplasm lung, and COPD [Chronic Obstructive Pulmonary Disease]. Asked to describe the appellant's mental or physical impairments that impact her ability to manage daily living activities, the GP wrote in the AR: "COPD, severe osteoporosis."

Physical Impairment

In the PR and the AR, the GP reported that:

- In terms of health history, the appellant's "...functional capacity limited to one flight of stairs, but slowly. Osteoporosis- low trauma fractures in the past."
- The appellant requires an aid for her impairment as she "uses a cane for balance to prevent falling."
- For functional skills, the appellant can walk 1 to 2 blocks unaided, climb 5 or more stairs unaided (comment: "but slowly"), lift 2 to 7 kg. (5 to 15 lbs.), and she can remain seated less than one hour.
- The appellant takes significantly longer than typical with most areas of mobility and physical ability, specifically walking indoors and walking outdoors, and climbing stairs, and the GP noted that she "takes longer and uses cane for balance." The appellant also takes significantly longer than typical with standing and the GP noted "limited to 15 minutes."
- For lifting, and carrying and holding, the appellant requires continuous assistance from another person, and the GP wrote "limited to 5 lbs. - help from family."
- In the additional comments to the PR, the GP wrote that the appellant is on daily medication but she has had "limited response to medication."
- In the section of the AR relating to assistance provided through the use of assistive devices, the GP indicated the use of a cane "for balance to prevent falling."
- For additional information, the GP wrote that the appellant "...has severe osteoporosis with previous history of low trauma fractures. COPD with level at 70% affects mobility."

On the fax sheet dated July 18, 2016, the GP responded to the ministry that the appellant had a left upper lobe of left lung resection done in 2012 and, since then, the appellant has been cancer-free with regular follow-up.

In her self-report and request for reconsideration, the appellant wrote that:

- It is very painful in the morning, on waking. During the day, she is very stiff and in pain.
- She can manage to walk a short distance but needs to rest before returning.
- She is on medication for her bones but so far there has been no improvement.

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- If she sits for 10 minutes, it is very painful to start moving. She can stand for about 15 minutes, but need to sit after that.

Mental Impairment

In the PR and the AR, the GP reported:

- The appellant has no difficulties with communication and no significant deficits in her cognitive and emotional functioning.
- The appellant has a good ability to communicate in all areas, specifically with speaking, reading, writing, and hearing.
- For the section of the AR assessing impacts to cognitive and emotional functioning as well as social functioning, the GP crossed the sections out and noted “N/A,” or not applicable.

Daily Living Activities (DLA)

In the PR and the AR, the GP indicated that:

- The appellant has not been prescribed medication and/or treatments that interfere with her ability to perform DLA.
- The appellant is independently able to perform every task of some listed DLA, specifically: meals, pay rent and bills, and medication.
- The appellant is independent with most tasks of the DLA personal care but takes significantly longer than typical with transfers in/out of bed and the GP noted “take a lot longer.”
- The appellant also takes significantly longer with the tasks of the DLA basic housekeeping (including laundry), and the GP wrote “limited carrying capacity, take a lot longer due to mobility.”
- For the DLA shopping, the appellant is independent with the tasks of reading prices and labels, making appropriate choices and paying for purchases, and she takes significantly longer with going to and from stores (comment: “takes longer to mobilize”), and she requires periodic assistance from another person with carrying purchases home (comment: “needs family to help, limited to 5 lbs.”)
- The appellant is independent with one task of the DLA transportation and takes significantly longer with getting in and out of a vehicle, with the GP noting “takes a lot longer.” The task of using public transit is not applicable to the appellant.

In her self-report and request for reconsideration, the appellant wrote that:

- She can take care of herself okay but to get tasks done it takes a while.
- She can manage to walk a short distance but needs to rest before returning.
- She is able to look after herself in her home, although it takes longer to get things done, but as far as working outside the home, she can no longer hold down a job to support herself.
- She feels as though she is being punished for her physical conditions over which she has no control.

Need for Help

In the AR, the GP indicated that the help required for DLA is provided by family as she lives with family. For the help required where none is available, the GP wrote that the appellant “...will wait till family members come home to assist.” In the section of the AR relating to assistance provided through the use of assistive devices, the GP confirmed the need for a cane and wrote: “...uses a cane for balance to prevent falling.”

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Additional Information submitted after reconsideration

In her Notice of Appeal dated August 23, 2016, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that she cannot hold down a job to support herself because of her physical limitations. She has been denied disability because she looks after herself at home and she does not understand the decision.

The ministry relied on its reconsideration decision, summarized at the hearing. At the hearing, the ministry emphasized that employability is not a criterion in the provincial legislation.

At the hearing, the appellant stated that:

- She can get along in her home but she cannot physically go out and get a job. At home she has a bed where she can lie down and chairs where she can sit when she needs to. They would not allow this at a job.
- She stays pretty close to home. She can go for short walks but not too far. Her walking is slow-moving and painful. She has no real quality of life.
- She can bathe and climb stairs, but slowly. She can get around in her home.
- She cannot transfer to the panel what her pain feels like. She would not want to, but if she could for an hour, it would help with understanding what she means when she says "painful."
- She also has shortness of breath from her COPD and uses a puffer when she needs to.
- She previously heard about the federal CPP disability pension but she thought that she would not qualify. She has worked for 40 years.

Admissibility of Additional Information

The ministry did not object to the admission of the oral testimony provided by the appellant. The panel considered the information provided by the appellant as corroborating the previous information from the appellant regarding the impacts of her medical conditions diagnosed in the PWD application. Therefore, the panel admitted all the information, as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with 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 person with disabilities (PWD), 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 does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that 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 designation 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) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

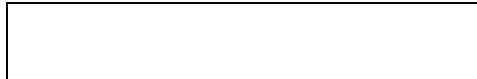
Definitions for Act

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.

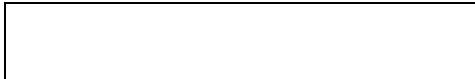
Section 2(2) of the EAPWDR defines prescribed profession as follows:

- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,
- if qualifications in psychology are a condition of such employment.

Severe Physical Impairment

The appellant's position is that she has a severe physical impairment due to the pain from severe osteoporosis and shortness of breath from her COPD. The appellant wrote that it is very painful in the morning, on waking and, during the day, she is very stiff and in pain. The appellant stated that she can manage to walk a short distance, slowly, but needs to rest before returning. The appellant wrote that she is on medication for her bones but so far there has been no improvement. The appellant stated that if she sits for 10 minutes, it is very painful to start moving, and she can stand for about 15 minutes, but need to sit after that.

The ministry's position, as set out in the reconsideration decision, is that there is insufficient evidence to establish that the appellant has a severe physical impairment. The ministry noted that the GP reported functional skills in the middle range of functioning and did not describe how much longer than typical the appellant takes with walking indoors and outdoors, climbing stairs and standing. The ministry wrote that although the GP reported that the appellant uses a cane for balance, he also indicated that the appellant can walk 1 to 2 blocks and climb 5 or more steps "unaided," which means without the assistance of an assistive device.



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.

To assess the severity of an impairment, the ministry must consider both 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 the ability to perform DLA is restricted. 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 a prescribed professional – in this case, the appellant’s GP.

In the PR, the GP, who has known the appellant for more than a year diagnosed the appellant with severe osteoporosis, malignant neoplasm lung, and COPD and wrote that the appellant’s “...functional capacity limited to one flight of stairs, but slowly. Osteoporosis- low trauma fractures in the past.” As noted on the fax sheet dated July 18, 2016, the GP advised the ministry that the appellant had a left upper lobe of left lung resection done in 2012 and, since then, she has been cancer-free with regular follow-up.” For additional information in the AR, the GP wrote that the appellant “...has severe osteoporosis with previous history of low trauma fractures. COPD with level at 70% affects mobility.” The GP reported that the appellant requires an aid for her impairment and wrote that she “...uses a cane for balance to prevent falling.” However, in terms of the appellant’s functional ability, the GP indicated that , the appellant can walk 1 to 2 blocks unaided, or without the assistance of another person or an assistive device, and can climb 5 or more stairs unaided (comment: “but slowly”), lift 5 to 15 lbs., and remain seated less than one hour. At the hearing, the appellant stated that she experiences shortness of breath due to her COPD and that she uses a puffer when she needs it, but she did not elaborate on how often she needs to use her puffer or other impacts due to COPD.

In the AR, the GP reported that the appellant takes significantly longer than typical with most areas of mobility and physical ability, specifically walking indoors and walking outdoors, and climbing stairs, and the GP noted that she “...takes longer and uses cane for balance.” The appellant also takes significantly longer than typical with standing and the GP noted “limited to 15 minutes.” This is consistent with the appellant’s self-report that she can manage to walk a short distance, slowly, and then needs to rest, if she sits for 10 minutes it is very painful to start moving, and she can stand for about 15 minutes, but needs to sit after that. For lifting, and carrying and holding, the GP reported that the appellant requires continuous assistance from another person, and the GP wrote “...limited to 5 lbs.- help from family.” In her self-report, the appellant wrote that she is on medication for her bones but so far there has been no improvement. In the additional comments to the PR, the GP confirmed that the appellant is on daily medication but she has had “...limited response to medication.”

At the hearing, the appellant stated that she can get along in her home but she cannot physically go out and get a job. At home she has a bed where she can lie down and chairs where she can sit when she needs to, and this would not be allowed at a job. As for finding work and/or working, the panel notes that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed DLA in section 2 of the EAPWDR. As discussed in more detail below under the heading Significant Restrictions to DLA , the appellant’s physical condition does not appear to have translated into significant restrictions in her ability to manage her DLA independently.

While the appellant routinely uses a cane “for balance,” as the ministry noted, the GP reported that the appellant maintains independent physical functioning in the moderate range, with the exception of lifting and carrying and holding. Given these assessments and the ministry’s argument that the GP has not described how much less than 1 hour the appellant can remain seated and how much longer than typical she takes for walking indoors and outdoors and climbing stairs, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant did not directly advance the position that she has a severe mental impairment.

The ministry’s position, as set out in the reconsideration decision, is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry wrote that the GP did not report any deficits or impacts with cognitive, emotional or social functioning. The ministry argued that the GP indicated that the appellant has no difficulties with communication and her ability to communicate is good in all areas.

Panel Decision

The GP did not diagnose a mental disorder and he reported that the appellant has no difficulties with communication and no significant deficits with her cognitive and emotional functioning. For the section of the AR assessing impacts to social functioning, the GP crossed out this section and indicated that it is not applicable.

Given the absence of a mental health diagnosis and the GP’s report of no impacts to the appellant’s cognitive, emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Significant restrictions to DLA

The appellant’s position is that her physical impairment severely impairs her and that her ability to perform DLA is significantly restricted to the point that she requires significant help and support from other people and from the use of an assistive device.

The ministry’s position is that the information from the prescribed professional does not establish that the appellant’s impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry wrote that the GP reported that the appellant is independent with the majority of listed DLA and, for those tasks that take longer or require periodic assistance, the GP does not sufficiently describe how much longer the appellant takes or the frequency or duration of the periodic assistance required.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the ministry be satisfied that a prescribed professional has provided an opinion that an applicant’s severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. 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, the prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant’s impairments either continuously or periodically for extended periods.

In the appellant's circumstances, the GP reported in the PR that the appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA. In the AR, the GP reported that the appellant is independently able to perform every task of some listed DLA, specifically: meals DLA, pay rent and bills DLA, and medication DLA. With some DLA, the GP indicated that the appellant takes longer with some tasks, specifically: transfers in/out of bed, laundry and basic housekeeping, going to and from stores, and getting in and out of a vehicle, with comments by the GP that the appellant "takes longer" or "take a lot longer", without indicating how much longer it takes the appellant, information which, as the ministry argued, would have been helpful in determining whether the restrictions in performing these tasks were "significant." As previously discussed, the GP indicated that moving about indoors and outdoors takes the appellant significantly longer than typical and she uses a cane for balance, but he also assessed the appellant as able to walk 1 to 2 blocks unaided, or without the assistance of an assistive device, and did not indicate how much longer than typical it takes the appellant.

For the DLA shopping, the GP reported that the appellant is independent with the tasks of reading prices and labels, making appropriate choices and paying for purchases, and she takes significantly longer with going to and from stores (comment: "takes longer to mobilize"), and she requires periodic assistance from another person with carrying purchases home (comment: "needs family to help, limited to 5 lbs.") The GP did not indicate how often the appellant requires periodic assistance with carrying purchases home, which may be for loads heavier than 5 lbs., in order to allow the ministry to determine that the periodic assistance is required for extended periods of time. In her self-report and request for reconsideration, the appellant wrote that she can take care of herself okay but to get tasks done "it takes a while." As reiterated at the hearing, the appellant wrote that she is able to look after herself in her home, although it takes longer to get things done, but as far as working outside the home, she can no longer hold down a job to support herself. As previously noted by the panel, employability is not a criterion for PWD designation in section 2(2) of the EAPWDA nor is it listed among the prescribed DLA in section 2 of the EAPWDR.

Given the appellant's independence with all but one task of the shopping DLA and a lack of description by the GP of how often and how long the appellant requires periodic assistance with carrying purchases home, or an explanation by the GP regarding how much longer it takes the appellant with a few other tasks of DLA, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the significant assistance of another person to perform DLA, specifically help from her family, and the use of a cane as an assistive device.

The ministry's position, as set out in the reconsideration decision, is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons or an assistive device.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in

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subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the AR, the GP indicated that the help required for DLA is provided by family as she lives with family. For the help required where none is available, the GP wrote that the appellant "...will wait till family members come home to assist." In the section of the AR relating to assistance provided through the use of assistive devices, the GP confirmed the need for a cane and wrote: "...uses a cane for balance to prevent falling."

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, 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.

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. The panel confirms the decision and the appellant's appeal, therefore, is not successful.