

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated November 3, 2016, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years. 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 those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, 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

Information before the ministry at reconsideration included:

- A PWD application comprised of a Physician Report (PR) dated June 27, 2016 and an Assessor Report (AR) dated June 27, 2016, which were both completed by the appellant's general practitioner (GP) of more than 2 years;
- The appellant's Self-report (SR) dated October 26, 2016 which was provided to the ministry after the above-noted PR and AR were completed; and
- October 26, 2016 Request for Reconsideration from the appellant.

Additional evidence submitted on appeal and admissibility

The Notice of Appeal (NOA), which is signed and dated November 10, 2016 and prepared by an advocate on behalf of the appellant, states that the appellant's physical, mental and emotional difficulties are severe and the only thing that gets her up in the morning is the young children. She is isolated and has to rest frequently during the day. She is only able to do some of the basic daily chores. The written statement in the NOA was accepted by the panel as argument intended to demonstrate the severity of her medical condition.

No additional written evidence was submitted by either the appellant or the ministry at the hearing.

Summary of relevant evidence

Diagnoses and history

The appellant's GP provides the following diagnoses:

- Fibromyalgia - causing chronic pain, originally diagnosed by a rheumatologist;
- Mild osteoarthritis - numerous x-rays have been taken showing either no abnormality or mild disc disease to the cervical spine and mild degenerative disc disease to the thoracic spine; and
- Depression - impacts her sleep to the extent that she wakes 2 - 3 times per night and has difficulty falling back to sleep, this also adversely affects her short term memory.

Physical Impairment

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

- The appellant is able to walk unaided on a flat surface (2 blocks) without taking a rest and it takes her significantly longer to walk that distance. In addition, she has pain in her legs after walking for 30 minutes;
- The appellant is able to stand but has pain after standing for 45 minutes;
- The appellant cannot climb stairs; and
- The appellant is able to lift under 5 lbs. and remain seated for less than 1 hour but develops pain after sitting for 15 - 30 minutes.

In the PR the appellant's GP also states that the appellant has at least an 8 year history of back pain and has also complained of neck pain with associated headaches for the past 3 years.

At the hearing, a witness spoke on the appellant's behalf. The witness is an outreach worker at a not-for-profit society in the appellant's community who provides support, assistance and aid to families with young children. The witness has over 35 years of experience working with families with difficulties and has known and assisted the appellant for over two years. She has visited the appellant at her current home and at her previous home.

The witness explained that in her previous home the appellant had to walk up two stories to her apartment and the witness saw that the appellant had significant difficulties walking up those stairs. The witness explained that the appellant is exhausted on a daily basis. The appellant is isolated; she cannot work and she is too tired to make plans to see other people. The appellant has a strong work ethic and she wants to return to work but she does not know from day-to-day whether she has the ability to do anything. The appellant has often talked to the witness about the pain she is suffering and she cannot see how things are ever going to get better. Over the past two years the witness has seen a decrease in the appellant's ability to get out and visit others, and as a result she is suffering from social isolation.

At the hearing, the appellant said that she has severe problems with pain in discs in her neck and her back and a weakness in her bones. She feels a numbness and pain in all of her joints, affecting her ability to do anything. She feels pain from the moment she wakes up in the morning. She said that she is not a lazy person. She wants to be able to do things, to help her children and to work again.

The appellant explained that she used to be a very active person. When she came to Canada several years ago, while she was well enough to be able to take a course to learn English and to go through the process of attaining Canadian citizenship, she was beginning to experience lower back problems. Now she can do nothing due to her medical condition and her health issues. When she is walking she feels like she is going to fall down. In addition to the physical problems identified by her GP, she has also recently had treatment for a thyroid disorder.

At the hearing, the ministry relied on the reconsideration decision and explained that there were three tests which would have to be met with respect to an applicant's abilities before recognizing a person as a PWD: is there a severe physical functioning impairment, is there a severe mental functioning impairment, and if one or both of those conditions apply, are the applicant's DLA restricted continuously or periodically? The ministry is not satisfied that the appellant meets the requirements in those three areas.

With respect to a physical impairment, the ministry said that it recognizes that the appellant has an impairment, but is not convinced that the impairment is severe. The GP in this case has indicated that the appellant takes significantly longer than typical walking outdoors and standing, but has not indicated how much longer. The ministry does not need to see that a particular number of disabilities are evident, but on balance in this instance the impairments are those of a person who has moderate but not severe physical disabilities.

Regarding the weight given to the appellant's SR versus what appears in the PR and the AR, the ministry indicated that it looks at all of the testimony but where there is a contradiction, the ministry assigns the most weight to a medical practitioner's assessment, as the legislation requires that the

ministry must be satisfied that a prescribed professional, in this case a medical practitioner, is of the opinion that the person has a severe mental or physical impairment that directly and significantly restricts the person's ability to perform DLA.

Mental Impairment

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

- While she has good speaking and writing skills, the appellant's first language is Arabic and she speaks limited English and as a result has significant deficits with language;
- The appellant has poor reading skills and satisfactory hearing;
- The appellant has significant deficits in her emotional functioning with respect to emotional disturbance; and
- The AR identifies a minimal impact on daily functioning with respect to memory and a moderate impact on bodily functions, consciousness, attention/concentration and language and a major impact on emotion. The GP also comments that she gets angry very quickly, has suicidal ideation and is separated from her husband.

In the SR, written by the appellant's witness, the appellant said that she, her husband and her children fled a foreign country in 2006 after her husband was released from prison where he had been serving time as a political prisoner. They spent 4 years in another foreign country, moving frequently and living under assumed names before being accepted as United Nations refugees and moving to Canada several years ago. As a result she suffered severe stress and trauma.

At the hearing, the appellant explained that her anxiety and depression have been present for almost 2 years, and her GP has prescribed medication for that. She is now separated from her husband and living with three of her five children: a 16 year old son, a 9 year old and a 5 year old. She has two other adult children: a 25 year old son who lives in the same community and helps her with some of her DLA, and a 26 year old daughter who does not live in Canada.

At the hearing, the ministry explained that only two deficits with cognitive and emotional functioning are identified in the PR: emotional disturbance and language, and the only comment provided by the GP is that the appellant's first language is not English. In addition, in the section of the AR dealing with cognitive and emotional functioning, only one of the items listed (emotion) is assessed by the GP to have a major impact on daily functioning. The ministry explained that while there was no specific threshold that had to be met to qualify as a severe impairment, the assessment in this instance describes someone who has a moderate rather than a severe functioning impairment.

DLA

In the PR, the GP reports periodic restrictions with meal preparation, basic housework and mobility outside the home. While the GP indicates that the appellant's activities are restricted with respect to mobility outside the home, she does not identify the nature of those restrictions. The GP states that the appellant sometimes has a lot of pain and is unable to prepare food. She says that the appellant only goes shopping once a month. There is no restriction identified for the remaining DLA: personal self care, management of medications, mobility inside the home, use of transportation, management of finances or social functioning.

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In the AR, the GP reports that most listed tasks of the DLA: personal care, shopping (except for carrying purchases home), meal planning and safe food storage (but not food preparation and cooking), paying rent and bills, medications, and transportation, are independently managed.

The GP indicates in the AP that the appellant manages all aspects of social functioning independently although the GP does state that the appellant has very disruptive functioning with respect to her relationship with her immediate social network, commenting that she is separated from her husband and gets angry easily. The GP reports that the appellant has good functioning with her extended social networks.

At the hearing, with regards to the question as to whether the DLA are continuously or periodically impacted, the ministry pointed out that the PR only identifies 4 activities that are restricted. For one of those (mobility outside the home) the GP has not indicated whether the restriction is continuous or periodic, and for the other three (meal preparation, basic housework and daily shopping), which have all been assessed by the GP as being periodically restricted, there is no indication as to the frequency or extent of the periodic restrictions. Regarding the DLA in the AR, the GP reports that the appellant is independent with respect to the vast majority of DLA and requires periodic assistance with five of them (laundry, basic housekeeping, carrying purchases home, food preparation and cooking), and that it takes significantly longer than typical for the appellant to go to and from stores, without explaining how much longer it takes.

Need for Help

In the PR, the GP reports that the appellant gets help from her eldest son with meal preparation and cooking as she is unable to prepare meals five out of seven days a week. Her son also helps the appellant with shopping by carrying her shopping for her because she is unable to lift more than 2 kg.

In the AR, the GP reports that the appellant requires periodic assistance from her son to do basic housekeeping and laundry, to carry purchases home, and to prepare and cook food, and that it takes her considerably longer to go to and from stores due to her back pain and her inability to walk more than 2 blocks at a time.

The GP states that the appellant requires assistance with interpretive services because her English is limited and that she does not have any prosthesis or any other physical aids, nor does she require an assistance animal.

PART F – Reasons for Panel Decision

Issue on Appeal

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

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

Relevant Legislation

EAPWDA

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

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

- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

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

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.

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

EAPWDR

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

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

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

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

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

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

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

Severe Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence, including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of

impairment resulting from a medical condition.

Physical Impairment

The appellant's position is that she is always in pain and is unable to perform her DLA most of the time. Every day she finds it difficult to do anything because of the severe pain in her back and her neck. She is exhausted in the morning because every night she wakes up two or three times because of the pain, and she finds it a real challenge to try to get through the day and look after her children.

The ministry's position is that the legislation makes it clear that the most important assessment and the one given the most weight is that of a medical professional. In this case the medical professional, the appellant's GP, has made it clear that the appellant has some impairment, but the ministry is not convinced that the impairment is severe because the appellant is independent with respect to most activities and for those activities where she is not independent, the degree of the appellant's physical impairment is not clearly identified by the GP in the PR or the AR.

Panel Decision

The appellant is diagnosed with fibromyalgia and mild osteoarthritis.

The GP reports that the appellant's physical functional skills are limited: she can walk up to 2 blocks unaided and lift up to 5 lbs. but she cannot climb any stairs unaided. In addition, mobility outside the home is restricted and walking outdoors and standing both take significantly longer than typical. However, it is unclear from the PR or the AR how restricted her outside the home mobility is as the GP does not indicate whether the restriction is periodic or continuous, and there is no information provided as to how much longer it takes the appellant to walk outdoors or stand. In addition, the GP indicates that the appellant can walk indoors independently. With respect to lifting, carrying and holding, the GP's assessment is that the appellant needs periodic assistance from her eldest son, but does not indicate the frequency or extent of the required assistance.

As the appellant's GP does not identify how her mobility outside the home is restricted, how often the appellant needs assistance with lifting, carrying and holding, or how much longer walking outdoors and standing take, the panel finds that the ministry reasonably determined that the information does not establish a *severe* physical impairment.

Mental Impairment

The appellant's witness prepared the SR on behalf of the appellant and wrote that the appellant had suffered significant trauma from the severe stress of her past life experiences as a refugee. However, at the hearing, apart from mentioning that her feelings of anxiety and depression have been present for almost 2 years, the appellant did not identify a significant mental impairment based on these experiences but rather focused on her physical impairments.

The ministry notes that the PR and the AR only identify a few deficits with cognitive and emotional functioning with the vast majority of those functions not impacted. The ministry concludes that the assessments in this instance describe someone who has a moderate rather than a severe functioning impairment.

Panel Decision

The appellant is diagnosed by her GP with depression, which the GP says impacts her sleep to the extent that she wakes during the night and has difficulty falling back to sleep. However, at the hearing the appellant said that it was the physical pain that kept her from getting a good night's sleep.

The GP identifies significant deficits with emotional disturbance and language but does not provide any information as to the extent, scope or frequency of the appellant's depression and anxiety. In addition, the comment provided in this section of the PR is "1st language is Arabic", which presumably refers to the significant cognitive deficit which the GP has assessed with respect to language and is not in the panel's finding indicative of a significant mental impairment.

In the AR, the GP also reports that there is a major impact on daily functioning in the area of emotion. For most of the other items there is no impact. The GP reports minimal impacts to memory and moderate impacts to bodily functions, consciousness, attention/concentration, and language. He adds the following comment regarding the major impact on emotion: "Her depression impacts her sleep..." However, as indicated above, at the hearing the appellant indicated that it was pain from her fibromyalgia and osteoarthritis that wakes her up during the night. The GP also comments on the minimally impacted memory: "Her mood also affects her memory, decreasing her short term memory." The only other comment made by the GP is with respect to the moderately impacted language impairment where she again states that the appellant's first language is not English.

When addressing social functioning, the GP reports that the appellant is independent with respect to all aspects (appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to deal appropriately with unexpected demands and able to secure assistance from others). The AR also indicates good functioning with respect to the appellant's extended social networks but very disrupted functioning with respect to her immediate social network with the comment: "separated from husband, gets angry easily".

Based on the information contained in the SR, the PR, the AR and the appellant's testimony at the hearing, the panel finds that the ministry was reasonable when it determined that the information does not establish that the appellant has a *severe* mental impairment.

Restrictions in the ability to perform DLA

The appellant argues that her constant neck and back pain makes it almost impossible to perform any DLA and that she feels the pain from the moment she wakes up in the morning. She says that she is not a lazy person and she wants to be able to get back to work eventually.

The ministry acknowledges that the appellant has certain limitations in her ability to perform DLA but that the restrictions are moderate or unspecified and that the GP has indicated that the appellant is independent with respect to the vast majority of them. Therefore, the ministry concludes that the information provided by the GP does not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods. With respect to her desire to eventually return to work, the ministry points out that an applicant's employability or ability to work is not taken into consideration for the purpose of determining eligibility for the PWD designation.

Panel Decision

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

In this case, the appellant's GP is the prescribed professional who has provided information addressing the appellant's ability to perform daily activities in both the PR and the AR.

In the PR, where asked if impairment directly restricts the appellant's ability to perform DLA, the GP reports that the appellant is periodically restricted with meal preparation, basic housework and daily shopping without providing any information on the frequency or extent of the restrictions, except for meal preparation and cooking where the GP indicates that the appellant has to rely on her eldest son to help her five out of seven days a week. In addition, while indicating that the appellant is periodically restricted with mobility outside the home, the GP does not say whether the restriction is periodic or continuous.

In the AR, where asked to indicate the assistance required related to impairment, the GP reports that, with the exception of basic housekeeping and some aspects of shopping and meals, the appellant independently manages DLA. As previously discussed, one major and a few moderate impacts on daily cognitive and emotional functioning are reported by the GP, however, the GP does not report a corresponding impact on her ability to perform DLA.

Based on the above information, the panel finds that the ministry reasonably determined that a *severe* impairment that significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA has not been established.

Help to perform DLA

The appellant argues that she has to rely on her eldest son to help her with meal preparation and that he also helps her with her shopping and carrying things because she cannot lift more than 5 lbs.

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

Panel Decision

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

another person, or the services of an assistance animal in order to perform DLA.

The panel notes that the appellant and her GP have indicated that the appellant does not use an assistive device or a guide animal, but does require periodic assistance from her eldest son with carrying purchases home, going to and from stores, basic housekeeping, laundry, cooking and preparing meals. However, it is not clear how frequent this assistance has to be provided. For example, while the GP says that the appellant's son helps her with meal preparation and cooking 5 out of 7 days a week, at the hearing the appellant testified that that she relied on his assistance less frequently than that. In addition, there is no indication of how often her son is required to assist with the other activities.

Nevertheless, the establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.