

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated November 10, 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 June 1, 2016;
 - The Physician Report ("PR") dated May 18, 2016 and the Assessor Report ("AR") dated June 8, 2016, both prepared by the appellant's general practitioner ("GP") of 12 years and who treated the appellant 11 or more 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 "office interview with applicant, file/chart information and family/friends/caregivers";
2. The appellant's Request for Reconsideration (RFR) dated September 22, 2016 in which she states that:
 - Her impairment significantly affects her activities of daily living and ability to function in most activities;
 - She has leg pain when she walks; and
 - Worry ends up disturbing daily life, make her sick and she is on anti-depressant medication.

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with anxiety disorder (onset 2000).

Physical Impairment

- SR:
- Appellant describes her disability as including pounding heart, chest tightness, pain in the chest, shortness of breath, stomach aches, heart palpitations, anxiety and fatigue.
- PR:
- GP states that the appellant has "severe global impairment" and "includes symptoms of SOB (shortness of breath), palpitations, fatigue and headache;
 - GP indicates that the appellant can walk 4+ blocks and climb 5+ steps unaided, lift with no limitation and remain seated with no limitation
- AR:
- GP indicates that the appellant is independent in walking indoors and outdoors, climbing steps, standing, lifting and carrying/holding.

Mental Impairment

- SR:
- Appellant describes an abusive living situation which caused anxiety, pounding heart, chest tightness, pain in the chest, shortness of breath, stomach aches, heart palpitations, and fatigue.
- PR:
- GP diagnosed the appellant with anxiety disorder and did not provide comments regarding the severity of her condition other than to say "severe global impairment"; and

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- Under significant deficits with cognitive and emotional function, the GP indicates executive, emotional disturbance and motivation with the comment “difficulty with judgment, anxiety and social isolation.

- AR:
- Speaking, reading, writing and hearing are good; and
 - All listed areas of cognitive and emotional functioning are listed as either moderate, minimal or no impact. Specifically, the GP indicates that executive functioning has a minimal impact, emotional disturbance has a moderate impact and motivation has no impact.

Daily Living Activities

- PR:
- GP has indicated that the appellant is continuously restricted with managing finances and social functioning with the comments “isolated, misinterprets social and environmental cues”, that social functioning is “severely affected”, isolated, feels afraid, and “no physical assistance” needed.

- AR:
- All listed areas of DLA are listed as independent functioning with the exception of social functioning;
 - Under social functioning ‘interacts appropriately with others’ and ‘able to deal appropriately with unexpected demands’ (with the comment “as needed”) are indicated as requiring periodic assistance;
 - Under social functioning ‘able to secure assistance from others’ is indicated as requiring continuous assistance with the comment “marginal”;
 - All other listed areas under social functioning are not indicated as either independent, periodic assistance or continuous assistance but have the comments “judgment impaired” and “very isolated”;
 - Marginal functioning is indicated for immediate social network and very disrupted functioning is indicated for extended social network with the comment “very marginal coping” and “no immediate help needed”.

Need for Help

- PR:
- GP notes that the appellant does not require any prostheses or aids for her impairment.

- AR:
- GP indicates “N/A” for help received by others.

Evidence On Appeal

Notice of appeal, signed and dated November 15, 2016, which states “it affects my daily living activities”.

Appellant’s Evidence At Hearing

At the hearing the appellant submitted the following documents:

- Radiologist report, dated November 23, 2016, which describes the results of a lumbar spine X-ray; and
- Spectacle lens prescription dated November 25, 2016.

The appellant stated that:

- Due to a language barrier and her shyness, the GP did not understand the extent of her medical problems;
- Since the PWD application she has seen a doctor who speak the same language she does and this doctor sent for X-rays and understands her conditions;
- She experiences pain in her legs and lower back and this is not reflected in the PWD application;
- The arthritis from her spine shoots pain down to her hip and leg which limit her activities;
- Walking even 1 block is painful due to nerve-like pain;
- Sitting at a computer and sleeping are also painful; and
- Her new doctor says she has a severe kind of arthritis.

When questioned, the appellant respond with the following:

- She did not want to see a mental health specialist because she did not want to take medications as they have bad side effects and stop working;
- She completed a ministry educational/training program but she was in pain and because it was inside she was able to manage it as being outside is difficult;
- Her eye-glass prescription changes every 6 months or so therefore she cannot afford to purchase the eye-glasses;
- She did not get an advocate because the advocates office is too far to walk and she cannot afford to travel by bus; and
- Her son and friend come 1-2 times per week to bring her things (such as food and heavy items) and to keep her company.

The ministry relied on the reconsideration decision and added that:

- The appellant participated in and completed a ministry sponsored educational/training program which demonstrates that she is capable of functioning in an learning environment and being a part of a community; and
- There are inconsistencies and contradictions in the PWD application and no additional or supporting information was provided by the GP despite a telephone conversation with the ministry.

Admissibility of Additional Evidence

Oral Evidence

The appellant gave oral evidence at the hearing. She described her arthritis, and lower back and hip pain. On review of the evidence, the panel notes that the appellant's reference to her arthritis, and lower back and hip pain are not in support of or corroborate the evidence that was before the ministry at the time of reconsideration. The panel therefore finds that the appellant's reference to her arthritis, lower back and hip pain are not admissible as they are not 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*.

Similarly, ministry described the appellant's participation a ministry learning program. On review of the evidence, the panel notes that the ministry's reference to the learning program 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 ministry's reference to the appellant's participation a ministry learning program is not admissible as it does not 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*.

At the hearing the appellant submitted a radiologist report and a spectacle lens prescription. On review of the evidence, the panel notes that the radiologist report and spectacle lens prescription are not in support of or corroborate the evidence that was before the ministry at the time of reconsideration. The panel therefore finds that the appellant's reference to her radiologist report and spectacle lens prescription are not admissible as they are not 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 he 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

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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.

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 physical impairment

The appellant takes the position that she has a pounding heart, chest tightness, pain in the chest, shortness of breath, stomach aches, heart palpitations, and fatigue. She is of the position that the above would amount to a severe physical impairment. She argues that she was unable to express her symptoms to her GP due to a language barrier. She further adds that the GP failed to portray the extent of her physical impairment due to this language barrier and the fact that the GP was busy and had rushed through the assessment.

The ministry's position as set out in the Reconsideration Decision is that the evidence as a whole does not support a finding that the appellant has a severe physical impairment. In particular, the ministry argues that no further information was provided by the GP despite a telephone conversation with the ministry, there is no physical impairment diagnosis and the appellant's functional skill limitation does not demonstrate a severe physical impairment.

Panel Decision

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. The appellant faces challenges but panel is of the view that the impacts of her physical impairments are not clear. In the PR, the GP indicated that the appellant experiences SOB, palpitations, fatigue and headaches. However, the GP did not provide a diagnosis for a physical impairment and indicated that the appellant can walk 4+ blocks and climb 5+ steps unaided, and lift and remain seated without limitation. Also, in the AR, the GP indicated that the appellant's mobility and physical ability is independent in all listed areas.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently or effectively. The evidence given by the GP indicates that the appellant's functional ability is good and there is no indication that she requires help. 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.

Severity of mental impairment

The appellant argues that she suffers anxiety and that this in itself constitutes a severe impairment.

The ministry's position as set out in the Reconsideration Decision is that there is not sufficient evidence to support a finding of a mental impairment that severely limits the appellant's ability to function independently.

Panel Decision

On review of the evidence, in the PR, the GP has diagnosed the appellant with anxiety disorder and indicates that she has significant deficits with executive function, emotional disturbance and motivation. However, in the AR, the GP indicated that the appellant has good speaking, reading, hearing and writing, and that executive functioning has only a minimal impact, emotional disturbance has a moderate impact, and motivation has no impact. In fact, the GP indicates that none of the listed areas of cognitive and emotional functioning have a major impact.

Restrictions in the ability to perform DLA

The appellant argues that she is restricted in her ability to perform tasks of DLA due to her anxiety and physical condition.

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.

The GP addresses DLA in both the PR and AR. In the PR the GP indicated that the appellant requires continuous assistance with management of finances and social functioning. However, in the AR, the GP indicated that the appellant is independent with banking, budgeting and paying rent/bills. In the AR, the GP again indicated that the appellant requires assistance either periodically or continuously with some aspects of social functioning. However, the GP failed to demonstrate the frequency and duration of the assistance that is required. With all other listed areas of DLA, the GP indicated that the appellant is independent in both the PR and AR.

In making its decision in this matter the ministry must consider the evidence from the GP as it is set out in the PR and AR. Given this evidence, the panel concludes that the ministry reasonably concluded that the evidence was insufficient to establish that the appellant's impairment significantly restricts her ability to perform tasks of DLA either continuously or periodically for extended periods.

Help with DLA

The appellant mentions that although she lives alone she does get help with various tasks of DLA. She states that she has difficulty climbing stairs and that she cannot carry anything that is too heavy. She gets help from her son and a friend 1-2 times per week. They help her with groceries and bring her various items that might be too heavy for her to carry.

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.