

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated October 17, 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*, all of which must be met in order for the ministry to grant designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that she has a severe physical impairment. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe mental impairment;
- in the opinion of a medical practitioner, the appellant's impairment is likely to continue for at least two years;
- 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

With the oral consent of the appellant, a ministry observer attended but did not participate in the hearing.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated May 20, 2016, a physician report (PR) and an assessor report (AR) both dated April 22, 2016 and completed by a general practitioner (GP) who has known the appellant since January 1999.

The evidence also included the following:

- 1) Medical Imaging Report dated January 21, 2016 describing tendinopathy in the appellant's left shoulder;
- 2) Medical Imaging Report dated May 8, 2016 following an MRI of the appellant's cervical spine and findings include no cord compression, with moderate right foraminal narrowing at C3-4, with possible right C4 nerve root compression;
- 3) Medical Imaging Report dated June 17, 2016 for the appellant's lumbar spine and findings include degenerative disc narrowing;
- 4) Undated letter received on September 29, 2016 indicating new family doctor and neurosurgeon referral; and,
- 5) Request for Reconsideration dated September 29, 2016 with attached letter from the appellant.

Diagnoses

In the PR, the appellant was diagnosed by the GP with "...motor vehicle accident [MVA]- subsequent left shoulder sprain, right hip pain, cervical sprain, insomnia, back pain, anxiety with driving, depression secondary to pain, and inability to work." In the AR, when asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities, the GP wrote "...MVA with subsequent accident-related injuries, including lower back pain and neck sprain, left shoulder injury, right hip contusion, headache, also depressive symptoms secondary to pain and unemployment resulting."

Duration

In the PR, regarding the degree and course of the impairment, the GP did not indicate either a "yes" or "no" response to the question whether the appellant's impairment is likely to continue for two years or more and wrote "uncertain, often MVA-related injuries may take 2 to 5 years to improve, it is too early to give a prognosis."

In her Request for Reconsideration, the appellant wrote that, as the doctor indicated on the application, it was too early to tell as the extent of the injuries were not known at that time.

Mental Impairment

In the PR and AR, the GP reported:

- In terms of health history, the appellant is "...sometimes forgetful...driving is limited secondary to pain and anxiety when driving, difficulty looking after her young child secondary to the above."
- The appellant does not have difficulties with communication.
- The appellant has significant deficits with cognitive and emotional function in 3 of the 11 listed areas, specifically: executive, emotional disturbance, and attention or sustained concentration,

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with a comment provided that "...patient has developed mood disorder and anxiety when driving due to the injuries from her MVA."

- In the additional comments to the PR, the GP wrote that the appellant "...has developed mood disorder as a result of pain and inability to work. She also has developed anxiety with driving."
- The appellant has a good ability to communicate in all areas, specifically: speaking, reading, writing and hearing, with writing taking longer "secondary to pain."
- There are no major impacts to the appellant's cognitive and emotional functioning, with moderate impacts in the areas of emotion, attention/concentration, and motivation. There were minimal or no impacts to the remaining 11 areas of functioning, including executive functioning. The GP wrote that the appellant "...has developed symptoms of depression from her accident and subsequent pain. She also has anxiety when driving. The symptoms of her depression include poor concentration, emotional lability, insomnia (also secondary to pain), and reduced ability to function as before."
- For social functioning, the appellant is independent in all areas, specifically: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. The GP wrote that the appellant "...is able to do and perform all this, but it is affected by her current mood disorder."
- The appellant has marginal functioning in both her immediate and extended social networks.

Daily Living Activities (DLA)

In the PR and AR, the GP reported that:

- In terms of health history, the appellant has "...difficulty looking after her young child."
- The appellant can walk less than 1 block unaided and the GP noted that the appellant "...has pain doing the above activities, affects her abilities to perform these tasks."
- The appellant has not been prescribed medications and/or treatments that interfere with her ability to perform DLA.
- The appellant is independent with walking indoors and requires periodic assistance from another person with walking outdoors, as the GP noted that the appellant "...takes twice as long to walk than before accident."
- The appellant is independently able to perform every assessed task of several DLA, specifically: shopping, meals, pay rent and bills, medication and social functioning. Regarding the meals DLA, the GP explained that the appellant "...cooks simple meals as she finds food prep and planning difficult."
- For the DLA personal care, the appellant is independent with all tasks with the exception of bathing, for which she requires periodic assistance from another person and has been described by the GP as "takes longer to bathe secondary to pain." With the tasks of toileting, feeding self, regulate diet, transfers in/out of bed and transfers on/off of chair, the GP noted that the appellant "...is able to do all these things independently but it takes her longer secondary to pain."
- For the DLA basic housekeeping, the appellant requires continuous assistance from another person with laundry and with housekeeping, with a comment by the GP that the appellant has "...difficulty doing any household tasks."
- Regarding the transportation DLA, the appellant is independent with getting in and out of a vehicle and requires periodic assistance from another person with using public transit and using transit schedules and arranging transportation, with a note by the GP that the appellant "...finds public transit makes her pain worse due to the walking, climbing, etc."

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- In the additional comments to the AR, the GP wrote that "...as she is having both pain and anxiety when driving, she is having difficulty looking after her daughter and is struggling to get her to/from school/appointments."

In her Request for Reconsideration, the appellant wrote that:

- While she is doing what she has to, it causes her pain, discomfort and great mental stress.
- Everything she does, she has to break down into several tiny sections with frequent breaks.
- She usually does a couple of dishes at a time, folds two or three pieces of laundry at a time, and gives her daughter a quick bath, with a very long break after.
- Public transportation is very painful. She drives but turning her neck for visual checks hurts and being confined to a sitting position requires rubbing her neck and shoulders and getting out of the car for a bit.

Need for Help

The GP reported in the AR that:

- The appellant "...would benefit from any help/support to assist her with her day-to-day activities" and she "...currently has no one to help her with her activities and chores as she is single."
- None of the listed assistive devices, including mobility aids, braces, bathing aids or any other equipment or devices were reported as being needed or used by the appellant.

Additional Information

In her Notice of Appeal dated November 4, 2016, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that:

- She is in pain and discomfort all of the time and this affects every part of her daily life.
- She cannot do anything, not even enjoyable or personal things.
- She believes this will last longer than 2 years, especially the back/neck deterioration and shoulder tendinopathy.

Prior to the hearing, the appellant provided the following:

- 1) Medical Imaging Report dated November 16, 2016 for the appellant's thoracic spine with findings including "early degenerative disc disease."
- 2) Email dated November 22, 2016 referring to the x-ray results of her thoracic spine. The appellant wrote that the x-ray shows disc space narrowing in more than one spot. She attached a note from her GP since her impairment does strongly affect her daily life in many areas; and,
- 3) Letter dated November 22, 2016, in which the appellant's current GP wrote that the appellant has neck pain and upper and lower back pain issues. Neck pain radiates to arm and associated with numbness in the right fingers. This pain affects her daily activities and she was advised to see physiotherapy as per the specialist.

At the hearing, the appellant stated that:

- She does not claim to have a severe mental impairment as it is mostly frustration she experiences from the pain from her physical medical conditions.
- In the original PR, the GP could not give a definitive amount of time that her condition will

continue. However, it has been a year since this started and it is ongoing.

- She has started going to a new GP because she felt the GP who completed the PR and the AR was not really listening to her. Her new GP has sent her to a back specialist but she has been unable to get the specialist's report because they are behind on their paperwork.
- The two x-rays and the MRI scans show degenerative changes throughout her back. There is a bulge in her cervical spine but because it only sometimes presses on the nerve and it is not continuous, there is nothing that can be done with surgery.
- She experiences back pain when she is cooking dinner and she has to lean over and give her lower back a break.
- She cannot sit in chairs at offices because they are too hard and she cannot bend over all the way. She cannot turn her head all the way.
- Her left arm is weak and sometimes numb when lifting a jug of milk. They are still investigating this symptom. She hoped to have the back surgeon's report, but it is not yet available.
- She tried to walk her daughter to school but her back could not take it. She had to have a friend come and help her because she was in so much pain.
- She has pain when she tries to do anything, and it is very frustrating for her.
- She cannot do household chores and her grown son has to help.
- Kneeling to wash her daughter's hair is impossible and she has to continually switch positions to get this done.
- Her MVA occurred in another province and she has been trying to get medical help from the other province. They had paid for 6 months of physiotherapy and she went twice per week but then the funding stopped and she could not afford to continue on her own.
- It was recommended that she have a cortisone shot for her shoulder but she did not get it because of problems she had heard about with this option. She still has weakness and numbness in her arm.
- Her GP prescribed muscle relaxants and a pain reliever, which she takes at night. She had an ulcer at one time so she is cautious about taking medications.
- Her grown-up son does the grocery shopping and he takes out the garbage for her.
- She does not use a brace, although it has been suggested that it might help. She sometimes feels like she could use something to lean on.
- She has a small electrical massage device to try to help since her muscles get tense when she compensates due to pain on one side.
- She is not someone who complains and she has found it difficult to fully express her limitations to the GP.
- Although she has to get things done, it is out of necessity and she is in pain and will "pay for it afterwards."

The ministry relied on its reconsideration decision, as summarized at the hearing.

Admissibility of Additional Information

The ministry did not object to the admissibility of the additional information provided by the appellant. The panel considered the letter from the GP, the Imaging Report, and the appellant's email and oral testimony as information that corroborates the extent of the appellant's impairment as a result of a medical condition diagnosed in the PWD application, which was before the ministry at reconsideration. Therefore, the panel admitted this additional 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 PWD designation, 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 has a severe physical impairment but that she does not have a severe mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry further found that her 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 being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

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

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

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

- (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that
- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
 - (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.
- (3) For the purposes of subsection (2),
- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
 - (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.
- (4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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

- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
 - (i) prepare own meals;

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- (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.

The positions of the parties

Appellant's position

The appellant's position is that as the doctor indicated on the application, it was too early to tell as the extent of the injuries were not known at that time but it has already been over a year and she believes her impairment will last longer than 2 years, especially the back/neck deterioration and shoulder tendinopathy. The appellant's position is that her severe physical impairment directly and significantly restricts her ability to perform DLA on an ongoing basis as she is in pain and discomfort all of the time and this affects every part of her daily life. The appellant argued at the hearing that she receives help from her grown son who does the grocery shopping and household chores for her.

Ministry's position

The ministry's position, as set out in the reconsideration decision, is that the appellant's GP had not confirmed in the PR that the appellant's impairment will continue for two years or more since he wrote "uncertain, often MVA-related injuries may take 2 to 5 years to improve, it is too early to give a prognosis." The ministry found that there is insufficient evidence to establish that the appellant has a severe mental impairment as required by Section 2(2) of the EAPWDA as there are significant deficits to cognitive and emotional functioning in three areas, with no major impacts and only moderate impacts to daily functioning and no difficulties with communication. As to DLA, the ministry's position is that the information from the prescribed professional does not establish that the appellant's impairment significantly restricts her DLA either continuously or periodically for extended periods of time. The ministry noted that although the GP assessed the appellant as requiring periodic assistance with some tasks of the personal care and transportation DLA, there was no information to explain the type, frequency and degree of assistance required. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Duration

Section 2(2)(a) of the EAPWDR requires that a medical practitioner provide an opinion that the appellant's impairment is likely to continue for at least two years. In response to the question in the PR whether the appellant's impairment is likely to continue for two years or more, the GP did not indicate either "yes" or "no" when prompted and instead wrote a comment: "...uncertain, often MVA-related injuries may take 2 to 5 years to improve, it is too early to give a prognosis." The appellant wrote in her Request for Reconsideration that as the doctor indicated on the application, it was too

early to tell as the extent of the injuries were not known at that time. The appellant stated at the hearing that she has consulted a new GP who has referred her to a back specialist and she had hoped to have the specialist report for the hearing but it was not yet available. She pointed out that it has been a year already and, in her Notice of Appeal, she wrote that she believes this will last longer than 2 years, especially the back/neck deterioration and shoulder tendinopathy.

However, given an opportunity to update the information provided in the PR, the new GP consulted by the appellant did not provide an opinion about the duration of the appellant's impairment. In the letter dated November 22, 2016, the appellant's current GP wrote that the appellant has neck pain and upper and lower back pain issues, the neck pain radiates to her arm and is associated with numbness in the right fingers, and this pain affects her daily activities, but he did not provide a prognosis at that time. As there was no further information provided from the GP or a specialist, the panel finds that the ministry's determination that the medical practitioner had not confirmed that the appellant's impairment will continue for two or more years from the date of the application, as required by Section 2(2)(a) of the EAPWDR, was reasonable.

Severe Mental Impairment

At reconsideration, the ministry was satisfied that the information provided is sufficient evidence of a severe physical impairment. At the hearing, the appellant did not argue that she has a severe mental impairment. However, as the appellant's GP diagnosed a mental health condition – anxiety “with driving” and depression “secondary to pain and inability to work” – the panel considers it relevant to review the severity of her mental impairment to determine whether the “decision-making” and “relating to others” DLA applicable to a person with a severe mental impairment set out in section 2(1)(b) of the EAPWDR need to be factored in when addressing the “Direct and significant restrictions in the ability to perform DLA” criterion discussed below.

As noted in the reconsideration decision, the GP identified significant deficits in the appellant's cognitive and emotional functioning in the areas of executive, emotional disturbance, and attention or sustained concentration. In assessing the impacts of the appellant's mental impairment on daily functioning, the GP noted no major impacts, with minimal impact in the area of executive and moderate impacts in emotion, attention/concentration, as well as motivation. The GP assessed the appellant as independent in all listed areas of decision-making and relating to others, while describing her relationship with her immediate social network and with her extended social networks as marginal functioning. With regard to aspects of the other DLA that might be restricted due to a mental health condition, such as making appropriate choices when shopping, meal planning (although the GP wrote “difficult”), banking and budgeting, and taking medications as directed, the GP has assessed the appellant as independent. Considering that no major impacts were reported by the GP in the impacts of the appellant's mental health condition on daily functioning and that the GP did not report any restrictions resulting from her mental health condition in her ability to perform DLA, the panel finds that the ministry was reasonable in determining that a severe mental impairment had not been established.

Direct and Significant Restrictions in the ability to perform DLA

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 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, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the appellant's circumstances, the GP who completed the PR and the AR has known her for over 15 years and reported in the PR that the appellant has not been prescribed medications and/or treatments that interfere with her ability to perform DLA. The GP reported in the PR that the appellant has pain that affects her functional skills and that she can walk less than 1 block unaided. In the AR, the GP indicated that the appellant is independent with walking indoors and requires periodic assistance from another person with walking outdoors, as the GP noted that the appellant "...takes twice as long to walk than before accident." At the hearing, the appellant stated that she tried to walk her daughter to school but it caused so much pain that a friend had to help her. She also stated that she does not use any assistive device for her mobility although she sometimes feels like she could use something to lean on.

The GP reported that the appellant is independently able to perform every assessed task of several DLA, specifically: the shopping DLA, the meals DLA, the "pay rent and bills" DLA, and the medication DLA. For the personal care DLA, the GP reported that the appellant is independent with all tasks with the exception of bathing, for which she requires periodic assistance from another person and has been described by the GP as "...takes longer to bathe secondary to pain." With the tasks of toileting, feeding self, regulate diet, transfers in/out of bed and transfers on/off of chair, the GP noted that the appellant "...is able to do all these things independently but it takes her longer secondary to pain." The GP does not provide an explanation or a description of how much longer it takes the appellant with these tasks or how often or how long she requires assistance. The appellant wrote in her Request for Reconsideration that everything she does, she has to break down into several tiny sections with frequent breaks; however, she does not provide detail of how much longer it takes her with specific tasks of DLA.

For the DLA basic housekeeping, the GP reported that the appellant requires continuous assistance from another person with laundry and with housekeeping, with a comment that the appellant has "...difficulty doing any household tasks." In her Request for Reconsideration, the appellant wrote that she usually does a couple of dishes at a time, folds two or three pieces of laundry at a time, and gives her daughter a quick bath with a very long break after. At the hearing, the appellant stated that her grown son helps her with household chores, including taking out the garbage.

Regarding the transportation DLA, the appellant is independent with getting in and out of a vehicle and requires periodic assistance from another person with using public transit and using transit schedules and arranging transportation, with a note by the GP that the appellant "...finds public transit makes her pain worse due to the walking, climbing, etc." The GP did not provide any further comments regarding the frequency or duration of the appellant's need for assistance in order to allow the ministry to determine that the periodic assistance is required for extended periods of time. In her Request for Reconsideration, the appellant wrote that public transportation is very painful. The appellant wrote that she drives but finds that turning her neck for visual checks hurts and being confined to a sitting position requires rubbing her neck and shoulders and getting out of the car for a bit for relief. In the additional comments to the AR, the GP wrote that "...as she is having both pain and anxiety when driving, she is having difficulty looking after her daughter and is struggling to get her to/from school/appointments."

In her Request for Reconsideration, the appellant wrote that while she is doing what she has to, out of necessity, it causes her pain, discomfort and great mental stress. At the hearing, the appellant stated that she rarely complains and, therefore, may not have been able to accurately convey to her doctor the full limitations from her medical condition. The appellant has consulted with another GP; however, in the letter dated November 22, 2016, the GP wrote that the appellant has neck pain and upper and lower back pain issues and that this pain “affects her daily activities” and she was advised by the specialist to pursue physiotherapy. There was no further detail provided by the appellant’s current GP regarding specific restrictions to tasks of DLA or with respect to the appellant’s need for assistance, and the appellant stated at the hearing that she cannot afford physiotherapy treatment and the specialist report is not yet available.

Considering the assessment of independence with most tasks of DLA, and the absence of detail regarding those few tasks of DLA that take the appellant longer or require periodic assistance from another person, the panel finds that the ministry was reasonable to conclude that there is insufficient evidence from the prescribed professional to show that the appellant’s overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

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 a DLA.

The GP reported in the AR that the appellant “...would benefit from any help/support to assist her with her day-to-day activities” and she “...currently has no one to help her with her activities and chores as she is single.” None of the listed assistive devices, including mobility aids, braces, bathing aids or any other equipment or devices were reported as being needed or used by the appellant. At the hearing, the appellant confirmed that she does not use an assistive device but she stated that her grown son now helps her with many household chores and with grocery shopping.

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 pursuant to Section 2(2) of the EAPWDA was reasonably supported by the evidence, and therefore confirms the decision. The appellant’s appeal, therefore, is not successful.