

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated November 16, 2016, which found that the appellant did not meet four 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. However, the ministry was not satisfied that the evidence establishes that:

- the appellant's impairment is likely to continue for at least two years;
- 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 ministry did not attend the hearing. After confirming that the ministry was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

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 May 28, 2016, a physician report (PR) dated July 2, 2016 and an assessor report (AR) dated July 10, 2016 both completed by a general practitioner (GP) who has known the appellant since March 2013.

The information at reconsideration also included the appellant's Request for Reconsideration dated November 6, 2016 and a letter dated May 22, 2016 from the appellant's son.

Diagnoses

In the PR, the GP diagnosed the appellant with Diabetes Mellitus (DM) with an onset in August 2015, hypertension and anxiety with an onset of "many years." Asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities, GP wrote in the AR that the GP does "...not expect her physical and mental conditions affect seriously on her daily activities."

Duration

In the PR, regarding the degree and course of the impairment, the GP indicated a "no" response to the question whether the appellant's impairment is likely to continue for two years or more. The GP wrote: "...as above, she should be on medication to control her blood pressure and DM for lifetime. The patient is anxious and gets tired and fatigued easily. Her physical condition is not suitable for labor work."

Physical Impairment

In the PR and AR, the GP reported that:

- In terms of health history, "...her blood pressure and DM have been under control."
- The appellant does not require any prostheses or aid for her impairment.
- For functional skills, the appellant can walk 1 to 2 blocks unaided, she can climb 2 to 3 steps unaided, she can lift 2 to 7 kg. (5 to 15 lbs.), and there is no limitation with how long she can remain seated.
- The appellant is independently able to perform most areas of mobility and physical ability, specifically walking indoors and walking outdoors, climbing stairs, and standing. She requires periodic assistance from another person with lifting, and carrying and holding and the GP wrote that the appellant "...should avoid lifting, carrying or holding heavy loads more than 7 kg."
- In the section of the AR relating to assistance provided through the use of assistive devices, the GP did not identify any of the listed items.

In her self-report, the appellant wrote that:

- She has weak arms and legs, diabetes, high blood pressure and high cholesterol.
- Her arms and legs get tired and fatigued very easily from just standing or walking after a short period of time.

In the Request for Reconsideration, the appellant wrote that:

- She has been suffering from chronic health problems and has been taking many kinds of

medication daily.

- She takes medications for her high cholesterol, for her heart and high blood pressure and for her stomach protection.
- Taking all these pills makes her feel very tired and fatigued.
- She often has problems in standing and walking because of weakness in both of her arms and legs.
- Sometimes she drops things uncontrollably due to shaking on both hands.

Mental Impairment

In the PR and AR, the GP reported:

- In terms of health history, the appellant presented to his office in March 2013 with complaints of chronic insomnia and anxiety.
- The appellant has no difficulties with communication.
- The appellant has a significant deficit in her cognitive and emotional functioning in the area of emotional disturbance and the GP wrote "...sad mood, anxious personality."
- 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, the GP indicated no major impacts, with moderate impacts to bodily functions (sleep disturbance highlighted), emotion (inappropriate anxiety highlighted), and attention/concentration, with no impacts assessed in the remaining 9 areas of functioning. There is also a minimal impact indicated for emotion, and no assessment made for the area of consciousness.
- For the section of the AR assessing impacts to social functioning, the GP reported that the appellant is independent in all aspects, specifically: making appropriate social decisions, develop and maintain relationships, interact appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.
- The appellant has good functioning in her immediate and extended social network, with no further comments provided.
- Asked to describe the support/supervision required to help maintain the appellant in the community, the psychologist did not comment.
- In the additional information, the GP wrote that "...patient is anxious person who has suffered from chronic insomnia."

In her self-report, the appellant wrote that:

- She suffers from anxiety and has trouble sleeping at night, which is why she has to take sleeping pills.
- The lack of sleep causes her to not function very well during the day.

In the Request for Reconsideration, the appellant wrote that:

- She has been suffering from chronic health problems and has been taking many kinds of medication daily.
- She takes two medications for sleep.

Daily Living Activities (DLA)

In the PR and AR, the GP indicated that:

- The appellant has not been prescribed medication and/or treatment that interfere with her ability to perform DLA.

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- The appellant's impairment does not directly restrict her ability to perform DLA.
 - In the additional comments to the AR, the GP wrote that the appellant is anxious and gets tired and fatigued easily and she "...cannot perform labor work; however, she still functions with her daily activities."
 - The appellant is independent with moving about indoors and outdoors.
 - The appellant is independent with all tasks of most of the listed DLA, specifically: personal care, meals, "pay rent and bills," medication, transportation, and social functioning.
 - For the DLA basic housekeeping, the appellant is independent with doing laundry and requires periodic assistance from another person with basic housekeeping, with the note "for gardening."
 - With respect to the shopping DLA, the appellant is independent with the tasks of going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases, and requires periodic assistance from another person with carrying purchases home, with the comment: "she should avoid carrying or lifting heavy loads more than 7 kg."
 - In the additional information to the AR, the GP wrote that the appellant "...is anxious person who has suffered from chronic insomnia- she gets fatigued easily, her concentration and memory are poor; however, she still functions well on her daily activities."

In her self-report, the appellant wrote that:

- Her arms and legs get tired and fatigued very easily when she does day-to-day things.
- Her overall health is poor and it prevents her from performing labor work.

In the Request for Reconsideration, the appellant wrote that:

- With all of her health problems, it has been very difficult for her when it comes to day-to-day functions.
- She cannot do any heavy work.
- She has been depending on her son and his family for support since she has been living in Canada.

Need for Help

In the AR, the GP reported that the help required with DLA is provided by family. The GP did not indicate that the appellant uses any of the listed assistive devices.

Additional Information submitted after reconsideration

In her Notice of Appeal dated November 21, 2016, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that:

- She has diabetes and suffers from high blood pressure and high cholesterol.
- For the past 10 years, she has taken medicine every day but her health is still in poor condition and she cannot perform labor work.

At the hearing, the appellant submitted a list dated December 5, 2016 of the medications she has been taking, signed by the GP.

At the hearing, the appellant stated that:

- For a few years, she has been staying home. She went to the welfare office and she was given some benefits.
- She told the ministry she was taking many medications, and she was given some forms to



- apply for the PWD designation and she just followed instructions and made the application.
- She takes the medication in the list provided daily and has been taking them for 5 or 6 years.
 - The medications affect her memory.
 - When she wakes up, she shakes and sometimes has difficulty sitting up. She constantly shakes.
 - She is unable to work.
 - She is getting older and is quite ill. She used to look after her grandchildren but she cannot do that now. Her daughter-in-law looks after the children.
 - A few times she was admitted to hospital. Two or three months ago she was admitted to hospital and she had to stay for 3 to 4 days. She needed a transfusion. She took too much of her sleeping pills. She had obtained a generic type of the medication from her country of origin and she had a bad reaction.
 - She cannot sleep without her sleeping pills. If she did not take them, she would have to go to the hospital because she would not sleep. She is not sure why she cannot sleep but the hours go by and she lies awake.
 - She lives with her son and daughter-in-law and their children. Sometimes her daughter-in-law helps with doing some of the things around the home. Her daughter-in-law lifts everything for her. She tries to be active and if there is something she can do, she does it. She stops when she is not feeling well.
 - She has dizziness when she does physical things.
 - Her family doctor provided the information in the Request for Reconsideration with the list of medications she is taking. The GP speaks her original language and she understands him; however, her memory is not very good and the GP does not take very much time.
 - She is not sure why the letter from her son dated May 22, 2016 was included in the materials. He has been saving to pay for her funeral.

The ministry relied on its reconsideration decision.

Admissibility of Additional Information

The panel considered the list of medications and the oral testimony of the appellant and finds the information provided by the appellant tends to corroborate the previous information from the appellant before the ministry at reconsideration regarding her medications and the impacts of her medical conditions. 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 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 that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry also found 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 PWD designation 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.

Duration of Impairment

The appellant's position, as set out in the Request for Reconsideration and Notice of Appeal, is that she has been suffering from chronic health problems and has been taking many kinds of medication daily for 10 years.

The ministry's position is that the GP has not confirmed that the appellant's impairment will continue for two years or more.

Panel Decision

The legislation – section 2(2)(a) of the EAPWDA – does not permit the ministry to designate an applicant as a PWD unless it is satisfied that, in the opinion of a medical practitioner, the applicant's impairment is likely to continue for at least 2 years.

Although the appellant pointed out that she has been taking medication for 10 years for several chronic health problems, this legislative criterion relates to the anticipated duration of the impairment from the date of the application and must be confirmed by a medical practitioner. In the appellant's

situation, her GP responded “no” to the question whether the appellant's impairment is likely to continue for two years or more and commented: “...as above, she should be on medication to control her blood pressure and DM for lifetime. The patient is anxious and gets tired and fatigued easily. Her physical condition is not suitable for labor work.” The GP indicated that the appellant’s blood pressure and DM are controlled by medication and there was no time-specific prognosis for her impairment or any further information from the GP provided on appeal. Based on the foregoing evidence, the panel finds that the ministry reasonably determined that this legislative criterion has not been satisfied.

Severe Physical Impairment

The appellant’s position is that she has a severe physical impairment due to weakness in her arms and legs, shakiness and dizziness, due to DM and hypertension. The appellant argued that her arms and legs get tired and fatigued very easily from just standing or walking after a short period of time. The appellant argued that she has been suffering from chronic health problems and has been taking many kinds of medication daily.

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 wrote that the GP reported that the appellant’s blood pressure and DM have been “under control,” her functional skills are not severely impacted, and the GP commented about her inability to perform labor work, while employability is not taken into consideration for PWD designation.

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 diagnosed the appellant with DM and hypertension, both of which the GP reported have been under control. In her self-report, the appellant wrote that she has weak arms and legs, and her arms and legs get tired and fatigued very easily from just standing or walking after a short period of time. The GP reported in the PR that the appellant does not require any prostheses or aid for her impairment and she can walk 1 to 2 blocks unaided, she can climb 2 to 3 steps unaided, she can lift 2 to 7 kg., and there is no limitation with how long she can remain seated. As well, the GP indicated that the appellant is independent with walking indoors and walking outdoors, climbing stairs, and standing.

The GP indicated that the appellant requires periodic assistance from another person with lifting, and carrying and holding and the GP wrote that the appellant “...should avoid lifting, carrying or holding heavy loads more than 7 kg.” At the hearing, the appellant stated that her daughter-in-law helps her by lifting everything for her. In the Request for Reconsideration, the appellant wrote that sometimes she drops things uncontrollably due to shaking on both hands. At the hearing, the appellant stated

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that she has dizziness when she does physical things, but dizziness was not a symptom described by the GP to impact the appellant's physical functioning. The appellant stated at the hearing that she had been hospitalized for several days; however, she stated that this was due to a reaction from her medications and not due to an exacerbation in her existing medical conditions.

As discussed in more detail in these reasons for decision under the heading "Restrictions in the Ability to Perform DLA", the evidence indicates that the limitations to the appellant's physical functioning have not directly and significantly restricted her ability to perform her DLA either continuously or for extended periods, as required by the EAPWDA

Given the level of independent physical functioning reported by the GP, 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's position is that a severe mental impairment is established by the impacts from her anxiety. The appellant argued that she suffers from anxiety and has trouble sleeping at night, which is why she has to take sleeping pills, and the lack of sleep causes her to not function very well during the day.

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 reported a significant deficit with cognitive and emotional functioning in the area of emotional disturbance, noting "sad mood, anxious personality", and indicated no major impacts, with a minimal to moderate impact to emotion as well as moderate impacts to bodily functions and attention/concentration. The ministry wrote that the GP indicated that the appellant has no difficulties with communication and she is independent in all areas of social functioning.

Panel Decision

The GP diagnosed the appellant with anxiety and wrote in the health history that the appellant presented to his office in March 2013 with complaints of chronic insomnia and anxiety. In her self-report, the appellant wrote that she suffers from anxiety and has trouble sleeping at night, which is why she has to take sleeping pills, and the lack of sleep causes her to not function very well during the day. At the hearing, the appellant stated that if she did not take her sleeping pills she would have to go the hospital because she would not be able to sleep, and she stated that her memory is poor. The GP reported in the PR that the appellant has a significant deficit in her cognitive and emotional functioning in the area of emotional disturbance and the GP wrote "...sad mood, anxious personality," and no indication of a significant impact to memory. In the section of the AR for assessing impacts to cognitive and emotional functioning, the GP indicated no major impacts. The GP assessed moderate impacts to bodily functions (sleep disturbance highlighted) and attention/concentration, and minimal to moderate impact in emotion (inappropriate anxiety highlighted), and no impacts assessed in the remaining 9 areas of functioning.

The GP also reported that the appellant has no difficulties with communication and she is independent with all aspects of social functioning, specifically: making appropriate social decisions, develop and maintain relationships, interact appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. The GP reported that the appellant has good functioning in her immediate and extended social networks.

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Given the absence of evidence from the prescribed professional of significant 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 and mental impairments severely impair her and her ability to perform DLA is significantly restricted to the point that she requires significant help and support from other people, including her son and daughter-in-law.

The ministry's position, as set out in the reconsideration decision, is that the information from the prescribed professional does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry wrote that the GP indicated in the PR that the appellant's impairment does not directly restrict her ability to perform DLA and he wrote that "she cannot perform labor work; however, she still functions well in her daily activities." The ministry wrote that for the purposes of determining eligibility for PWD designation, employability or ability to work is not taken into consideration.

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 have 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, when asked to describe the mental or physical impairments that impact the appellant's ability to manage DLA, the GP wrote that he does "...not expect her physical and mental conditions affect seriously on her daily activities." The GP also indicated in the PR that the appellant's impairment does not directly restrict the appellant's ability to perform DLA, that the appellant is anxious and gets tired and fatigued easily, and she "...cannot perform labor work; however, she still functions with her daily activities." In her self-report, the appellant wrote that her arms and legs get tired and fatigued very easily when she does day-to-day things, her overall health is poor and it prevents her from performing labor work. In her Notice of Appeal, the appellant wrote that for the past 10 years she has taken medicine every day but her health is still in poor condition and she cannot perform labor work. The panel finds that the ministry reasonably concluded that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

In the AR, the GP indicated that the appellant is independent with moving about indoors and outdoors and with all tasks of most of the listed DLA, specifically: personal care, meals, "pay rent and bills," medication, transportation, and social functioning. The GP indicated that the appellant requires periodic assistance from another person with basic housekeeping, with the note "for gardening," with no indication of a need for assistance with indoor tasks or any detail of how often or how long the appellant requires assistance. The GP also reported that the appellant requires periodic assistance

from another person with the task of carrying purchases home as part of the shopping DLA, with the comment: "...she should avoid carrying or lifting heavy loads more than 7 kg." At the hearing, the appellant stated that her daughter-in-law helps her with lifting but, as previously discussed, an ability to lift up to 7 kg. is not indicative of a significant impact to this aspect of physical functioning. In the additional information to the AR, the GP wrote that the appellant "...is anxious person who has suffered from chronic insomnia- she gets fatigued easily, her concentration and memory are poor; however, she still functions well on her daily activities."

Given the absence of evidence from the prescribed professional of significant restrictions to DLA and the associated need for significant assistance, including a lack of evidence to establish the need for periodic assistance for extended periods of time, 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 her son and daughter-in-law.

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 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 reported that the help required with DLA is provided by family. The GP did not indicate that the appellant uses any of the listed assistive devices.

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