

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 December 5, 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 July 25, 2016 and an Assessor Report (AR) dated July 25, 2016, which were both completed by the appellant's general practitioner (GP) of 4 years;
- The appellant's Self-report (SR) dated July 15, 2016; and
- November 28, 2016 Request for Reconsideration (RFR) from the appellant.

In her Notice of Appeal (NOA), signed and dated December 13, 2016, the appellant states that she can no longer do housework and only drives her car when she is helping her elderly mother. On those occasions she waits for her mother in the car because walking around with her mother is too strenuous. When she is active, the appellant states that she has to take breaks because she feels weak and suffers from a constant lack of energy. She stated that she is not able to babysit her grandson because it is too physically challenging. She indicates that she has weekly migraines and that for 1 to 3 days after getting a migraine she cannot consume food because of nausea from the migraine headache and the medication, and as a result she now weighs 80 lbs. She struggles with life on a daily basis and rarely leaves her home.

At the hearing, the appellant introduced 4 self-photographs to demonstrate her low weight. Both the written statement in the NOA and the photographs were considered by the panel to be argument intended to demonstrate the severity of her medical condition.

Summary of relevant evidence

Diagnoses and history

The appellant's GP provides the following diagnoses:

- Chronic Obstructive Pulmonary Disease (COPD) with an onset of January 2015; and
- Migraine headaches with an onset of 2013 (month not specified).

In the PR the GP reports that the appellant has shortness of breath with slight exertion and that the appellant also suffers from migraine headaches that last between 2 and 3 days and occur almost every week. She also states that sore and watery eyes and nausea are associated with the migraine headaches.

In her RFR the appellant states that she started noticing that she was losing weight in October 2015 and that her weight dropped from just under 110 lbs to 80 lbs. She stated that she feels that the combination of her migraine headaches and her weight loss have contributed to her inability to function normally. The appellant stated that her GP indicated at the time that she (the GP) was not concerned about the weight loss. The appellant noted that she was diagnosed with COPD at that time.

Physical Impairment

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

- The appellant is able to walk 2 to 4 blocks unaided on a flat surface;
- The appellant is able to climb 2 to 5 steps unaided; and
- The appellant is able to lift 5 to 15 lbs. and remain seated without limitation.

In the PR the appellant's GP also states that the appellant's physical impairment is chronic and ongoing and that one form of medication (Ketorolac) provides temporary relief from her headaches while another (Ventolin) helps her with her shortness of breath.

In the SR the appellant states that she has low energy and tires easily. With regard to her migraines, the appellant reports that they cause her so much nausea, headache and eye pain that she has to sit in the dark. When suffering from a migraine, she takes medication every 4 hours, and the medication also causes nausea and lethargy. She explains that her migraines last for one to two days and occur every week or two. When she gets migraines she cannot do anything because she has to sit in the dark. On the day after her migraine subsides she still suffers the effects of the medication and has a swollen right eye, which tears up.

In her RFR the appellant stated that she must always wear sunglasses when she goes outside due to her chronic migraines, and when it is really bright outside she must also wear a cap. She also states that she does not feel that the severity of her migraines has been detailed properly by her GP. Her migraine episodes last 2 to 3 days and occur every week. She states that she has to wear ear plugs, sit upright all day, and that she cannot eat anything due to her nausea.

At the hearing, the appellant stated that when she has a migraine she is unable to work for several days and that as a result she is not viewed by her employer as being reliable. When she does return to work a few days after getting a migraine she knows that it will only be a week or two before she will have to miss work again because of another migraine. She also clarified for the panel that a migraine typically lasts for 2 days and the third day is a recovery day. She usually gets one migraine a week but occasionally she will go 2 weeks between migraines.

In response to a question from the ministry representative she explained that she had not sought the assistance of an advocate in either preparing her PWD application or in preparing for the appeal because she is not comfortable talking to other people about her condition.

At the hearing, the Ministry relied on the reconsideration decision and explained that engaging a local advocate is a good way for a PWD applicant to get advice about the process and expertise in reviewing a PWD application for completeness before it is submitted to the Ministry. The Ministry also noted that most of the information in the PR and the AR related to the migraine impairment with very little about the COPD other than it resulting in the symptom of shortness of breath.

Regarding the appellant's statement about her being unable to work when she gets a migraine, the ministry explained that the criteria assessed in a PWD designation application do not consider employability. The Ministry provided examples of other Provincial programs under which people with barriers to employment can get help, including the Ministry's Persons With Persistent Multiple Barriers designation.

Mental Impairment

[]

In the PR, the GP indicates that the appellant has no difficulties with communication and that she has no significant difficulties with cognitive and emotional function. In the AR, the GP states that the appellant's abilities to speak, read, write and hear are all good and that the appellant has no identified mental impairments.

In the SR, the appellant made no reference to any mental impairments.

DLA

In the AR, the GP reports that the appellant is independent with respect to almost all DLA with the exception of carrying, lifting and holding, for which she requires periodic assistance. Regarding the DLA of basic housekeeping and laundry, the GP notes that, while the appellant is independent in these activities, she needs to periodically take breaks and rest. The frequency and length of those breaks is not provided. With respect to carrying purchases home, the GP explains that the appellant is only able to carry a small bag.

In her SR the appellant reports that the migraine medication slows down her cognitive abilities to the point where she forgets what she is doing. She walks slowly and generally finds it hard to function. She states that she cannot drive when on her migraine medication because she cannot trust her reflexes. She also states that her COPD limits her ability to exert herself and that anything that requires extra energy causes her to pant and she has to sit down and catch her breath.

In her RFR the appellant refers to the fact that her GP has indicated that she is independent with respect to most DLA and states that she cannot lift things repeatedly or walk all day. When walking she has to rest after covering short distances. She also indicates that her ability to complete DLA is harder now than it was when she first applied for a PWD designation. The appellant also states that she cannot complete any DLA when she has a migraine.

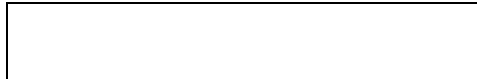
At the hearing, the Ministry stated that the GP has often provided conflicting information, pointing to Section 3-C of the AR wherein the GP indicates that the appellant is independent in all aspects of basic housekeeping. In addition, the ministry emphasized that the GP does not provide details about the frequency and duration of periods during which the appellant cannot complete her DLA.

Need for Assistance

In the AR, the GP reports that the appellant lives alone and requires periodic assistance from other people for lifting, carrying and holding, but there is no indication as to who provides the periodic assistance, the frequency or extent of the periodic assistance required, nor does the GP indicate that the appellant requires the use of an assistive device or an assistance animal. The GP does not report the need for assistance with respect to any of the other DLA.

In the SR the appellant did not indicate that she required the help of another person to complete any DLA. In addition, she does not indicate that she has to use any assistive device, nor that she requires the help of an assistance animal.

At the hearing, the appellant indicated that she does need help with her DLA when she is suffering from a migraine and asked the Ministry how she was expected to come up with the money necessary



to pay someone to provide the assistance.

In response to the appellant's question, the ministry explained that people who require help with their DLA usually get that assistance from family and friends.

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 suffers from severe impairment whenever she has a migraine, and that these migraines last for 2 to 3 days and occur almost every week. When she is experiencing a migraine she is not capable of doing any DLA and has to sit upright and motionless in the dark.

The Ministry's position is that the appellant's PWD application in general, and the GP's PR and AR in particular, provide conflicting information, but that on balance the assessments indicate that the appellant does not have a severe impairment.

Panel Decision

The appellant is diagnosed with COPD and Migraine headaches.

The GP reports that the appellant's physical functional skills are limited: she can walk up 2 to 4 blocks unaided, lift up to 5 to 15 lbs., and climb 2 to 5 steps unaided. The GP has also reported in the AR that the appellant is independent in all aspects of mobility and physical ability except for lifting, carrying and holding, for which the appellant requires periodic assistance from another person without specifying the form, frequency or duration of the periodic assistance required.

As the fundamental basis for the analysis of PWD application is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning, and because the GP has reported that the appellant is independent in virtually all aspects of mobility and physical ability, the panel finds that the Ministry reasonably determined that the information does not establish a severe physical impairment.

Mental Impairment

Neither the appellant nor the Ministry have identified that the appellant has a mental impairment.

Panel Decision

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 migraines in particular make it impossible for her to complete her DLA for the 2 to 3 days during which she is suffering from one. As a result she is unable to feed herself whenever she has a migraine.

The Ministry acknowledges that the appellant has a few 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 all 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.

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, the assessor is instructed to not complete the section of the report identifying whether or not the applicant's DLA are restricted in the PR if the assessor is also completing the AR. As the appellant's GP completed both the PR and the AR, the section of the PR detailing impact on DLA has not been completed.

In the AR, where asked to indicate the assistance required related to impairment, the GP reports that the appellant is able to independently manage all aspects of DLA, with the only qualifications being that she needs to take periodic breaks from basic housekeeping and laundry and that she is only able to carry a small bag. The frequency and extend of those periodic breaks is not specified by the GP.

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 cannot complete any of her DLA whenever she is suffering from a migraine and that she cannot afford to pay someone to assist her when she needs help.

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

In addition to the other requirements set out in the legislation, 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 must also require help to perform those activities in order to qualify for a PWD designation. 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.

In addition to the panel's findings 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 notes that the GP has indicated that the appellant does not require periodic assistance from another person, an assistive device or a guide animal to complete her DLA, with the exception of carrying, lifting and holding, for which she needs the periodic assistance of another person. With respect to the appellant's physical ability to carry, lift and hold, however, the GP does not explain the form and nature of the periodic assistance or how often it is required.

Therefore the panel 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. Therefore the appellant is not successful on appeal.