

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated January 4, 2017 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 appellant was not in attendance at the hearing. After confirming that the appellant 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:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:

- The Applicant Information and Self-report ("SR") completed by the appellant and dated March 18, 2016;
- The Physician Report ("PR") dated June 30, 2016 and the Assessor Report ("AR") dated June 30, 2016, both prepared by the appellant's general practitioner ("GP") of 15 years who treated the appellant 2-10 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 and file/chart information";

2. The appellant's Request for Reconsideration (RFR), signed and dated December 12, 2016 in which she stated in part:

- Fibromyalgia and osteoarthritis in the neck swells and compresses her C 4, 5, 6 vertebrae causing pinched nerves and extreme pain.
- Back and arms throb and hands shake from the pain of writing.
- Vertigo comes and goes without warning and has caused falls in the shower and down the stairs.
- Feet constantly hurt, it hurts to sleep and walk, joints throb and she has been in chronic pain for 20 plus years.

Diagnoses

In the PR, the GP noted that the appellant has been diagnosed with chronic lower back pain/past lumbar compression fracture (onset April 2010), generalized anxiety disorder (GAD) (onset November 2010), chronic soft tissue pain syndrome/fibromyalgia (onset 2007), vertigo (onset September 2013) and carpal tunnel syndrome (onset illegible).

Physical Impairment

SR:

- Disabilities are described as including back and feet pain, carpal tunnel syndrome, dizzy spells and chronic pain in the legs, back, arms, neck, shoulder and hip.
- Back pain has made vacuuming, sweeping, housework and shoveling snow difficult and therefore can only do chores a little at a time.
- Dizzy spells come and go and can last from one day to months. The dizzy spells have caused falls down the stairs, while getting out of bed and in the shower.
- Carpal tunnel syndrome prevents her from doing extensive work in writing, typing and counting money.

PR:

- GP stated that the lumbar compression fracture combined with fibromyalgia results in difficulty with domestic chores including vacuuming, sweeping and shoveling snow.

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- GP stated that the appellant had several emergency visits for unpredictable dizzy spells and that the appellant's vertigo can flare up for weeks.
 - GP indicates that the appellant can walk 1-2 blocks and climb 5+ steps unaided, lift 15-35 lbs and remain seated less than 1 hour (without indicated how much less than 1 hour).

AR:

- GP indicated that the appellant is independent with walking indoors and outdoors, climbing stairs and standing.
- GP indicated that the appellant requires periodic and continuous assistance with lifting (with the comment "relies on family for lifting over 15lbs or carrying items for prolonged periods).
- GP indicates that the appellant requires periodic assistance with carrying and holding.

Mental Impairment

SR:

- Disability is described as anxiety and panic attacks.

PR:

- GP indicated that the appellant suffers from GAD with agoraphobia which causes panic episodes unpredictably in public settings and that the appellant uses avoidance strategies to cope.
- GP indicated that there are significant deficits with cognitive and emotional function in the area of emotional disturbances.

AR:

- GP indicated that the appellant had good speaking, reading and hearing, but has poor writing due to carpal tunnel syndrome.
- GP indicated a major impact to emotion when completing the cognitive and emotional functioning section of the application. The GP indicated a moderate impact to attention/concentration, and that all other listed areas of cognitive and emotional functioning had either minor or no impacts.

Daily Living Activities

PR:

- GP indicated that the appellant is not restricted with any of the listed DLA except basic housekeeping (but did not indicate if the restriction was either continuous or periodic) and daily shopping which is periodically restricted.

AR:

- GP indicated that all listed areas of DLA are performed independently except the following that require continuous assistance: laundry, basic housekeeping assistance (with the comment 'needs assistance for items over 15 lbs and with vacuuming, sweeping and shoveling snow') and carrying purchases home (with the comment 'with items over 15lbs or if carrying light items over 100 feet').
- GP indicated that all the listed areas of DLA under social functioning are performed with periodic assistance required except 'able to develop and maintain relationships and able to secure assistance from others, which are indicated as independently performed.

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- GP indicated that immediate and extended social networks are at marginal functioning.

Need for Help

PR:

- The GP noted that the appellant receives assistance from her family.

AR:

- The GP noted that the appellant receives assistance from son with manual domestic chores.
- The GP indicated that the appellant did not require assistive devices or the use of assistance animals.

Evidence on Appeal

Notice of Appeal, signed and dated January 12, 2017, which stated that the appellant has provided all the information that is needed to make a decision.

Evidence at the Hearing

The ministry relied on its reconsideration decision and added that the evidence must explicitly demonstrate the level of severity of the impairment and restrictions to DLA as the ministry cannot make a determination regarding PWD designation on assumptions.

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 she 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 or nurse 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;
- (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 or nurse 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 her medical conditions result in chronic pain and unpredictable dizzy spells.

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 the evidence provided failed to demonstrate that the combination of the appellant's functional skills, mobility and physical abilities, as indicated in the PWD application, exhibit a severe physical impairment.

Panel Decision

As mentioned previously, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. The appellant faces challenges but the evidence provided by the GP does not clearly demonstrate the impact of her physical impairments. In the PR the GP indicates that the appellant suffers from chronic lower back pain/past lumbar compression fracture and chronic soft tissue pain syndrome/fibromyalgia but can walk, unaided, 1-2 blocks and climb 5+ steps. The GP also indicated that the appellant can lift 15-35lbs and remain seated for less than 1 hour without indicating how much less. In the AR under mobility and physical ability, the GP indicated that the appellant can independently walk indoors and outdoors, climb stairs and stand, and that she requires periodic assistance with lifting, carrying and holding when the weight is over 15lbs or if the carrying distance is over 100 feet. The ministry argued that the level of functioning described by the GP is indicative of a moderate level of impairment. The GP indicated that the areas in functional ability in which the appellant is restricted or requires periodic assistance are lifting, carrying and holding weight over 15lbs. However, the panel notes that in the SR and the RFR, the appellant did not mention her inability to lift, carry or hold, or that she requires assistance in these areas other than to say that her back pain makes it difficult to do laundry without indicating which aspect of performing laundry she requires assistance.

The appellant argues that her unpredictable dizzy spells cause her to fall unpredictably. However, in the evidence provided by the GP, the appellant can walk and climb stairs unaided and that the assistance the appellant requires is limited to lifting, carrying and holding. There is no indication from the GP that the appellant's vertigo has a severe impact on her ability function independently. Similarly, the appellant argues that she is in chronic pain in her back, neck, feet, legs and hips. However, the evidence provided by the GP indicates that the appellant can function independently despite her chronic pain.

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 moderate and there is no indication that she requires significant 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 has anxiety and panic attacks which restrict her ability to function independently.

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. In particular, the ministry argues that the appellant suffers from agoraphobia but can independently function/perform going to and from stores, paying for purchases, filling prescriptions, using public transit, developing and maintaining relationships and securing assistance from others.

Panel Decision

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that

the mental impairment is severe. The appellant faces challenges but the evidence provided by the GP does not clearly demonstrate the impact of her mental impairment. In the PR the GP indicates that the appellant suffers GAD and that she has significant deficits with cognitive and emotional functioning in the area of emotional disturbances. All other listed items under cognitive and emotional functioning are left blank. In the AR, the GP indicates that the appellant has good speaking, hearing, and reading abilities but that writing is impacted due to her carpal tunnel syndrome. Under cognitive and emotional functioning the GP indicates that there is a major impact to emotion and all other listed areas are indicated as either moderate, minimal or no impact. The GP indicates that the appellant has marginal functioning with immediate and extended social networks. The appellant indicates that she suffers from anxiety and panic attacks but does not explicitly describe how her ability to function is impacted.

The GP indicates that the appellant requires periodic assistance with activities related to communication and interaction with others, but that she is independent in making decisions about personal activities, care and finances. Furthermore, the GP does not indicate the frequency and degree of the periodic assistance required. The panel finds that the ministry reasonably determined that the evidence does not support a finding of a severe mental impairment pursuant to section 2(2) of the EAPWDR.

Restrictions in the ability to perform DLA

The appellant argues that due to her medical conditions, she cannot vacuum, sweep or shovel snow.

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 severe 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. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

The GP wrote in the AR that the appellant has chronic pain and that she requires assistance with lifting, carrying and holding weight over 15lbs or carrying light weight for over 100 feet, and that she requires continuous assistance with laundry, basic housekeeping and carrying purchases home.

However, all other listed items under DLA are performed independently and the restriction of carrying, lifting and holding, which is seemingly caused by her chronic lower back pain/past lumbar compression fracture and chronic soft tissue pain syndrome/fibromyalgia does not transfer to her ability to, for example, cook, transfer in/out of bed or a chair, go to the store, or get in or out of a vehicle. Additionally the information provided does not clarify why the appellant requires continuous assistance if she can walk 1 to 2 blocks and climb 5 steps unaided, and lift up to 35lbs or carry 15lbs.

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 argued that she needs help from her family.

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.