

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated January 25, 2017, 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* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment 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 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

Evidence before the Ministry at Reconsideration

The evidence before the ministry at the time of the reconsideration decision included the PWD Application comprised of the appellant's self report (SR) dated September 20, 2016, a medical report (MR) dated September 27, 2016 completed by her general practitioner (the GP), who has seen the appellant 2 to 10 times in the past 12 months but does not note how long the appellant has been her patient, and an assessor report (AR) also completed by the GP on September 27, 2016.

The evidence at reconsideration also included the appellant's Request for Reconsideration received by the ministry on January 20, 2017, in which she writes that:

- she is not able to lift/carry items even less than 5 lbs with her right hand due to rotator cuff rupture
- she can only go shopping if in the company of friends
- friends or hired help are required in order to do housework
- job loss and reduced physical ability have been a huge emotional burden
- antidepressants have caused sleep disturbance and temporary memory loss episodes
- she lacks confidence in her ability to do banking or forms completion
- she feels embarrassed when she has to ask for help or drops/ breaks items
- she refuses to go out for days at a time and as a result has become overweight and has recently developed an inguinal hernia.

Diagnosis

In the MR the GP notes the following diagnoses related to the appellant's impairment: mild osteoarthritis in knees (onset 2014), disc disease in neck and lumbar spine (onset 2012), depression (onset 2006), right shoulder rotator cuff tear (onset 2013) and scoliosis (date of onset not noted by GP).

Physical Impairment

In her SR the appellant wrote that her physical impairments made it difficult for her to walk, carry/lift packages and climb stairs.

In the MR the GP reported that the appellant:

- walks 2 to 4 blocks unaided;
- climbs 5+ steps unaided;
- is limited to lifting less than 5 lbs;
- has no limitation to remaining seated.

In the AR the GP did not answer Question #1 asking for a description of the appellant's mental or physical impairments. The GP reported that the appellant:

- is unable to lift, carry or hold;
- is independent with walking indoors and outdoors and standing.

Mental Impairment

In her SR the appellant wrote that she experiences a lot of stress and depression. She has

difficulties making decisions and planning ahead, and experiences memory problems. She also has difficulty interacting with family, friends and strangers, making and maintaining relationships and dealing with unexpected situations. She feels anxious when speaking or listening to others.

In the MR the GP noted that the appellant has significant deficits in cognitive and emotional functioning in the following 4 areas: Executive (planning, organizing, sequencing, calculations, judgment), Memory, Emotional disturbance (depression, anxiety) and Motivation (loss of initiative or interest), but not in the remaining 7 areas of functioning. The GP did not make additional comments respecting the appellant's cognitive and emotional functioning deficits. In Section F of the MR she added the following information which she considered relevant to the appellant's impairments and the impact on her daily functioning: "*She is having a disabled son. She has been limited and depressed because of this all her life. She was a single mom and had to work full time. Now with all disabilities she can't work and she needs financial help*".

In the AR the GP assessed the appellant's ability to communicate as good for speaking, reading, writing, and hearing. In the area of cognitive and emotional functioning the GP noted that the appellant has the following impacts:

Major impact: emotion and motivation

Moderate impact: (none)

Minimal impact: memory

No Impact: bodily functions, consciousness, impulse control, insight and judgement, executive, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems.

Daily Living Activities (DLA)

In her SR the appellant wrote that her disability condition is severe and makes it difficult for her to do the following DLA: standing at the sink and stove, moving and preparing food, opening cans or jars, all aspects of general housework and cleaning, walking around stores long enough to make good choices, carrying groceries home or to her car. She added that her memory problems cause her to forget to eat meals regularly, to discard spoiled food, to take medications as prescribed and refill them when necessary, and to pay her bills on time.

In the MR the GP noted that the appellant is restricted in her ability to perform daily shopping, but is not restricted in personal self care, meal preparation, management of medications and finances, mobility inside and outside the home or social functioning. In the area of basic housework the GP wrote "unknown" and "periodic restriction" and explained: "*When she has pain she can't do any work at home*". The GP also commented that the appellant is impacted in social functioning: "*Not going anywhere*".

In the AR the GP noted that the appellant is independent in all areas of personal care, shopping, meals, paying rent and bills, medications (taking, handling and filling/refilling prescriptions). She did not complete the section on impairments to the appellant's ability to perform DLA in the area of basic housekeeping and did not provide any additional comments.

The GP also noted that the appellant is independent in all areas of social functioning but commented that she has marginal functioning with her immediate and extended social networks. In response to the question asking the GP to describe any help needed by the appellant to maintain her in the community the GP responded: "*Financial support, as she cannot work.*"

Assistance Required

In her SR the appellant wrote that she relies on the assistance of friends and hired help to accomplish her DLA.

In the MR the GP gave the following response to the question regarding the appellant's need for assistance with DLA: "*Financial.*"

In the AR the GP noted that help for DLA is provided by friends, and that the assistance with DLA required by the appellant is "*Financial*".

Additional Information at the Hearing

At the hearing the appellant provided the following additional information:

- she has become deeply depressed because her son suffers from a serious mental disorder and has been hospitalized several times;
- her neck and shoulder problems were caused by many years of work as a hairstylist;
- because of her medical problems and depression she is taking many medications that are causing memory issues, difficulty with DLA and an overweight problem;
- she is doing the prescribed physiotherapy but it is not helping her recovery enough to work again;
- she has kidney, bladder and digestive system problems;
- she is also taking medication for osteoporosis;
- she lives alone;
- when she goes out shopping a friend almost always accompanies her;
- she no longer drives her car, and travels to appointments by bus;
- she prepares her own meals, but it takes longer.
- she can only lift 1kg with her right hand due to her rotator cuff injury, and must use her left hand and arm to lift anything heavier.

Admissibility of Additional Information

The panel admitted all of the appellant's additional oral information under EAA Section 22 (4)(b) as evidence in support of the information that was before the ministry at reconsideration, except the statements concerning her kidney, bladder and digestive problems and osteoporosis, because none of these medical conditions was identified by her GP in the MR or PR. These additional medical conditions constitute new information that was not before the ministry at reconsideration, and are therefore not admissible under EAA Section 22 (4) (b).

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision of January 25, 2017 that determined 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* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that her impairment 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 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.

The relevant legislation is as follows:

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 is in a prescribed class of persons or 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.

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

(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.

Severe Physical Impairment

The appellant's position is that her daily functioning is severely limited by her physical impairments, namely osteoarthritis, neck and lumbar spinal disc disease, scoliosis, inguinal hernia and a rotator cuff tear in her right shoulder. She cannot carry more than 1 kg with her right arm due to the shoulder injury, and must use her left arm. She almost always relies on friends to assist with shopping, lifting and carrying.

The ministry's position is that the appellant's physical impairments are not severe because in the MR the GP indicates that the appellant can walk 2-4 blocks unaided, climb 5+ stairs unaided, and has no restriction in remaining seated, and is limited in lifting under 2 kg. In the AR the GP confirms that the appellant is independent with walking indoors, walking outdoors and standing, but is unable to lift or carry items.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. "Impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider 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. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or a "prescribed professional" – in this case, the appellant's GP. The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment.

The GP has noted that the appellant is limited in lifting and carrying packages. In the MR the GP writes that she cannot lift more than 2 kg, and in the AR the GP writes that she is "unable" to lift or carry items. The appellant assisted the panel by explaining that she cannot lift or carry an item weighing more than 1 kg with her right arm due to shoulder injury, and must use her left arm to carry heavy items. In the MR the GP has also indicated that the appellant can walk 2-4 blocks unaided, climb 5+ stairs unaided, and has no restriction in remaining seated. In the AR the GP confirms that the appellant is independent with walking indoors, walking outdoors and standing.

Except for the limitation with respect to lifting, the other assessments are in the minimal to moderate range. The panel finds the ministry was reasonable in determining that these assessments were not sufficient to establish a severe physical impairment.

Severe Mental Impairment

The appellant's position is that she suffers from anxiety and depression which cause difficulty in interacting with family, friends and strangers. Her antidepressant medication has caused sleep disturbance and temporary memory loss episodes which seriously impact her ability to function.

The ministry's position is that the information provided by the GP in the MR and AR is insufficient to demonstrate a severe impairment in mental functioning. In the MR the GP notes that the appellant

has significant deficits with cognitive and emotional functioning in the areas of memory, emotional disturbance and motivation, but in the AR the GP indicates that she experiences minimal impact in the area of memory. Although in the AR the GP indicates major impacts in the areas of emotion, attention/concentration and motivation she reports no impact to cognitive and emotional functioning in the remaining 10 areas listed on the AR.

Panel Decision

The GP has diagnosed the appellant as suffering from depression, and indicates that she has significant deficits to cognitive and emotional function in the areas of executive function, emotional disturbance and motivation. The GP also notes that the impact on the appellant's memory function ranges from significant (in the MR) to minimal (in the AR). The GP does not indicate any communication difficulties. In the AR the GP reports major impact to only 3 of the 14 functioning areas listed (emotion, attention/concentration and motivation), no moderate impacts to functioning, and no impacts to 10 of the listed areas. The panel also notes that the GP did not use the additional space provided to describe impacts to daily functioning. When speaking to social functioning in AR Section 3-C the GP describes the appellant as independent in making appropriate social decisions, developing/maintaining relationships, interacting and obtaining assistance from others. The GP also indicates that the appellant has marginal functioning with immediate and extended social networks, but the appellant refers to frequent assistance from friends in her SR, Request for Reconsideration and oral evidence at the hearing..

Considering the GP's assessments in the MR and PR, the lack of additional information from the GP and the evidence of the appellant respecting her social networks the panel finds the ministry was reasonable in determining that the information provided was not sufficient to establish a severe mental impairment.

Restrictions in Ability to Perform DLA

The appellant's position is that as a result of her physical and mental impairments she is restricted in performing almost all aspects of DLA, including food preparation, cooking, housecleaning, laundry, use of medications, paying bills, making appropriate shopping choices and interacting with others.

The ministry's position is that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods. Although in the MR the GP indicates periodic restrictions with shopping, in the AR the GP indicates that the appellant is independent in all shopping-related DLA. In the AR the GP also indicates that the appellant is independent in all areas of personal care, meals, medication, paying rent and bills and getting in and out of vehicles.

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 MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In the appellant's case the GP is the sole prescribed professional providing an opinion regarding ability to perform DLA. In the MR the GP indicates that only daily shopping is restricted, and the restriction is periodic. The GP explains: "*When she has pain, she can't do any work at home*". She does not explain the frequency or severity of the periods in which the appellant's pain impacts her DLA. In the AR the GP indicates that the appellant is independent in all aspects of DLA, but has marginal functioning with immediate and extended social networks.

Based on the level of independence with which the appellant is reported to manage almost all DLA tasks, and the absence of information as to the frequency and duration of the periodic assistance required for the remaining DLA tasks, the panel finds that the ministry reasonably determined that the information provided does not establish that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

Help in Performing DLA

The appellant's position is that she is reliant on the assistance of friends and hired help to perform many of her DLA, including housekeeping, shopping, lifting and carrying.

The ministry's position is that the GP does not indicate that the appellant requires any prostheses or aids for her impairment or the help of an assistive. The GP has also not indicated that the appellant requires the significant help of another person or the services of an assistance animal. The ministry also argues that because it has not been established that DLA are significantly restricted, it cannot be determined that 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. 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 MR and AR, responding to the question asking what assistance with DLA is needed, the GP responds: "*Financial*". Although in the AR the GP indicates that friends provided assistance for DLA, she does not provide any additional detail to establish that the significant help of another person is required. Although the GP refers to the use of splints to compensate for the appellant's impairment she provides no additional details or explanation.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also 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

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, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.