

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 January 5, 2017 which held that the appellant did not meet 4 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 but was not satisfied that:

- a medical practitioner has confirmed that the appellant’s impairment is likely to continue for 2 years or more;
- 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 help, as it is defined in the legislation, 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

- A PWD application comprised of: the appellant’s Self-report (SR) dated May 17, 2016; a Physician Report (PR) dated August 9, 2016, completed by the appellant’s general practitioner (GP) of 3 months; and, an Assessor Report (AR) dated May 27, 2016, completed by a social worker (SW) who has known the appellant for 3 months.
- The appellant’s December 13, 2016 Request for Reconsideration, to which she attached:
 - 1) A November 15, 2016 letter from the GP, and
 - 2) A 13-page Vocational Psychological Assessment respecting an assessment on October 5, 2016, performed by a PhD Clinical Consultant.

Information submitted on appeal

No further evidence was provided on appeal. In her Notice of Appeal, the appellant explains why she disagrees with the reconsideration decision. The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses and Duration of Impairment

A medical practitioner, the appellant’s GP, indicates that the appellant has diagnoses including “epilepsy – unspecified” with an onset date of 2011. Where asked “Is the impairment likely to continue for two years or more from today?” the GP did not tick either the “yes” or “no” box, commenting “Depends on response to treatment.”

Physical Impairment

In the PR, the GP provides the following information.

- The appellant says she has been fired from work because of seizure disorders. She is not able to work for now. She may require medication after review by specialists.
- The appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift 5 to 15 lbs., and there is no limitation to the time she can remain seated.
- There are no cognitive, motor, sensory, or other difficulties with communication.

In his subsequent letter, the GP writes that the appellant’s seizures seemed to have relapsed, the last seizure episode being a month prior to this clinic visit, and that she has been restarted on medication.

In the AR, the SW provides the following information.

- Walking indoors is managed independently.

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- Walking outdoors (right knee pain), climbing stairs (needs railing or support), lifting (small size limited), and carrying and holding take significantly longer than typical.
 - Standing requires periodic assistance from another person (needs help after 10 minutes).
 - “Motor movement some impairment physically.”
 - Has had seizures, periodically since 1989. Has been more frequent. Very difficult to predict – generally need others nearby to assist.
 - Uses a cane.

In the SR, the appellant writes that she has epileptic seizures 3-4 times a month, sometimes more, which makes finding and keeping a job nearly impossible. She needs someone around her to make sure she is safe when having a seizure.

The vocational assessor notes that the appellant does not currently report issues with pain and that she reports a history of seizures. On both matters, the vocational assessor defers to the opinion of the appellant’s medical doctor regarding the impact on the appellant’s ability to work.

Mental Impairment

In the PR, the GP reports that there are no difficulties with communication or significant deficits with cognitive and emotional function.

In his subsequent letter, the GP writes that the appellant has been in a physically abusive relationship with a partner from whom the appellant has been separated for several years. She “seems to have some symptoms suggestive of Post-Traumatic Stress Disorder as she used to wake up from sleep once or twice a week with her heart racing and recalling past abusive events. These episodes are less frequent now and she sleeps well mostly.”

In the AR, the SW reports the following.

- Seizure activity increases anxiety levels.
- Respecting the 14 listed aspects of cognitive and emotional functioning, a major impact on daily functioning is reported for 2 aspects - bodily functions (problems with feet and balance) and emotion (“due seizure unpredictable activity”, tends to isolate self after seizure). A moderate impact is reported for consciousness, attention/concentration, executive, memory, motivation, motor activity, language (English understanding limits, difficulty processing information), other neuropsychological problems, and other emotional or mental problems. A minimal impact is reported for impulse control and insight/judgement. No impact is reported for consciousness. The SW also reports the need for dentures to help with adequate nutrition.
- Ability to communicate is good for speaking and hearing, and is poor for reading and writing (vocabulary limited).

In her SR, the appellant writes that she feels a lot of shame and embarrassment after she has a seizure and feels that people judge her because of her seizures.

The vocational assessor identifies past substance abuse, including 3 weeks prior to the assessment, and that the appellant reports being a lifelong worrier. The appellant indicated that she is not interested in looking for work or training at the time of the assessment, wanting to work on healing

and improving herself. The vocational assessor reported observing appropriate emotional reactions to the content of the conversation. In order to evaluate current status and assist with career planning, the appellant's strengths, limitations and vocational interests were identified. A number of tests were administered, with the findings falling within the required diagnostic range for an intellectual disability.

DLA

In Section E of the PR, the GP reports that the appellant's impairment does not directly restrict her ability to perform DLA. All listed DLA are reported as not being restricted. In Section F of the PR, the GP comments that the appellant has complained of recurrent seizures, which is affecting her employment, and that her "ADL" and "IADL" are also affected immediately after seizure activities. She may need some social assistance until the seizure is well investigated and controlled.

In the AR, the SW provides the following information specific to each DLA.

Move about outdoors and indoors

- As described above under the heading Physical Impairment.

Personal care

- Dressing, grooming, bathing, toileting and transfers in/out of bed are managed independently.
- Feeding and self-regulating diet (will not eat for up to a week after a seizure and needs assistance) and transfers on/off chair (right knee pain, needs help to get up) require periodic assistance from another person.

Basic housekeeping

- Laundry and basic housekeeping take significantly longer than typical and require periodic assistance from another person.

Shopping

- Making appropriate choices and paying for purchases (math poor, needs to count 4-5 times) require periodic assistance from another person.
- Going to and from stores and reading prices and labels (understanding labels almost impossible) take significantly longer than typical.
- Carrying purchases home (only able to carry small amounts) requires continuous assistance from another person.

Meals

- Meal planning requires continuous assistance from another person.
- Food preparation, cooking, and safe storage of food require periodic assistance from another person as they are "physically difficult."

Paying rent and bills

- All tasks (banking, budgeting, and paying rent and bills) take significantly longer than typical and require periodic assistance from another person (help to understand mathematical part).

Medications

- Filling/refilling prescriptions requires continuous assistance from another person, while taking medications as directed and safe handling and storage require periodic assistance from another person (needs help to understand, verbal assistance).

Transportation

- Getting in and out of a vehicle and using public transit schedules/arrange transportation (needs assistance due to literacy) take longer than typical and require periodic assistance from another person.
- Using public transit is not applicable, as none is available.

Social Functioning

- Continuous support/supervision is required for develop and maintain relationships.
- Periodic support/supervision is required for appropriate social decisions, interact appropriately with others, deal appropriately with unexpected demands, and secure assistance from others.
- Very disrupted functioning with both immediate (often neglected and has been subject to physical and mental abuse) and extended (very isolated) social networks.
- Can be taken advantage of easily due to level of understanding.

The vocational assessment includes responses to a questionnaire completed by the appellant's roommate identifying that the appellant has low functioning for self-care and extremely low functioning for home living, community use, and health and safety. The same questionnaire was also completed by the appellant's case worker, who indicated that a high proportion of her responses were guesses, and the appellant, both of whom reported results similar to those of the roommate.

Need for Help

The GP does not identify the need for help with DLA.

The SW reports the need for a worker to maintain regular contact to monitor seizure complications and suggest a supportive living arrangement where staff could monitor activities and support dietary needs. The appellant uses a cane and would benefit from an assistance canine to alert others.

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 medical practitioner had not confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- a severe physical or mental impairment was not established;
- the appellant's 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require help, as it is defined in the legislation, 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;

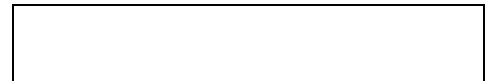
"**prescribed professional**" has the prescribed meaning.

(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 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).

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....

Duration of Impairment

The appellant's position is that her medical and cognitive functioning has impacted her severely on a daily basis for 27 years.

The ministry's position is that, as the GP has not ticked the "yes" box when asked if the appellant's impairment is likely to continue for two or more years, and comments "Depends on response to treatment," it is not satisfied that in the GP's opinion the appellant's impairment is likely to continue for at least two years.

Panel Decision

Section 2(2)(a) of the EAPWDA requires that the minister be satisfied that in the opinion of a medical practitioner or nurse practitioner an applicant's impairment is likely to continue for at least two years. In this case, a medical practitioner, the appellant's GP, identifies one medical condition, seizures – unspecified, but did not tick either the "yes" or "no" boxes in response to the question "Is the impairment likely to continue for two years or more from today?" As the ministry notes, the GP answers with "Depends on response to treatment." The panel notes that the GP also comments that the appellant may need some social assistance until the seizure is well investigated and treated. The panel finds that the information from the GP does not provide any indication as to how long the appellant's impairment is likely to continue, as the seizures may respond to treatment. Therefore, the panel finds that the information from the GP was reasonably viewed by the ministry as not satisfying the requirement that a medical or nurse practitioner confirm that the appellant's impairment is likely to continue for two years or more.

Severe Physical or Mental Impairment

The appellant's position is that her medical and cognitive functioning impacts her severely on a daily basis. In response to the reconsideration decision, she explains that neither the GP nor the SW knew her well at the time the PWD application was completed, and that the differences between the information they provided are in areas that neither the GP nor the SW spoke with the appellant about to gain further information. The vocational psychological assessment shows that she has extremely low adaptive functioning skills, limited educational and literacy abilities, and that she meets the DSM-V criteria for an Intellectual Disability. Additionally, she has been placed back on medication as her seizures were significantly impacting her life.

The ministry's position is that the level of physical capability assessed by the GP is not indicative of a severe physical impairment. Additionally, the GP reports that the appellant's ability to perform DA is not restricted, and while he also states that DLA are affected immediately after seizures, he does not explain in what way they are affected, to what degree, and how often.

While the SW indicates the need for periodic or continuous assistance in several areas of DLA, this information does not coincide with the opinion of the GP and, in fact, differs in several areas. For example the GP reports that there are no significant deficits with cognitive and emotional functioning

or restrictions with social functioning, whereas the SW identifies a major impact on daily cognitive and emotional functioning and very disrupted functioning with both immediate and extended social networks. Because of these differing opinions, the ministry cannot confirm that the appellant's ability to perform DLA is restricted, which speaks to the severity of impairment.

The ministry recognizes that employability is mentioned several times throughout the appellant's application, but comments that the PWD application is not intended to assess employability or vocational abilities, and that a medical barrier to the ability to engage in paid employment is not a legislated criteria for PWD designation. The ministry notes that the vocational assessment was conducted for the purpose of evaluating current status and to assist with career planning, recommending suitable employment positions. Although the vocational assessment test results reveal low intellectual functioning, having low intellectual functioning does not necessarily confirm a severe impairment and furthermore, no medical diagnosis is provided and the information is unrelated to the original medical diagnosis of epilepsy.

In exercising its legislative discretion to determine severity of impairment, taking into account all of the information provided, the ministry is not satisfied that the information provided is evidence of a severe impairment.

Panel Decision

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.

The appellant's GP diagnoses the appellant with seizures, commenting that the appellant's "IADLs" are impacted immediately following seizure activities, but that otherwise the appellant is able to independently walk 4+ blocks, climb 5+ stairs, and lift between 5-15 pounds. The GP does not indicate how often the seizures occurs, though in his subsequent letter he indicates that the last one occurred one month prior to the appellant's appointment, which does not coincide with the appellant's self-report that seizures occur 3-4 times a month. The SW makes the general comment that seizures are occurring more frequently and are unpredictable. The appellant and the GP confirm that since the time the PWD application was completed, the appellant is taking anti-seizure medication, but there is no additional information as to the effectiveness of the treatment. The SW assesses the appellant as independently walking indoors, but as taking significantly longer, requiring periodic assistance from another person, or using a cane to manage all other aspects of physical ability and mobility. It is possible that the need for periodic assistance relates to times when the appellant experiences seizures, though it would be expected that the ability to walk indoors would also be impacted. It is unclear how often periodic assistance is required or how much longer the appellant takes and

furthermore, the SW identifies walking outdoors taking significantly longer as relating to right knee pain, a diagnoses not confirmed by the GP. The appellant comments that seizures prevent her from working, and significantly impact her life, but does not describe her ability to mobilize.

Based on the above analysis, the panel finds that the information establishes some periodic limitations to physical functioning due to seizures, but that the frequency and nature of these limitations is unclear. Consequently, the panel finds that the ministry has reasonably concluded that the information is not indicative of a severe level of physical impairment.

Respecting cognitive, emotional and social functioning, the information varies substantially. In the PR, the GP reports that there are no communication difficulties or significant deficits with cognitive and emotional functioning. Subsequently, in his letter, the GP reports that the appellant seems to have symptoms suggestive of PTSD, but no diagnosis is made, and the described symptoms are occurring less frequently and the appellant is sleeping well mostly. In contrast, the SW reports a major impact on daily functioning in most listed areas of cognitive and emotional functioning, as well as very disrupted functioning with all social networks. The SW identifies that seizure activity impacts emotion, increasing anxiety and causing the appellant to tend to isolate after a seizure. However, a number of other impacts, including impacts on the ability to perform listed cognitive DLA tasks, are attributed to causes other than seizures, including problems with literacy, difficulty with mathematics, and past physical and mental abuse. The vocational assessment also addresses the appellant's intellectual functioning but, as the ministry notes, the information is unrelated to the diagnoses of epilepsy and there is no additional supporting diagnoses from a medical or nurse practitioner. Additionally, as noted by the ministry, a low level of intellectual functioning does not necessarily confirm a severe impairment and the vocational assessment is intended primarily to assess psychological functioning in terms of employment, which is not a legislated criterion for assessing PWD eligibility. The appellant does not describe her cognitive and emotional functioning, except to say that she has feelings of embarrassment and shame surrounding her seizures.

Given the conflict between the GP's assessment of good cognitive and emotional functioning and the information provided by the SW and the vocational assessment, especially as the information from the SW and the vocational assessment in large part does not relate to the only diagnosed medical condition of seizures, the panel finds that the ministry has reasonably determined that a severe mental impairment has not been established.

Restrictions in the ability to perform DLA

The appellant argues that she is continually impaired in the ability to function due to her physical and mental conditions.

The ministry comments, as noted above, that the GP indicates that the appellant's ability to perform DLA is not restricted and subsequently indicates that DLA are affected immediately after seizures without any description of the effects. The ministry argues that while the legislation does not specifically require an explanation of the frequency and duration of restrictions, this information is valuable in determining the significance of the restrictions. Also, the ministry argues that given "the extreme differing opinions" of the GP and the SW respecting DLA, the ministry cannot confirm that the appellant's ability to perform DLA is significantly restricted. The ministry notes that the vocational

assessment rates the appellant's functioning in categories such as home living and self-care as low or extremely low, which conflicts with both the GP who indicates that personal care and basic housekeeping are managed independently and with the SW who indicates that the appellant independently manages aspects of personal care and only requires periodic assistance with basic housework.

Considering the information as a whole, the ministry finds that the information provided does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b)(i) 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. As the ministry notes in its reconsideration decision, employability or the ability to work is not a prescribed DLA or a criterion under the legislation.

In this case, the prescribed professionals who provide information respecting the appellant's functioning are the GP and the SW. It is unclear if the vocational assessment was conducted by a prescribed professional. The information summarized within the vocational assessment respecting the appellant's abilities with home living, community use, and self-care was provided by the appellant, her roommate, and a case worker, none of whom are prescribed professionals. Furthermore, as noted by the ministry, the low and extremely low levels of functioning in these areas reported in the vocational assessment conflicts with the assessments of both the GP and SW.

As discussed previously, the GP reports that DLA are managed independently except immediately following seizures, but the GP does not provide any further description of the impact or whether medication has either reduced or controlled the seizures.

The SW identifies some restrictions with two aspects of the DLA meals due to the appellant's seizures – feeding self and regulating diet are impacted in the following week - and as previously discussed, some of the periodic limitations reported for mobility may be related to seizures. However, for the most part, the cause of a particular restriction is not described, such as the need for continuous assistance with meal planning, or is attributed to a cause unrelated to seizures, such as the need for periodic assistance with transfers off/on chairs due to right knee pain, or difficulties with math and literacy which are reported as impacting cognitive aspects of the DLA shopping, paying rent and bills, medications, and transportation.

As the ministry commented in its analysis respecting severe impairment, the legislation requires a direct causal connection between an applicant's medical conditions, in this case seizures, and the

resulting impairment, including the restrictions on the ability to perform DLA. In this case, the GP assesses the appellant as independently managing all DLA except immediately following a seizure, but does not provide sufficient detail in order to assess if the periodic restrictions are both significant and for extended periods. The SW's information substantially conflicts with that from the GP, and identifies causes other than seizures for many of the reported impacts on DLA. Consequently, the panel finds that the ministry has reasonably determined that considering the information as a whole, the information provided does not establish that the appellant's DLA are directly and significantly restricted either continuously or periodically for extended periods.

Help to perform DLA

The appellant argues that as a result of her physical and mental conditions, she needs the assistance of others.

The ministry's position is 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 being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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.

As the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

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.