

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 31, 2017, which held that the appellant did not meet 2 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 the appellant has a severe physical impairment that a medical practitioner has confirmed is likely to continue for at least 2 years. However, the ministry was not satisfied that:

- 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

Information before the ministry at reconsideration

- A PWD application comprised of a Physician Report (PR) and Assessor Report (AR), both dated July 11, 2016 and completed by a general practitioner (GP) who has known the appellant since 2008. The appellant elected not to complete the Self-report section of the PWD application.
- A 2-page, undated typewritten reconsideration submission from the appellant.
- A January 24, 2017, letter from the GP submitted with the appellant's Request for Reconsideration.

Information provided on appeal and admissibility

The appellant submitted a Notice of Appeal in which she stated that insufficient information had been provided by the GP respecting DLA and the need for assistance, and that she was seeking more specific information from the GP.

Prior to the hearing, the appellant submitted a February 23, 2017, letter from the GP who confirms that the appellant suffers from daily spine pain following a motor vehicle accident and writes that he has discussed the attached review from the appellant's advocacy agency. Attached is 1-page of information provided under the headings "Directly and significantly restricted daily living activities" and "Assistance required with daily living activities as a result of significant restrictions." The page has been stamped by the GP's office.

At the hearing, the appellant's advocate reviewed the additional 1-page of information. The ministry did not object to the admission of the information in this document, noting that it was much more detailed than the information available at reconsideration.

At the hearing, the appellant stated that it is a challenge for her to get her children up and out and that she has not been able to do very much since her motor vehicle accident. The appellant also described the resulting anxiety she has experienced when driving a vehicle.

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

At issue is the admissibility of the 1-page document endorsed by the GP; the GP's February 23, 2017

letter did not provide additional information and the appellant's oral testimony did not introduce new evidence. The panel finds that while some of the information may be viewed as elaborating on information previously provided by the appellant and the GP, there are a number of significant changes from the information available at reconsideration. Of particular note is that the appellant previously reported having between 1-5 best days of functioning but is now reported as having 10 best days per month. Additionally, the appellant is now reported as requiring two specific assistive devices whereas the GP previously indicated in both the PR and the AR that none were required. Also, whereas the GP previously indicated the need for periodic assistance, the information provided on appeal expressly states that continuous assistance is required. Consequently, the panel concludes that, on balance, the new information substantially conflicts with the information available at reconsideration and is therefore not admissible under section 22(4) of the EAA as it is not information in support of the information and records before the ministry at reconsideration; rather, it is information that is properly first put before the ministry.

The ministry did not provide additional evidence on appeal, and relied on its reconsideration summary.

Summary of relevant evidence

Diagnoses and history

The GP diagnoses cervicothoracic lumbar strain resulting from a motor vehicle accident in May 2015 that causes chronic severe daily back pain and limited range of motion. Treatment thus far has failed. Chronic pain makes work impossible.

No mental impairment or brain injury is diagnosed and the appellant is reported to have good communication abilities. The GP indicates that the section of the AR addressing cognitive and emotional functioning is "N/A", commenting "pt just has the migraines 2/weekly."

In her reconsideration submission, the appellant reports chronic sensitivity to bright or fluorescent lights and loud or simultaneous noises, which cause an instant headache or migraine.

DLA

In the PWD application, the GP provides the following information respecting the appellant's ability to perform DLA.

Move about indoor/outdoors

- No assistive devices or aids are used or required.
- Can walk less than 1 block unaided; climb 2 to 5 steps unaided; lift under 5 lbs. and, remain seated less than 1 hour.
- Periodic assistance from another person is required for walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding. "Pt needs help often with lifting

objects/walking etc.”

Personal care

- All listed tasks are managed independently - dressing, grooming, and bathing, toileting, feeding self, regulate diet, transfers (in/out of bed and on/off chair).

Basic Housekeeping

- Both listed tasks require periodic assistance from another person - laundry and basic housekeeping.

Shopping

- All listed tasks require periodic assistance from another person - going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home. “Pt gets help from a friend for lifting objects.”

Meals

- All listed tasks are managed independently - meal planning, food preparation, cooking, and safe storage of food.

Paying Rent and Bills

- All listed tasks are managed independently – banking, budgeting, and pay rent and bills.

Medications

- All listed tasks are managed independently – filling/refilling prescriptions, taking as directed, and safe handling and storage.

Transportation

- All listed tasks are managed independently - getting in and out of a vehicle, using public transit, and using transit schedules/arranging transportation.

Social Functioning

- All listed aspects managed independently – appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to secure assistance from others, and able to deal appropriately with unexpected demands.

In his subsequent January 24, 2017 letter, the GP’s comments respecting DLA are as follows:

“She is unable to complete such tasks as walking 4+ blocks unaided and climb 5+ stairs unaided on a bad day. Her physical impairments significantly restrict her from doing daily living activities and the time to do simple tasks is significantly lengthened. She requires assistance from others with daily activities such as personal care, housecleaning, and food preparation.”

In her reconsideration submission, the appellant reports that on her worst days, which occur roughly 15 days per month, she cannot get out of bed and cannot stand due to pain. On her worst days, she must crawl up the two flights of stairs in her home and, at other times, must use the railings. She cannot carry her toddler and must use a stroller to assist with balance. On her best day, she can walk on flat, dry pavement for a maximum of 15 minutes; if she continues, pain becomes debilitating and

leaves her bed-ridden for the remainder of the day.

On an average day, she cannot take a bath, experiences severe throbbing when lifting her right arm and hand to brush her teeth.

She relies on quick, ready-made meals because she cannot stand at the counter to cut and prepare food for over 10 minutes. On her worst day, moving food from the fridge, shelves or counter is impossible as she cannot bend or carry due to severe pain.

Doing dishes is extremely taxing on her neck, shoulder and arms, and is only done for a maximum of 7-10 minutes before a headache ensues; beyond 10 minutes causes a migraine. On her best day, roughly 1-5 days a month, she can complete one laundry load and on one of her worst days, she was folding laundry while sitting on the floor because looking down caused severe neck pain and had to crawl to the couch to pull herself up. She is incapable of walking her roughly 5-pound garbage bag about 10 metres to the bin so she loads it into the car and drives to the bin.

The appellant grocery shops about once a month, always using a cart for balance, and can last for about 20 minutes in the store. Bending down to get items and read labels causes extreme pain and vertigo. On her worst days, she drives to the store but feels so overwhelmed and anxious that she cannot go.

Since the accident, she experiences significant anxiety when driving. She must hold onto the handles and car, even on her best day, for balance and to reduce the risk of pulling or straining neck muscles.

Debilitating depression prevent caring for her children to the best of her ability. Depression and loss of motivation have detrimentally impacted her relationships.

Need for Help

The GP reports that family and friends help with daily activities. The appellant does not require assistance through assistive devices or an assistance animal.

The appellant reports using a stroller whenever possible to reduce carrying weight of her children, items and bags, as well as to secure her balance due to unexpected dizzy spells at any moment. She receives no support from family, as they do not live in the same town. If she had friends or family, she would request support with laundry, housecleaning, taking out the garbage, and cooking.

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:

- 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 requires 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, or.....

Restrictions in the ability to perform DLA

The appellant's position is that she is significantly restricted in her ability to perform DLA because of the pain and other physical symptoms as well as the anxiety and depression that have resulted from her motor vehicle accident.

The ministry argues that it is difficult to establish significant restrictions to DLA based on the assessments in the AR because the GP does not describe the frequency or duration of periodic assistance required with the DLA basic housekeeping and shopping. Additionally, as the GP does not

indicate impairments to cognitive and emotional functioning, it is difficult to establish the nature of the restrictions indicated for certain tasks of shopping.

The ministry also argues that it is difficult to establish significant restrictions based on the assessment in the GP's letter. In particular, the ministry notes that the GP does not describe how much longer than typical the appellant takes to perform simple tasks or the duration and frequency of assistance from another person required with personal care, housecleaning and food preparation. The ministry also notes that the GP had assessed the appellant as independent with all listed areas of personal care and meals in the AR and does not describe why his assessment has changed.

The ministry relies on the medical opinion and expertise from medical practitioners and other prescribed professionals to determine that an impairment significantly restricts the ability to perform DLA either continuously or periodically for extended periods and concludes that based on the GP's assessments and the appellant's self-report that there is not enough evidence to confirm that the appellant meets the legislative requirements.

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 mark boxes and provide additional narrative.

In this case, the GP is the prescribed professional who has provided information addressing the appellant's ability to perform DLA. In the AR, the GP identifies the need for periodic assistance with the DLA move about indoors and outdoors, basic housekeeping, and shopping. The appellant's reconsideration submission is consistent with the need for periodic assistance, as her functioning varies from day to day, having both best and worst days of functioning. However, as the ministry notes, the GP does not describe the frequency or duration of the assistance required in order to establish the restrictions as being significant and for extended periods.

The GP's subsequent January 24, 2017 letter confirms that the appellant's functioning is variable, commenting that on bad days the appellant is unable to walk 4+ blocks and climb 5+ steps unaided. The GP also writes that physical impairments significantly restrict the appellant from doing DLA, that the time to do simple tasks is significantly lengthened, and that assistance from others is required from others with personal care, housecleaning and food preparation. As the ministry notes, there is no explanation as to why the appellant is now assessed as requiring assistance with personal care and food preparation when she had been assessed as completely independent with those DLA in the AR. Nor is there any description of the frequency or duration of the assistance required in order to establish the significance of the restrictions. The panel also notes that in the AR the GP did not "tick" any of the boxes alongside each listed DLA task to indicate that the task takes the appellant significantly longer to perform and, as the ministry notes, in his letter, the GP does not describe how

[]

much longer simple tasks take.

In conclusion, the panel finds that the ministry reasonably determined 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* as required by section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires assistance from another person with DLA including personal care, housekeeping, shopping, and meal preparation. On appeal, the appellant also argues that she requires assistive devices for personal care.

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 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.

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.