

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated February 8, 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 March 3, 2016, a physician report (PR) dated September 2, 2016 completed by her general practitioner (the GP), who has known the appellant for 10+ years and seen the appellant 2 to 10 times in the past 12 months, and an assessor report (AR) also completed by the GP on September 2, 2016.

The evidence at reconsideration also included:

- appellant's Request for Reconsideration received by the ministry on January 10, 2017;
- December 18, 2014 post-operative medical report, noting that the appellant underwent an ileostomy due to leakage at the site where her original colectomy was performed;
- June 19, 2015 post-operative medical report, noting that the appellant underwent surgical reversal of an ileostomy and reattachment of her small intestine to her rectum.

### **Diagnosis**

In the PR the GP notes the following diagnoses, with date of onset 2012: chronic constipation, poor transition, subtotal colectomy.

### **Physical Impairment**

In her SR the appellant wrote that since her subtotal colectomy she has been left with just her small intestine. As a result she suffers from constipation, closure of her small intestine due to scar tissue, and has experienced rectal prolapse. She is required to take a liquid laxative daily, which causes frequent, unpredictable and urgent need to use the bathroom. This makes it difficult for her to have a job. Her diet must be very structured and limits what she can eat, making her fearful that she is not receiving sufficient nutrition.

In the PR the GP reported that the appellant:

- walks 4+ blocks unaided;
- climbs 5+ steps unaided;
- is limited to lifting 5-15 lbs;
- has no limitation to remaining seated.

In the AR the GP described the appellant's physical impairment that impacts her DLA as "*Chronic bowel issues*". The GP reported that the appellant:

- is unable to lift, carry or hold ("*unable to do; needs assistance*")
- is independent with walking indoors and outdoors, climbing stairs and standing.

In Part E of the AR the GP noted: "*still wants to work; needs retraining to work again. Unsited for current job*".

### **Mental Impairment**

The appellant did not address a mental impairment in her SR.

No mental impairments are indicated by the GP in either the PR or the AR.

### **Daily Living Activities (DLA)**

In her SR the appellant noted that her abdominal pain prevents her from bending, lifting, etc.

In the AR the GP noted that the appellant is independent in all areas of DLA other than she takes significantly longer than typical in the areas of:

- toileting (*"Taking significantly longer. Does not know when she needs to go"*);
- regulating diet (*"Needs to avoid multiple foods"*);
- meal planning, food preparation and cooking (*"due to illness. Not able to eat much"*)

### **Assistance Required**

In the PR the GP did not respond to the question: "What assistance does your patient need with DLA?"

In the AR the GP noted that help for DLA is provided by family but did not comment or describe what assistance would be necessary.

### **Additional Written Information Submitted after Reconsideration**

1. On February 24, 2017 the appellant submitted a handwritten document for consideration by the panel. In it she noted that:

- she has moved to a new community and the GP is no longer her family doctor, so she was unable to submit any additional medical documents;
- she has been unable to find a new family doctor;
- she worries all the time that she may have a bowel accident and it causes anxiety and mental anguish;
- the long-term use of the laxative is affecting her mental and physical health;
- after she suffered a rectal prolapse in 2015 she was told not to lift anything over 5 lbs;
- she is very underweight and weak and dizzy;
- she doesn't know very many people to assist with DLA so tries to do things herself but it is very difficult;
- she gets help with lifting laundry from people at the laundromat.

2. On March 13, 2017 the appellant submitted a copy of a December 28, 2015 emergency outpatient record detailing treatment for a rectal prolapse.

The ministry representative did not object to admission of either of these documents. The panel admitted all of the appellant's additional written information under EAA Section 22 (4) (b) as evidence in support of the information that was before the ministry at reconsideration because it related directly to and substantiated the evidence provided by the GP and the appellant in the PWD application.

### **Additional Oral Evidence at the Hearing**

#### **1. Evidence of Witness ("W")**

W told the panel that the appellant's daily routines have changed significantly since her last surgery, specifically:

- she gets sick from her liquid laxative and can't eat, and anti-nausea medication makes her sleepy;
- she used to be really active with lots of energy for hiking and swimming, but now can't walk more than 2 blocks without stopping and resting;
- she can't lift even a laundry basket, or bend over without having a bowel accident;
- her emotions "run wild" because she can't do things anymore;

- she experiences headaches.

## 2. Evidence of Appellant

Much of the appellant's oral evidence reiterated what was before the ministry at reconsideration or contained in her written submissions. She added the following information:

- her 4 surgeries have been very hard on her;
- she can't play with or lift her grandchildren;
- she has to watch everything she eats, to avoid fibre and rich foods;
- from 5-9 pm she takes liquid laxative doses hourly, which negatively affects her sleep until at least 3 am;
- her only good hours (where she is less affected by the laxatives) are between 10 am – 4 pm;
- she eats only once each day, around 4 pm;
- she suffers from headaches which she believes are due to poor nutrition;
- she tried to work as a home care aide during the summer of 2016, but twisted something and had to quit due to abdominal pain;
- she can no longer work as a care aide;
- her pelvic floor needs to be strengthened in order to avoid another rectal prolapse;
- no one can realize how restricted she is in her DLA unless they are with her for an entire day.

The ministry representative did not object to admission of the oral evidence provided by W or by the appellant. The panel admitted W's oral evidence and the appellant's oral evidence other than the information relating to her headaches, which constituted new evidence that was not before the ministry at reconsideration and therefore inadmissible under EAA Section 22 (4)(b).

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision of February 8, 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 argues that as a result of her bowel condition she is unable to walk more than 2 blocks, cannot lift or bend over, is weak and dizzy due to malnourishment, suffers from sleep deprivation and nausea due to the effects of her liquid laxative medication and can no longer work as a care aide.

The ministry argues that the information provided in the PR and AR does not indicate that the appellant's functional skills are severely impacted as a result of her physical impairment. The ministry also argues that inability to be employed is not a criterion for assessing severity of an impairment.

#### 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.

In the AR the GP writes in Part B ("Health History") that the appellant can no longer work as a care aide because lifting and handling are impossible, but in the next section the GP indicates that the appellant can walk 4+ blocks and climb 5+steps unaided, and has no limitations in sitting. In the AR the GP indicates that the appellant requires continuous assistance with lifting, carrying and holding, commenting: "*unable to do; needs assistance*". The GP also notes that the appellant's ability to communicate is good in all areas.

The panel accepts the evidence of the appellant, W and the GP that the appellant's ability to lift and carry is continuously restricted as a result of her physical impairment. However, taking into account the remaining areas of functioning that are either not restricted or minimally restricted, the panel finds that the ministry reasonably determined that the appellant's functional skills limitations are not sufficient to establish a severe physical impairment.

#### **Severe Mental Impairment**

The appellant argues that she suffers anxiety and mental anguish because she is always worried that she will have a bowel accident.

The ministry argues that the information provided does not establish that the appellant suffers from a severe mental impairment because the GP did not identify a mental condition or impairment in the PR and in the AR he indicated that the appellant experiences no impact in all areas of cognitive and emotional functioning.

#### Panel Decision

Although the appellant states that she suffers from anxiety and mental anguish her GP has not indicated that she has a mental illness or impairment and in the AR has noted that the appellant is not impacted in any of the listed areas of cognitive and emotional functioning. Considering the absence of a mental condition and unimpaired cognitive and emotional functioning indicated by the GP the

panel finds that the ministry reasonably determined that the appellant does not suffer from a severe mental impairment.

### **Restrictions in Ability to Perform DLA**

The appellant argues that her chronic bowel condition severely restricts her ability to perform DLA due to her inability to control her toileting activities, and that the medication that she is required to take to avoid constipation makes her nauseated and unable to sleep. She can eat only once per day, and must restrict her diet to avoid fibre and rich foods.

The ministry argues that a severe impairment has not been established and that the appellant is determined by her GP to be independent in most of her DLA.

### Panel Decision

Both the appellant and the witness W provided information to indicate that the appellant's ability to perform DLA has been significantly affected by her physical impairment. She is constantly fearful of having a bowel accident, and is unable to receive adequate nutrition due to her inability to follow a regular diet. She adds that all of her DLA take longer than they did before she underwent bowel surgery.

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. While other evidence may be considered, the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In the appellant's case the GP indicates that the appellant is independent in all listed areas of DLA other than toileting (*"takes significantly longer; does not know when she needs to go"*), regulating her diet (*"needs to avoid multiple foods"*) and meal planning, food preparation and cooking (*"due to illness. Not able to eat much"*).

Based on the appellant's degree of independence with almost all DLA tasks (other than those described above) as indicated by the GP 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 argues that because she does not know many people in her new community she tries to do things by herself. When she goes to the laundromat someone helps her with lifting.

The ministry argues that the appellant does not require an assistive device or an assistance animal, and also argues that because it has not been established the DLA are significantly restricted it cannot be determined that significant help is required from other people.



### 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. Although in the AR the GP indicates that family provides assistance for DLA, he does not provide any additional detail to establish the extent to which the help of another person is required.

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.