

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated January 19, 2016 which found that the appellant did not meet all of the statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a Person With Disabilities (PWD). The ministry found that the appellant met the age requirement and that she has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or physical impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – Summary of Facts

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:
 - The Applicant Information and Self-report ("SR") completed by the appellant and dated September 8, 2016.
 - The Physician Report ("PR") dated September 12, 2016 and the Assessor Report ("AR") dated September 15, 2016, both prepared by the appellant's general practitioner ("GP") of 6 years and who treated the appellant 11 or more times in the 12 months prior to completing the PR and AR. It is also indicated that the source of the information used to complete the PWD application was "office interview with applicant, file/chart information" and "other professionals (Medical Imaging Report).
2. Imaging report of the cervical spine dated August 28, 2015 which indicates that the findings have progressed slightly since the 2013 CT scan but no indication as to how these findings affect the appellant's physical functioning, ability to perform DLA or the help she requires with DLA.
3. Page 1 of 3 of an imaging report of the head dated August 28, 2015, which indicates chronic sinus disease, mild right mastoiditis, and several tiny subcortical white matter T2 hyperintensity. However, there is no indication as to the effect on the appellant's physical functioning, ability to perform DLA or the help she requires with DLA.
4. Notice of Appeal (NOA) signed and dated December 16, 2016, in which the appellant described her medical condition, impacts to her physical functioning, restrictions to her ability to manage DLA, and the impacts to her employability.
5. Request for Reconsideration (RFR), signed and dated January 10, 2017. In it the appellant described her medical condition, impacts to her physical functioning, restrictions to her ability to manage DLA, and the assistance she requires. She also stated that the information presented in the PWD application was based on her ability while medicated.

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with Spinal stenosis – moderate C5-5 (onset December 2012) and Osteoarthritic changes – multiple level and disc nerve (onset December 2012).

Physical Impairment

SR:

- Appellant describes her medical condition as neck injury from a motor vehicle accident and pre-existing arthritis in the neck. This causes imbalanced walking, difficulties getting up and taking the first few steps, pain when lifting anything (even a cup of coffee), the rain exacerbates the pain, and driving is difficult due to speed bumps.
- She has severe, daily, non-stop pain, which gets worse each year.
- She is able to do standard things but it takes longer, and she is able to take care of herself right now.

- Medication eases the pain but leaves her in a stupor.

PR:

- GP stated that the appellant can walk 1-2 blocks and climb 5+ steps unaided, lift under 5lbs and remain seated for less than 1 hour.
- GP commented that the appellant has moderate to severe osteoarthritis, moderate to severe foraminal stenosis in C-spine, C4-5 C56, spinal stenosis moderate on C5-6, and osteophytes on C6-7.
- GP commented "...ongoing pain, neck pain [and] mobility difficult".

AR:

- GP indicated that the appellant is independent with walking indoors and standing.
- GP indicated that the appellant takes significantly longer (2x longer) with walking outdoors and climbing stairs.
- GP indicated that the appellant requires continuous assistance with lifting and carrying/holding with the comment "any quick movements of upper body and neck causes pain and dizzy symptoms, extension neck causes dizzy symptoms".

Mental Impairment

SR:

- Appellant did not argue that she suffers from a severe mental impairment.

PR:

- GP did not diagnose the appellant with a mental impairment. In response to whether or not there are any significant deficits with cognitive and emotional function, the GP indicated significant deficits to motivation and attention/sustained concentration. In response to difficulties in communication the GP indicated cognitive.

AR:

- GP crossed out the section regarding impacts to cognitive and emotional functioning. The abilities of speaking, hearing, writing and reading are indicated as good.
- All listed areas of social functioning indicate "N/A".

Daily Living Activities

PR:

- GP indicated 'no restriction' to all listed items except basic housework, daily shopping and mobility outside of the home, which are indicated as requiring continuous assistance.
- GP indicated that the appellant has been prescribed medication and/or treatment that interfere with her ability to perform DLA.
- In the additional comments, the GP wrote "difficult to do housework as of balance and pain".

AR:

- The following items are listed as independent functioning and 'takes significantly longer': dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed),

transfers (on/off chair), food preparation, and cooking. Each is indicated to take twice as long to complete.

- The following items are listed as independent functioning: going to and from stores, reading prices and labels, making appropriate choices, meal planning, safe storage of food, banking, budgeting, pay rent and bills, filling/refilling prescriptions, taking prescriptions as directed, safe handling and storage of medication, using public transit, and using transit schedules.
- Getting in and out of a vehicle is listed only as takes significantly longer with the comment “takes 2x as long”.
- Laundry, basic housekeeping, and carrying purchases home are listed as requiring periodic assistance and takes 2x as long to complete.
- In the additional comments, the GP wrote “patient feel confident to try and take care of herself just takes significantly longer”.

Need for Help

PR:

- GP noted that the appellant does not require any prostheses or aids for her impairment.

AR:

- GP noted that the appellant receives assistance from her family but did not provide further comments.
- GP did not indicate if the appellant uses assistive devices and stated ‘no’ to the use of assistance animals.

Evidence on Appeal

NOA signed and dated January 24, 2017 which stated that the answers in the PWD application were quick and rushed and based on her ability while medicated. The appellant stated that her reality is as follows:

- While on non-stop medication, she stops the pain by simply not moving.
- Since the neck controls walking, balance and standing it causes all sorts of problems.
- She cannot stand to cook a meal and standing is worse than sitting. She grazes, snacks and has quick meals or leftovers.
- If she does cook on the rare occasion then she is in pain for several days following.
- She drops at least one thing a day due to her grip.
- She has developed a slow system of being relatively independent but she is not able to take out the garbage, vacuum, scrub the bathtub or biffy, or any significant cleaning that requires motion from the hands or arms in a repetitive motion.
- The tasks described in the PWD application are not performed daily but once or twice per year.
- She cannot put on her make-up.
- She sits in the tub for a bath but twisting the hot/cold water is painful.
- She cannot do things that take more than a few minutes to complete.
- She sits for 95% of her day and for the rest of the time she will change positions, take a few steps and stretch before sitting down again.
- She relies on her weekly medication case to remind her to take her medications as she

forgets.

- Driving is exceptionally challenging. She struggles with the steering wheel and getting in/out of the car. Therefore she rarely drives.
- She finds it difficult to concentrate on managing her money. She pays for rent and buys snacks but that is the extent of her money management.

Admissibility of Additional Evidence

On review of the evidence, the panel notes that the additional information given with the NOA dated January 24, 2017 is in support of or corroborates the information and records that was before the ministry at the time of reconsideration. The panel therefore finds that the appellant's reference to this information is admissible as it is in support of the information and records that were before the minister when the decision being appealed was made, pursuant to section 22(4)(b) of the *Employment and Assistance Act*. The panel assigned little weight to the additional information because it was not verified by the GP.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's Reconsideration Decision, which found that the appellant is not eligible for designation as a PWD under section 2 of the *EAPWDA*, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe mental or physical impairment;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the *EAPWDA* as follows:

Persons with disabilities

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

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

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the *EAPWDR* defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

[]

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

Severity of impairment

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning. In making its determination, the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the GP.

Severity of physical impairment

The appellant takes the position that she is unable to function as normal and has adapted her lifestyle to accommodate her medical condition so that she can function. She also stated that the amount she does function day to day is because her medication eases the pain to complete short tasks.

The ministry's position as set out in the Reconsideration Decision is that the evidence as a whole does not support a finding that the appellant has a severe physical impairment. In particular, the ministry argues that the evidence provided failed to demonstrate the frequency, duration and degree of assistance required with activities of mobility and lifting, and the functional limitations described by the GP are more in keeping with a moderate degree of physical impairment.

Panel Decision

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. The appellant faces challenges but the evidence provided by the GP does not clearly demonstrate that the appellant suffers from a severe physical impairment and her limitations are not clear.

In the RFR and NOA the appellant outlined her restrictions in physical functioning. However the information provided by the GP is inconsistent with the appellant's assessment. Though the appellant explains that the information provided by the GP was based on the appellant physical ability while on medication, the GP did not provide updated information that at the time of the reconsideration.

In the PR, the GP indicates that the appellant can walk 1-2 blocks and climb 5+ steps, lift under 5lbs and remain seated for less than 1 hour. The GP did not elaborate on how long the appellant can remain seated but the appellant indicated that she remains seated 95% of the time. The GP recognized that balance and mobility are issues for the appellant yet assessed her to be able to walk outdoors and climb steps at a moderate level.

In the AR, the GP indicated that the appellant is independent with walking indoors and standing but that walking outdoors and climbing stairs takes twice as long to complete. The GP also indicated that the appellant requires continuous assistance with lifting and carrying. The GP commented that quick upper body movements cause pain and dizziness and that "the patient is confident she is able to care for herself, it just takes longer". The ministry argued that taking twice as long to complete tasks is not indicative of a severe impairment of physical functioning. The ministry also argued that though the abilities to lift and carry require continuous assistance, a severe impairment of the appellant's physical ability has not been established.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently or effectively. The evidence given by the GP indicates that the appellant's functional ability is moderate and there is no indication that she requires significant help. Therefore the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment.

Severity of mental impairment

The appellant did not argue that she suffers from a severe mental impairment.

The ministry's position as set out in the Reconsideration Decision is that there is not sufficient evidence to support a finding of a mental impairment that severely limits the appellant's ability to function independently.

Panel Decision

On review of the evidence, in the PR, the GP has not diagnosed the appellant with a mental impairment but indicated that she has have significant deficits with cognitive and emotional function in

the areas of motivation and attention/sustained concentration. However in the AR, under cognitive and emotional functioning the GP crossed out all listed areas. In the PR and AR the GP indicated “N/A” under all listed areas of social functioning. The panel finds that the ministry reasonably determined that the evidence does not support a finding of a severe mental impairment pursuant to section 2 (2) of the EAPWDR.

Restrictions in the ability to perform DLA

The appellant argues that since her motor vehicle accident she spends 95% of her time seated and unable to do any normal activity; including, personal care, basic housework, cooking, or driving. She also stated that her medical condition does not allow her to concentrate long enough to properly manage her finances.

The ministry’s position as set out in the Reconsideration Decision is that it has not been established by the evidence of a prescribed professional that the appellant’s ability to perform DLA has been directly and significantly restricted by his severe physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*. In particular the GP indicated that the appellant is independent in most DLA and takes only twice as long to complete. With the tasks that she periodically requires assistance, the evidence fails to explain the type, frequency and duration of the help required.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional provide an opinion that an applicant’s severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence of the challenges that she faces with DLA, the legislation is clear that to satisfy the criteria the evidence must come from a prescribed professional. In the present case, this evidence has been provided by one prescribed professional - the GP.

DLA are defined in section 2(1) of the *EAPWDR* and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which DLA, if any, are significantly restricted by the appellant’s impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant’s DLA are restricted by a severe impairment.

The GP addresses DLA in both the PR and AR. In the PR the GP indicated that the appellant is continuously restricted with basic housework, daily shopping and mobility outside the home. Yet, in the AR the GP indicated that the appellant is independent in 4 out of the 5 listed tasks under shopping (with periodic assistance required and takes 2 times longer to carry purchases home). Also the GP indicated that the appellant is independent with 2 out of the 3 listed tasks under transportation (with the third task taking 2 times longer to complete). In the AR the GP indicated that the appellant takes significantly longer with mobility outdoors with no indication as to whether this task is performed independently, or requires either continuous or periodic assistance which contradicts the evidence in the PR. Additionally, in the AR the GP indicated that basic housekeeping only periodically requires assistance and that it takes the appellant 2 times longer to complete this task. The GP has not

explained why a task that is continuously restricted (as indicated in the PR) only requires help periodically (as indicated in the AR). The panel finds that there are inconsistencies in the GP's evidence.

The ministry has argued that taking 2 times longer to complete a task is not indicative a severe impairment. It also argued that the GP did not describe the frequency or duration of the periodic assistance that is required with laundry, basic housekeeping and carrying purchases home.

In making its decision in this matter the ministry must consider the evidence from the GP as it is set out in the PR and AR. Given this evidence, the panel concludes that the ministry reasonably concluded that the evidence was insufficient to establish that the appellant's impairment significantly restricts her ability to perform tasks of DLA either continuously or periodically for extended periods.

Help with DLA

The appellant argued that she needs help from her children and that she has implemented procedures and processes that allow her to function as normal as possible given her medical condition.

The ministry's position as set out in the Reconsideration Decision is that because it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period.

Given the panel's finding that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel further finds that the ministry's conclusion that it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the *EAPWDA*, was reasonable.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's Reconsideration Decision which determined that the appellant was not eligible for PWD designation under section 2 of the *EAPWDA* was reasonably supported by the evidence and a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision. The appellant is not successful in her appeal.