

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 2 May 2017, which denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2.

Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or severe physical impairment; the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of those restrictions, she requires help to perform those activities.

The ministry found that the information provided did establish that the appellant has reached 18 years of age and her impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

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 reconsideration consisted of the following:

1. The appellant's **PWD Designation Application** dated 24 January 2017. The Application contained:
 - A Medical Report (MR) dated 1 February 2017, completed by the appellant's general practitioner (GP) who has known the appellant for more than 13 years and seen her 11 or more times in the past 12 months.
 - An Assessor Report (AR) dated 1 February 2017, completed by the appellant's GP.
 - A Self Report (SR) dated 29 January 2017 completed by the appellant.
2. A medical legal report dated 21 November 2016 prepared for the appellant's lawyer by a pain management specialist (MD) and submitted with the PWD application.
3. A **Request for Reconsideration** prepared by the appellant dated 19 April 2017, in which she states that the injuries she has sustained in multiple MVAs (motor vehicle accidents) has significantly impacted her daily life and self care. She suffers from chronic pain everyday and has an increased sensitivity to pain, which is triggered by daily living activities. She has pain in her knee and hip on stairs and requires handrail assistance. She has pain in her neck, shoulders and arms daily for overhead activities, such as hair combing or reaching for items above her head. Her lower back is flared after sitting for 30 minutes. Medications for pain management do not allow her to drive and limit transportation options. Pain and anxiety are constant with factors impacting severity. Household cleaning is limited due to flares. Pain is debilitating at times. Meal preparation and cooking present challenges as standing for extended periods is not possible (longer than 20 mins), as well head tilted down and arm movements consistently increase neck and shoulder pain. Washing hair and other personal hygiene activities present significant pain with arm movements reaching overhead or in any manner. Lower back pain increased on bending or rotation.
4. A medical legal report dated 16 March 2017 prepared by a pain management specialist (PhD) for the appellant's lawyer and submitted with the Request for Reconsideration.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

Diagnoses

In the MR, the GP diagnoses the medical conditions related to the appellant's impairment as:

- Soft tissue injury (multiple sites) – onset unspecified
- Generalized Anxiety Disorder – onset unspecified
- Depression Chronic Pain – onset unspecified

The GP provides the comment "complex layered history of multiple injuries/events".

In the AR, the GP describes the appellant's mental or physical impairments as chronic pain syndrome, injury to left hip/knee/shoulders. Resultant anxiety disorder, mood and sleeping problems.

Severity of mental impairment

MR:

Under Health History, the GP writes:

“Multiple MVAs resulting in chronic pain syndrome and anxiety.”

The GP indicates that the appellant had significant deficits with cognitive and emotional functioning in the areas of memory and emotional disturbance.

The GP indicates no restrictions to social functioning.

AR:

The GP assesses the appellant’s ability to communicate as good in all areas (speaking, reading, writing, and hearing).

The GP assess the appellant’s cognitive and emotional functioning as not impacted in the areas of impulse control, insight and judgement, executive, language, psychotic symptoms and other neuropsychological problems. The GP assesses minimal impacts on daily functioning in the areas of consciousness, attention/concentration, memory and motivation. Moderate impacts on daily functioning are assessed in the areas of bodily functions, motor activity and other emotional or mental problems. Major impact on daily functioning is assessed by the GP for emotion.

The GP indicates that the appellant is independent in all social functioning DLA and has good functioning in her immediate and extended social networks.

SR:

The appellant indicates that she suffers from chronic headaches, sleep and mood disturbances. As well, the appellant writes, “I have significantly changed some of my lifestyle habits as I do not like driving unless necessary. I have experienced quite a lot of anxiety while being in a vehicle since the accidents.” She writes that the injuries have presented an emotional challenge; her pain has become chronic and has significantly impacted her day to day life, career aspirations and well-being.

Severity of physical impairment

MR:

Under Health History, the GP writes:

“Multiple MVAs resulting in chronic pain syndrome and anxiety.”

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 2 to 5 steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated less than 1 hour.

The GP indicates that the appellant is not restricted with: meal preparation, management of medications, mobility inside of the home, mobility outside of the home, management of finances, and social functioning.

The GP indicates that the appellant is continuously restricted with basic housework.

The GP indicates that the appellant is periodically restricted with personal self-care, daily shopping, and use of transportation. The GP provides the comment “varies with anxiety level,

current level of pain.” In response to a request to provide additional comments regarding the degree of restriction, the GP writes “variable”.

The GP does not specify the nature and extent of any assistance needed with DLA.

The GP indicates that the appellant does not require any aids or prostheses.

AR:

The GP indicates the appellant’s mobility and physical ability as independent for walking indoors and walking outdoors. The GP indicates that the appellant requires periodic assistance from another person for climbing stairs, standing, lifting and carrying and holding, with the comment “as reported by patient.”

SR:

The appellant writes:

- Chronic mechanical spine pain, soft tissue injuries to left hip and left knee, chronic lower back and cervical spine pain, left and right shoulder injury, chronic headaches, sleep and mood disturbances.
- Injuries have impaired my daily living and functioning significantly. I am no longer able to do many of my previous activities due to the physical requirements necessary, and increase in pain they would cause.
- Day to day there are things I can no longer do on my own, or am physically challenged trying, I have chronic pain in my left hip, left knee, lower back, shoulder girdle (L & R), and cervical spine region. I have increased pain in completing daily household chores, carrying or lifting items, leaning over or reading or twisting in any manner, walking up or down stairs and getting up from a seated position.
- My balance has not returned to normal since the MVA of July 5, 2014 and I quite often have had to brace myself and catch my balance on the wall or table. I have accumulated a repertoire of self management techniques and exercises to help manage the ongoing pain. I have significantly changed some of my lifestyle habits as I do not like driving unless necessary. I have experienced quite a lot of anxiety while being in a vehicle since the accidents. I find pain increases during rotations and forward/back bend of my neck. I also have a chronic headache condition that is managed through radiofrequency lesioning of the cervical branch nerves. I have experiences an increase in muscle spasms in affected soft tissue injury sites.
- My musculoskeletal pain has been treated through a combination of medicinal and active rehabilitation factors so far. Emotionally these injuries have presented another challenge. My pain has become chronic and has significantly impacted my day to day life, career aspirations and well being.

Ability to perform DLA

General

MR:

The GP indicates that the appellant has been prescribed medication that interferes with her ability to perform DLA. Specifically, tramadol may impair alertness with “no current end date” as the anticipated duration of treatment/medication.

The GP indicates that the appellant has no difficulties with communications.

The GP indicates that the appellant’s impairment directly restricts her ability to perform DLA. He

assesses the appellant as being restricted on a continuous basis for basic housework and periodic basis for personal self-care, daily shopping, and use of transportation. He indicates that the appellant is not restricted for meal preparation, management of medications, mobility inside of the home, mobility outside of the home, management of finances, and social functioning DLA.

The GP indicates no restrictions to social functioning and has not provided any comment in the corresponding section of the form.

AR:

The GP indicates that the appellant has no difficulties with communications and in the AR, assesses her ability to communicate as good for speaking, reading, writing, and hearing.

The GP indicates that the appellant is independent in: the personal care DLA of grooming (takes significantly longer), bathing, toileting, feeding self, regulating diet; the shopping DLA of reading prices and labels, making appropriate choices; all meals DLA; all pay rent and bills DLA; all medications DLA; and the transportation DLA of using public transit and using transit schedules and arranging transportation.

The GP indicates that the appellant requires periodic assistance for: the personal care DLA of dressing and transfers in/out of bed and on/off chair; the shopping DLA of going to and from stores and carrying purchases home; and the transportation DLA of getting in and out of a vehicle.

The GP indicates that the appellant requires continuous assistance with basic housekeeping DLA of laundry and basic housekeeping.

In Part E of the AR, the GP provides the additional comment, "it is the compound effect of physical and mental diagnoses that impair this individual."

Section 2(1)(a) DLA

Prepare own meals

MR:

The GP indicates that the appellant is not restricted in relation to meal preparation.

AR:

The GP indicates that the appellant is independent in independent in all meals activities.

Manage personal finances

MR:

The GP indicates that the appellant is not restricted in relation to management of personal finances.

AR:

The GP indicates that the appellant is independent in all of the activities related to management of personal finances, including banking, budgeting, and pay rent and bills.

Shop for personal needs

MR:

The GP indicates that the appellant is periodically restricted with daily shopping.

AR:

The GP indicates that the appellant is independent in the shopping DLA of reading prices and

labels, making appropriate choices and requires periodic assistance in the shopping DLA of the shopping DLA of going to and from stores and carrying purchases home.

Use public or personal transportation facilities

MR:

The GP indicates that the appellant is periodically restricted in relation to use of transportation.

AR:

The GP indicates that the appellant is independent in the transportation DLA of using public transit and using transit schedules and arranging transportation and requires periodic assistance getting in and out of a vehicle, with the comment "difficulty rising from seated position".

Perform housework to maintain the person's place of residence

MR:

The GP indicates that the appellant is continuously restricted in relation to basic housework.

AR:

The GP indicates that the appellant requires continuous assistance or is unable in relation to laundry and basic housework; with the comment "Pt. reports great difficulty in this area".

Move about indoors and outdoors

MR:

The GP indicates that the appellant is able to walk 4+ blocks unaided on a flat surface, can climb 2-5 steps unaided, is limited to lifting 5 to 15 lbs. and can remain seated for less than 1 hour.

The GP indicates that the appellant is not restricted with mobility inside of the home or mobility outside of the home.

AR:

The GP indicates that the appellant is independent walking indoors and outdoors and requires periodic assistance climbing stairs, standing, lifting, and carrying and holding. The GP comments: "as reported by patient."

Perform personal hygiene and self-care

MR:

The GP indicates that the appellant is periodically restricted with personal self-care.

AR:

The GP indicates that the appellant is independent in the personal care DLA of grooming (takes significantly longer, "Pt. has pain that can interfere with [illegible]"), bathing, toileting, feeding self, regulating diet. The appellant requires periodic assistance with the personal care DLA of dressing and transfers in/out of bed and on/off chair. No information about the degree and duration of support or type and amount of assistance has been provided.

Manage personal medication

MR:

The GP indicates that the appellant is not restricted in her management of medications.

AR:

The GP indicates that the appellant is independent in all medications DLA.

Section 2(1)(b) DLA

The following DLA are applicable to a person who has a severe mental impairment:

Make decisions about personal activities, care or finances

MR:

The GP indicates that the appellant has no restrictions with communication, social functioning, management of finances and medications.

AR:

THE GP indicates that the appellant is independent with shopping DLA of readings labels and making appropriate choices, meals DLA of meal planning and safe storage, all rent and bills DLA, all medications DLA and all social functioning DLA.

Relate to, communicate or interact with others effectively

MR:

The GP indicates no problems with communication and no restrictions to social functioning.

AR:

The GP assesses the appellant's ability to communicate as good in all areas (speaking, reading, writing, and hearing). The GP also indicates that the appellant is independent in all social functioning DLA and has good functioning in her immediate and extended social networks.

Help required

MR:

The GP indicates that the appellant does not require an aid or prosthesis for her impairment.

The GP does not indicate that any assistance is needed with DLA.

AR:

The GP indicates that the appellant receives assistance from family and friends for DLA and has not completed the sections of the AR dealing with assistance provided by assistive devices and assistance animals.

Notice of Appeal

In her Notice of Appeal, dated 09 May 2017, the appellant gives as Reasons for Appeal, "Injuries sustained from multiple MVA's ranges from 3/10 to most severe 8.5/10 pain. Flare ups can last several days at a time, and on a weekly basis arise. Previous flare ups to 9/10 following meeting with occupational therapist."

The hearing

At the hearing, the appellant explained that she has been in multiple MVAs where she was a passenger and deals with the resultant injuries on a daily basis. She has muscle and soft tissue injuries as well as significant problems with her pelvis. She explained that she cannot do her daily activities as she did previously. Her physical movement is limited and she has difficulty with a number of activities, including sitting and moving up/down stairs. She explained that her injuries are much more debilitating than expected at this point and her daily life involves exercises, pool work, physiotherapy and RMT visits. She has had some recent assessments of her condition that have shed some light on why her injuries have not healed as well as anticipated. The appellant explained that she is still learning to deal with her injuries so that she is not stuck on the couch in

pain.

The appellant explained that grooming activities, such as hair combing and shampooing, which require her hands and arms to be raised are painful. She described being previously able to “get out the door” in the morning in about 30 minutes and this now takes 1-1.5 hours. The appellant stated that she is limited in her ability to do housekeeping and can do one chore per day or one room at a time. As well, she is only able to lift about 10 pounds, and her landlord often carries her laundry up and down the stairs for her and her boyfriend takes care of garbage, recycling and vacuuming.

The ministry relied on its reconsideration decision.

Admissibility of new information

The panel finds that the information provided by the appellant in her Notice of Appeal and at the hearing is in support of the information and records before the ministry at reconsideration, as it tends to substantiate or corroborate the information that was before the minister at reconsideration. The panel therefore admits this information as evidence under section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* 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. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or severe physical impairment;
- that the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age; and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

The following section of the *EAPWDA* applies to this appeal:

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 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.

The following section of the *EAPWDR* applies to this appeal:

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.

Severity of impairment

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence, including that of the appellant.

Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment. An "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 degree of impact on daily functioning.

Severity of mental impairment

In the reconsideration decision, the ministry found that it was not satisfied that the information provided is evidence of a severe mental impairment. In its analysis of the evidence, the ministry noted that, in the assessment of impacts to cognitive and emotional functioning, the GP noted only one major impact in the area of emotion and did not provide any additional information. The ministry considered that there were moderate impacts noted in relation to bodily functioning and motor activity but noted minor or no impacts for all other areas. The ministry went on to consider that the GP had indicated the appellant's independence with all areas of social functioning. In her Request for Reconsideration, the appellant indicated that she avoids driving and has anxiety being in a vehicle since the accidents. She states that she suffers from chronic headaches, sleep and mood disturbances.

The panel considers it appropriate that in the reconsideration decision the ministry acknowledged that the appellant experiences challenges to emotional functioning due to depression and anxiety but finds that the information provided does not establish a severe impairment of mental functioning. The panel concludes that the ministry reasonably determined that the appellant's level of emotional functioning alone did not establish a severe impairment. The panel notes that despite the provision of information about cognitive and emotional impacts by the GP in the PR and the AR, the appellant's communication abilities are assessed as good and she is reported to be independent with all aspects

of social functioning. The panel finds that the ministry reasonably concluded that the information provided did not establish a severe mental impairment.

Severity of physical impairment

In the reconsideration decision, the ministry found that it was not satisfied that the information provided establishes a severe physical impairment. The ministry noted that the GP had assessed the appellant as being able to walk 4+ blocks unaided, climb 2-5 steps unaided, lift 5-15 lbs. and remain seated for less than an hour. The ministry noted that the GP's comment of "self report" and "reported by patient" makes it unclear whether the GP had confirmed these assessments through observation. The ministry considered the GP's report that the appellant requires periodic assistance from another person for climbing stairs, standing, lifting and carrying and holding, and noted that this assessment was qualified by the comment "as reported by patient." The ministry also considered the appellant's SR descriptions of difficulty with lifting, carrying, standing, reaching and climbing stairs, but noted that her GP or other medical practitioner did not confirm the impairment described by the appellant. At the hearing, the appellant described having difficulty with sitting and using stairs and being able to lift only 10 pounds. She reported taking significantly longer with grooming and requiring assistance with some housekeeping and laundry tasks. She appellant reported that she cannot return to work at her previous job and is not competitively employable. The panel notes that employability is not a consideration for PWD designation.

The panel considers that in the reconsideration decision the ministry acknowledged that there are some limitations restrictions in the appellant's physical functioning due to chronic pain syndrome but ultimately concluded that the information provided in the assessments of physical functioning and the appellant's ability to manage activities requiring mobility and physical ability does not establish a severe physical impairment. The panel notes that the GP indicates some restrictions in the PR but finds that the ministry reasonably concluded that the information provided in relation to functional skills, and mobility and physical ability did not establish a severe physical impairment.

Direct and significant restrictions in the ability to perform DLA

At issue is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion not established in this appeal. In the reconsideration decision, the ministry found that the information provided did not establish that the appellant has a severe physical or mental impairment. The panel has found above that the ministry was in determining that the information provided did not establish a severe mental impairment. The panel has also found above that the ministry in determining that the information provided, including that related to the impacts on physical and mobility functioning, did not establish a severe physical impairment.

The legislation – section 2(2)(b)(i) of the EAPWDA – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that other evidence should not be considered, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied."

In the reconsideration decision, the ministry found that the information provided did not establish that the appellant's ability to manage DLA is significantly restricted either continuously or periodically for extended periods of time and that as a result she requires significant assistance from others to complete them. In the reconsideration decision, the ministry reviewed the information provided by the GP in the MR and AR. The ministry noted that the GP indicates continuous restriction with basic

housework and period restriction with daily shopping, personal self-care and transportation with the comment, “varies with anxiety level, current level of pain.” The ministry concluded that the GP’s assessment that the appellant requires continuous assistance from others with basic housework is not supported by the assessment of physical functioning and mobility. The ministry found that the appellant is able to perform some level of housework unaided. The panel finds that conclusion is consistent with the information provided by the appellant at the hearing about the limitations in her ability to do housework. The ministry further noted that, in relation to DLA assessed as requiring periodic assistance, there was no information provided about the type and frequency of assistance required. The panel notes the necessity of information specifying the type and frequency and/or nature and extent of any assistance needed in order to determine whether DLA are significantly restricted periodically for extended periods. As such, the panel concludes that the ministry’s determination that this criterion was not met is reasonable; the panel therefore finds that the ministry was reasonable in concluding that there is not enough evidence to establish that DLA were restricted continuously or periodically for extended periods.

Help required

In the reconsideration decision, the ministry found that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

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 must also require help to perform those activities. 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, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the appellant benefits from help from her family and friends, the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry’s reconsideration decision, which determined that the appellant was not eligible for PWD designation, was a reasonable application of the legislation in the appellant’s circumstances and reasonably supported by the evidence. The panel therefore confirms the ministry’s decision. The appellant is not successful on appeal.